U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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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 FILE: [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 church. 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 leader. 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, a letter from the petitioner, a collection of signatures "In Support for Pastor Guillermo Torres and Family," a copy of a receipt notice for a previously filed I-360 petition, and a copy of the U.S. Citizenship and Immigration Services (USCIS) Memorandum from June 25, 2009 entitled "Implementation of the District Court's Order in *Ruiz-Diaz v. United States*, No. C07-1881RSL (W.D. Wash. June 11, 2009)."

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;
>
> (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 January 13, 2010. 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.
> >
> > (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 as well as the director's findings, the beneficiary was admitted to the U.S. on September 9, 2005 in valid R-1 nonimmigrant status which expired on September 8, 2008. In the petition, the petitioner states that it has employed the beneficiary since September 2005. In a letter accompanying the petition, the petitioner states that "[f]rom September of 2005 to September 2009 he has been employed in R-1 status." Service records do not indicate that the beneficiary held any lawful status in the United States after the expiration of his nonimmigrant status that would have authorized him to work for the petitioner during the qualifying two-year period. Accordingly, any work performed by the beneficiary after the expiration of his R-1 status on September 8, 2008 is not considered qualifying prior experience under 8 C.F.R. § 204.5(m).

On appeal, the petitioner argues that the beneficiary meets the pertinent conditions under the *Ruiz-Diaz* litigation, and is therefore entitled to have his unlawful presence tolled for a portion of the two-year qualifying period. The petitioner additionally argues that the period of time between the end of the *Ruiz-Diaz* tolling period and the filing date of the petition constitutes an acceptable break in the continuity of the beneficiary's employment under 8 C.F.R. § 204.5(m)(4). Lastly, the petitioner argues that the beneficiary should receive discretionary relief regarding his accrual of unlawful presence under section 245(k) of the Act.

Counsel for petitioner argues on appeal that the beneficiary is protected from the accrual of unlawful presence and unauthorized employment under the *Ruiz-Diaz* decision. 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 those 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 refiles 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 petitioner previously filed a Form I-360 petition on behalf of the beneficiary on September 15, 2008, which the director denied on February 12, 2009. The petitioner then filed an appeal of the decision on February 25, 2009 which the AAO dismissed on October 28, 2009. Counsel for the petitioner argues that the previous petition was pending as of June 11, 2009, and therefore the beneficiary is eligible, under the second paragraph quoted above, to have his unlawful presence and unauthorized work tolled from the filing date of the previous petition until September 9, 2009. However, even following counsel's argument, the beneficiary was out of lawful immigration status for two portions of the two-year qualifying period. First, the beneficiary was out of lawful status between the expiration of his R-1 nonimmigrant status on September 8, 2008 and the filing of the previous Form I-360 petition on September 15, 2008 (counsel incorrectly states that the first petition was filed on September 9, 2008). Second, the beneficiary was out of status following the end of the tolling period, September 9, 2009 until the filing of the instant Form I-360 petition on January 13, 2010. Therefore, even if the AAO were to adopt counsel's reasoning, the petitioner has not established that the beneficiary has the requisite two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

As stated above, counsel for the petitioner additionally argues that the period of time from the end of the *Ruiz-Diaz* tolling period, September 9, 2009, until the filing date of the petition, January 13,

2010, constitutes an acceptable break in continuity of employment. 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 qualifies for the exception allowing for a brake [sic] in continuity because:
>
> First, the Beneficiary was still employed as a religious worker for the same religious organization during the break of continuity of his authorized status of 127 days between 09/09/2009 and 01/13/2010;
>
> Second, the break clearly did not exceed 2 years;
>
> Third, the nature of the break was for further religious training while the Beneficiary continued his religious vocation during that period.

Although counsel asserts that the beneficiary was still employed by the petitioner between September 9, 2009 and January 13, 2010, the petitioner has not offered sufficient evidence of the beneficiary's continued employment during this period. In the petitioner's letter dated January 5, 2010, submitted with the petition, the petitioner only states: "From September of 2005 to September 2009 [the beneficiary] has been employed in R-1 status in our religious congregation." Likewise, the petitioner has offered no evidence to indicate that the beneficiary was on sabbatical or furthering his religious training during the periods in which he lacked lawful immigration status. 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).

Lastly, counsel for the petitioner argues that the beneficiary should be granted discretionary relief under section 245(k) of the Act. Section 245(k) of the Act reads:

> An alien who is eligible to receive an immigrant visa under paragraph (1), (2), or (3) of section 203(b) (or, in the case of an alien who is an immigrant described in section 101(a)(27)(C), under section 203(b)(4)) may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and (c)(8), if –
>
> (1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;
>
> (2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days –
>
> (A) failed to maintain, continuously, a lawful status;
>
> (B) engaged in unauthorized employment; or
>
> (C) otherwise violated the terms and conditions of the alien's admission.

Although section § 245(k) of the Act does enable a person who is adjusting status in an employment-based category to adjust status even if he or she has been out of status or worked without authorization for less than 180 days, at issue in this proceeding is whether the beneficiary is eligible for approval of the special immigrant petition. Any discussion of eligibility for adjustment of status is premature. At this time, the petitioner must establish that the beneficiary meets all of the requirements for 8 C.F.R. §204.5(m), which requires two years of lawful continuous employment.

The AAO agrees with the director's finding that the beneficiary lacked employment authorization and lawful immigration status during portions of the two years immediately preceding the filing of the petition. Therefore, the petition does not meet the regulatory requirements of 8 C.F.R. §§ 204.5(m)(4) and (11).

As an additional matter, the AAO finds that the petitioner has not established that it has the ability to compensate the beneficiary. The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(m)(10) states:

> *Evidence relating to compensation.* Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence

acceptable to USCIS. If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

On the Form I-360 petition Employer Attestation, the petitioner states that it will provide the beneficiary with a stipend of [redacted]er year in addition to nonmonetary compensation. In the letter submitted with the petition, the petitioner reaffirms this intent and states that it has been providing this amount of compensation to the beneficiary "during his service with us in R-1 status since 2005." As evidence of its finances, the petitioner has submitted an uncertified copy of a 2008 financial report showing the church budget and uncertified copies of bank statements for the period of April 1, 2009 to April 9, 2009. The petitioner has not submitted any IRS documentation relating to its ability to compensate the beneficiary, nor has it provided any explanation for its absence or provided comparable, verifiable documentation regarding its finances. Further, although the petitioner states that it has been compensating the beneficiary since 2005, the petitioner has not submitted evidence of any past compensation provided to the beneficiary.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.