U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

Date: APR 0 5 2012 Office: CALIFORNIA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a Catholic Archdiocese. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a pastoral assistant. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel, copies of receipt notices for the Form I-290B Notice of Appeal, a copy of the August 3, 2010 decision denying the Form I-360 petition, a letter from the pastor of [redacted] Church regarding the beneficiary's employment experience, and photographs of [redacted] Church and its rectory as evidence of the room and board provided to the beneficiary as non-monetary compensation.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

> (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;
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> (ii) seeks to enter the United States –
>
> > (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
> >
> > (II) before September 30, 2012, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or
> >
> > (III) before September 30, 2012, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and
>
> (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation,

either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. The petitioner filed the petition on August 27, 2009. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two-year period immediately preceding that date.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) provides:

> *Evidence relating to the alien's prior employment.* Qualifying prior experience during the two years immediately preceding the petition or preceding any acceptable break in the continuity of the religious work, must have occurred after the age of 14, and if acquired in the United States, must have been authorized under United States immigration law. If the alien was employed in the United States during the two years immediately preceding the filing of the application and:
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> > (i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.
> >
> > (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.
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> > (iii) Received no salary but provided for his or her own support, and provided support for any dependents, the petitioner must show how support was maintained by submitting with the petition additional documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other verifiable evidence acceptable to USCIS.
>
> If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

According to the Form I-360 petition, the beneficiary entered the United States without inspection in November 1992. In the petition and an accompanying letter, the petitioner states that it has employed the beneficiary as a pastoral assistant since 2000. Service records do not indicate that the beneficiary has held any lawful status in the United States that would have authorized him to work for the petitioner during the qualifying two-year period. Accordingly, any work performed by the beneficiary during that time is not considered qualifying prior experience under 8 C.F.R. § 204.5(m).

On appeal, counsel argues that the beneficiary meets the pertinent conditions under the *Ruiz-Diaz* litigation, and is therefore entitled to have his unlawful presence tolled from November 21, 2007. Counsel additionally argues that the portion of the two-year qualifying period that occurred before

November 21, 2007 constitutes an acceptable break in the continuity of the beneficiary's employment under 8 C.F.R. § 204.5(m)(4). In the alternative, counsel argues that the beneficiary should receive discretionary relief regarding his accrual of unlawful presence under section 245(i) of the Act. Lastly, counsel asserts that USCIS erred by not issuing a Request for Evidence regarding the beneficiary's lawful employment.

Counsel argues that the beneficiary is protected from the accrual of unlawful presence and unauthorized employment under the *Ruiz-Diaz* decision, citing *Ruiz-Diaz v. United States of America*, No. C07-1881RSL (W.D. Wash. June 11, 2009). Counsel refers to a case in which the district court addressed the issue of the concurrent filing of the Form I-485, Application to Register Permanent Resident or Adjust Status, with the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. The court invalidated the USCIS regulation at 8 C.F.R. § 245.2(a)(2)(i)(B), which barred concurrent filing of the Form I-360 and Form I-485 for religious workers. On June 11, 2009, the court ordered:

> Beneficiaries of petitions for special immigrant visas (Form I-360) whose Form I-485 and/or Form I-765 applications were rejected by [USCIS] pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B) and who reapply under paragraph (2) of this Order are entitled to a [sic] have their applications processed as if they had been submitted on their original submission date. Any employment authorization that is granted shall be retroactive to the original submission date.
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> For purposes of 8 U.S.C. § 1255(c) and § 1182(a)(9)(B), if a beneficiary of a petition for special immigrant visa (Form I-360) submits or has submitted an adjustment of status application (Form I-485) or employment authorization application (Form I-765) in accordance with the preceding paragraphs, no period of time from the earlier of (a) the date the I-360 petition was filed on behalf of the individual or (b) November 21, 2007, through the date on which [USCIS] issues a final administrative decision denying the application(s) shall be counted as a period of time in which the applicant failed to maintain continuous lawful status, accrued unlawful presence, or engaged in unauthorized employment.
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> . . .
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> The accrual of unlawful presence, unlawful status, and unauthorized employment time against the beneficiaries of pending petitions for special immigrant visas (Form I-360) shall be STAYED for 90 days from the date of this Order to allow the beneficiaries and their family members time in which to file adjustment of status petitions (Form I-485) and/or applications for employment authorization (Form I-765).

The AAO notes that on August 20, 2010, the Ninth Circuit of Appeals reversed and remanded the district court's decision. *Ruiz-Diaz v. U.S.*, 618 F.3d 1055 (9th Cir. 2010). Nonetheless, in accordance with the district court's decision, USCIS implemented a policy tolling the accrual of

unlawful status and unauthorized employment until September 9, 2009. The requirements for tolling unlawful presence and unauthorized work are set forth in a memorandum from Donald Neufeld, Acting Associate Director of the USCIS Office of Domestic Operations, *Clarifying Guidance on the Implementation of the District Court's Order in Ruiz-Diaz v. United States, No. C07-1881RSL (W.D. Wash. June 11, 2009)* (August 5, 2009):

1. For any alien who had previously submitted a concurrently filed Form I-360 with a Form I-485 or Form I-765 and whose applications were rejected pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B), and who re-files the Form I-360 and Form I-485, the period of unlawful presence and unauthorized work was tolled from either the filing date of the Form I-360 or November 21, 2007, whichever was earlier, until September 9, 2009.

2. For any alien who had an approved or pending Form I-360 with USCIS as of June 11, 2009 (the date of the district court's decision), the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed until September 9, 2009.

3. For any alien who filed a new Form I-360 on or after June 11, 2009, the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed to September 9, 2009.

The record does not reflect that the beneficiary had previously filed a Form I-485 or Form I-765 that was rejected pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B). The instant petition was filed on August 27, 2009. Accordingly, any unauthorized employment by the beneficiary was tolled only from the date the Form I-360 was filed (August 27, 2009) to September 9, 2009. Thus, any work performed by the beneficiary in the United States prior to August 27, 2009 was in an unauthorized status. Any unauthorized work performed by the beneficiary in the United States interrupts the continuity of his work experience for the purpose of this visa petition.

As stated above, counsel for the petitioner additionally argues that the portion of the qualifying period that occurred prior to November 21, 2007 constitutes an acceptable break in continuity of employment. Counsel asserts that the beneficiary "was engaged in religious training for the two months preceding November 21, 2007." The regulation at 8 C.F.R § 204.5(m)(4) states, in pertinent part:

> A break in the continuity of the work during the preceding two years will not affect eligibility so long as:
>
> (i) The alien was still employed as a religious worker;
>
> (ii) The break did not exceed two years; and

> (iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States...

In a brief accompanying the appeal, counsel for the petitioner states the following:

> The Beneficiary has been serving as a Pastoral Assistant at [redacted] Church since 2000 to the present, which is more than two-years. The Beneficiary received non-salaried compensation in the form of room and board with a monthly stipend. In additional to his pastoral work, the Beneficiary engaged in religious training at the [redacted] to pursue his religious vocation. In compliance with 8 C.F.R. 204.5(m)(4), the Beneficiary's religious training from August 2007 to November 2007 must be counted towards the two-year requirement. Nowhere in the regulations does it require the religious training to be authorized.

The petitioner has not submitted evidence to establish a qualifying break in the continuity of the beneficiary's work. In a letter dated July 11, 2009, submitted with the petition and resubmitted on appeal, the pastor of [redacted] Church confirms that the beneficiary has been employed as a pastoral assistant since July 1, 2000. The pastor states that the beneficiary "participates on prayers, bible studies and other formal services based upon his prior Church studies, work and experience," but says nothing about a two-month break in the beneficiary's work for further religious training or for sabbatical. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, although counsel states that the regulations do not require the religious training during a break to be authorized, the regulation at 8 C.F.R § 204.5(m)(4)(iii) requires that the alien still be employed as a religious worker during the break and that the training or sabbatical not involve unauthorized work and the regulation at 8 C.F.R. § 204.5(m)(11) requires the employment to be authorized. In this case, the petitioner has not established that the beneficiary was authorized to work in the United States for any portion of the two-year qualifying period immediately preceding the filing of the petition.

In the alternative, counsel for the petitioner argues that the beneficiary should be granted discretionary relief under section 245(i) of the Act based on an I-130 which was filed on behalf of the petitioner's mother with a priority date of April 27, 2001. Section 245(i) of the Act permits certain aliens to adjust status in the United States despite otherwise disqualifying unlawful presence. The question of whether the 2001 Form I-130 petition qualifies the beneficiary for section 245(i) relief lies outside the scope of this proceeding.

The present proceeding is not an adjustment proceeding. Section 245(i)(2)(A) of the Act requires that an alien seeking 245(i) relief must be "eligible to receive an immigrant visa." That is, the alien

must be the beneficiary of an approved immigrant visa petition. The law does not require USCIS to approve every petition filed on behalf of aliens who seek 245(i) relief. Rather, such relief presupposes an already approved petition. Without an approved petition, the beneficiary has no basis for adjustment of status, and therefore section 245(i) relief never comes into play.

The regulations at 8 C.F.R. § 204.5(m) say nothing about what benefits are or are not available to the beneficiary at the adjustment stage, and the director, in this proceeding, did not bar the beneficiary from ever receiving benefits under section 245(i) of the Act. Rather, the director found that the beneficiary's lack of lawful status during the two-year qualifying period prevents the approval of the present petition. The AAO agrees with the director's finding.

In the brief submitted on appeal, counsel for petitioner additionally argues that USCIS did not provide "a fair opportunity to the petitioner to respond to the finding of beneficiary's lawful religious employment." Counsel states:

> If the Officer found that specific information was missing in regards to Beneficiary's eligibility, then the Officer was required to issue a Request for Evidence. The officer must provide adequate notice to missing evidence and afford an opportunity to the Petitioner and Beneficiary to properly respond.

The regulation at 8 C.F.R. § 103.2(b)(8) provides in pertinent part:

> (ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.
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> (iii) Other evidence. If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

A review of the record reflects that the director adjudicated the petition based on the evidence submitted at the time the petition was filed. The director did not deny the petition because initial evidence was missing; rather the submitted evidence failed to establish eligibility for the benefit. The AAO finds that in denying the petition, the director complied with 8 C.F.R. §§ 103.2(b)(8)(ii) and (iii). Furthermore, the regulations at 8 C.F.R. §§ 103.2(b)(8)(ii) and (iii) provide for discretionary authority to request additional evidence, provide notice of the director's intent to deny the application or petition, or deny the petition or application. In this case, the director exercised her

discretionary authority and denied the petition based on the evidence submitted by the petitioner not establishing eligibility for the benefit. For these reasons, the AAO is not persuaded by counsel's argument that the director erred in her decision regarding this matter.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.