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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

C1

[redacted]

DATE: FEB 2 3 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, (the director) denied the employment-based immigrant visa petition. The petitioner timely filed an appeal to the denied petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a Pentecostal 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 pastor. The Form I-360 petition was filed on June 17, 2009. On September 22, 2009, the director denied this petition because he found that the petitioner failed to establish that the beneficiary had two years of lawful employment for the two year period immediately preceding the filing of the petition.

On appeal, the petitioner submits a brief and further documentation in order to overcome the director's decision.

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 issue here is whether the beneficiary possesses two years of lawful work experience in the United States immediately prior to the filing of the form I-360 petition. 8 C.F.R. § 204.5 states:

(m) *Religious workers.* This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) must:

* * *

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. 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. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

Further, 8 C.F.R. § 204.5(m)(11) states that:

(11) *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:

(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.

The current I-360 petition was filed on June 17, 2009. According to the regulation above, the beneficiary must have been working in lawful status for two years prior to the filing of the petition, from June 17, 2007 to June 17, 2009. On May 21, 2009, the petitioner submitted a letter affirming that the beneficiary has been in this country working for the petitioner for the past two years

The beneficiary has not satisfied the regulations at 8 C.F.R. §§ 204.5(m)(4) and (11) because he was not in lawful immigration status. According to the Form I-360 petition, the beneficiary arrived in the United States on March 10, 2005 as a nonimmigrant B-2 visitor for pleasure. The USCIS regulation at 8 C.F.R. § 214.1(e) states that a B-2 nonimmigrant may not engage in any employment, and that any unauthorized employment by a nonimmigrant constitutes a failure to maintain status. The beneficiary's status expired on September 9, 2005. The beneficiary did not leave the country when his B-2 visa expired; rather he stayed in his country and worked without authorization. This is a violation of the regulation above, as his qualifying employment was not authorized by immigration law. Therefore, the beneficiary did not satisfy the regulations because he was working in the country while out of status for the two years prior to the filing and at the time of the filing of the Form I-360 petition.

Regarding the beneficiary's failure to maintain status and lawful employment, on appeal, the petitioner's counsel states:

> Please also note that my client did file an I-485 pursuant to *Ruiz-Diaz v. United States,* No. C07-1881RSL (W.D. Wash. June 11, 2009). A copy of the I-485 and rejection notice are attached. Therefore, if and when this I-360 is reopened for favorable adjudication, we respectfully request that the Beneficiary be afforded the opportunity to re-file the I-485 as a concurrently filed case pursuant to Ruiz-Diaz.

Counsel refers to *Ruiz-Diaz v. U.S.*, (W.D. Wash., June 11, 2009) in which the 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 United States Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 245.2(a)(2)(i)(B), which permits concurrent filing of the Form I-485 under certain provisions of the Act, including under section 203(b)(4), only after approval of the petition or application. 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.
>
> 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.
>
> . . .
>
> 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 presence 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.

In the present case, counsel erred in relying on the *Ruiz-Diaz* decision. The *Ruiz-Diaz* ruling waives the accrual of unlawful presence in relation to adjustment applications and unauthorized employment for specific time periods. Counsel appears to be using the *Ruiz-Diaz* decision in this case to argue that the I-485 that was rejected by the director should be allowed to be re-filed as concurrently filed with the Form I-360, if and when the decision is reopened. The AAO notes that counsel is not using *Ruiz-Diaz* to make a substantive argument as to why the director erred in denying the Form I-360 petition and does not dispute the beneficiary's unlawful status. Further, *Ruiz-Diaz* applies to Forms I-360 and I-485 that were concurrently filed. In this case, the Form I-360 petition and the Form I-485 petition were not even concurrently filed much less rejected pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B). The Form I-360 was filed on June 17, 2009 and the I-485 was filed on August 31, 2009 and subsequently rejected in a rejection letter dated September 1, 2009. The rejection letter stated that the I-485 was rejected because a visa number was not available at the present time, and not because the I-485 was rejected as being concurrently filed, as set forth in reason "e" on the rejection letter.

Further, when applying the three categories above to the petitioner, the petitioner does not qualify for the first category of requirements tolling unauthorized employment since there is no evidence that the petitioner and the beneficiary had a previously filed Form I-360 and a Form I-485 rejected based on concurrent filing pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B). The petitioner also does not meet the requirements for the second category since the petitioner did not have an approved or pending Form I-360 with USCIS as of June 11, 2009. The petitioner qualifies for the third category, since it filed a new Form I-360 on June 17, 2009, six days after June 11, 2009. Pursuant to that category, the beneficiary's period of unauthorized employment would be tolled from June 17, 2009 to September 9, 2009.

However, the *Ruiz-Diaz* decision and subsequent USCIS policy based on that decision fail to toll any of the beneficiary's unauthorized presence or unauthorized work experience for the two years immediately preceding the filing of the Form I-360 petition. The *Ruiz-Diaz* decision does not nullify the requirements set forth in 8 C.F.R. 204.5(m), listed above. Therefore, the AAO will not accept counsel's argument that the beneficiary should not be considered to have accumulated any unauthorized employment due to the *Ruiz-Diaz* decision. The evidence submitted does not establish that the beneficiary worked in lawful status or was authorized to work under United States immigration law for the two years prior to the filing of the Form I-360 petition.

Counsel further argues that the failure to maintain lawful immigration status should not have a bearing on the beneficiary's eligibility for this classification. He states:

> The beneficiary's failure to maintain lawful status is an issue of admissibility not of eligibility for the immigration classification. The visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws." In Re ____ AAU [redacted] March 21, 2008.

The AAO is not persuaded by counsel's arguments. Counsel here refers to an unpublished decision, and has furnished no evidence to establish that the facts of the instant petition are analogous to those in that unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, the case to which counsel cites was dated March 21, 2008, which was before the new regulations were enacted in November of 2008. This petition was filed in March of 2009, and is subject to the new regulations that specifically indicate prior work must have been authorized. The beneficiary's failure to maintain lawful status is an issue of eligibility, as it is one of the requirements of 8 C.F.R. § 204.5(m)(4).

Further, in the Form I-290B, counsel wrote:

> Your decision posits that the two years of religious employment must be full time and compensated. The regulations do not require that the two years of religious employment be full time nor that the compensation be full time (but in this case the beneficiary was carrying on Religious pastoral duties on a full time basis during the two year period.) The regulations do provide for non-salaried compensation. Therefore, the amount of compensation to the Beneficiary should not have a negative bearing on the I-360 petition.

While the regulation does provide for non-salaried compensation paid to the beneficiary, the petitioner must submit IRS documentation of the non-salaried compensation. In the Form I-360 petition, the petitioner also stated that it paid the beneficiary $400 weekly, which is salaried compensation. However, the petitioner did not submit any IRS documentation to show that the petitioner paid the beneficiary that wage. Therefore, as the petitioner failed to provide verifiable evidence of any claimed salaried or non-salaried compensation to the beneficiary, it failed to satisfy the regulation at 8 C.F.R. § 204.5(m)(11).

Regarding the beneficiary's failure to maintain status and lawful employment, on appeal, the petitioner's counsel states:

> The decision makes reference to lack of documentation referenced under 8 C.F.R. 204.5(m)(11) . . . In referencing this provision, the decision states that "there is nothing in the record to ascertain that the beneficiary has been employed and compensated for said employment as a full time religious worker." We respectfully submit the regulations do not require that the previous two years of religious employment be "full time." Furthermore, we respectfully submit that it would have been judicious for the adjudicator to issue an RFE requesting the documentation enumerated in 204.5(m)(i-iii) thereby allowing the Petitioner to substantiate that the Beneficiary was accordingly employed and compensated during the relevant period.
>
> With regards to the conclusion in the decision regarding the beneficiary's perceived failure to maintain lawful immigration status and employment authorization status

> thereby rendering him ineligible pursuant to 8 CFR 204.5(m)(4), we would again respectfully request that USCIS issue an RFE to allow the Petitioner to present evidence regarding the beneficiary's previous efforts to rectify his immigration and employment authorization in the United States. An RFE period would provide undersigned counsel the opportunity to fully analyze beneficiary's immigration history in the U.S. in order to ascertain provisions that may assist beneficiary to render him eligible for the instant I-360. It should again be noted that the undersigned attorney was retained on this file just prior to the filing of the I-290B.

The AAO is not persuaded by counsel's argument that the director committed error by not sending out a Request For Evidence (RFE) before issuing the denial of the Form I-360 petition. If the application does not demonstrate eligibility, the director is not required to send a request for evidence. 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.
>
> (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. We find that in denying the petition, the director complied with 8 C.F.R. §§ 103.2(b)(8)(ii) and (iii). Furthermore, 8 C.F.R. §§ 103.2(b)(8)(ii) and (iii) provides 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 his discretionary authority and denied the petition based on the evidence submitted by the petitioner not establishing eligibility for the benefit. For these reasons, we are not persuaded by counsel's argument that the director erred in his decision regarding this matter.

On appeal, counsel for the petitioner further claims that that it would have been judicious for the adjudicator to issue an RFE. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The RFE stated that the petitioner needed to submit evidence in support of her claim for eligibility under each criterion. 8 C.F.R. § 103.2(b)(8) requires that the RFE

specify the "type of evidence required" and does not require that any sort of exact documents be identified. Although counsel on appeal states that the decision "blindside[d]" the petitioner with his denial, counsel identified no further evidence in support of the petitioner's claims.

Moreover, even if the director committed a procedural error by failing to adequately notify the petitioner, it is not clear what remedy would be appropriate beyond the appeal process itself. As with any claim of a violation of due process, a violation of an immigration regulation will not render a decision unlawful unless the violation prejudiced the interests of the alien protected by the regulation. *United States v. Rangel-Gonzales,* 617 F.2d 529, 530 (9th Cir. 1980). Furthermore, the AAO notes that in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I. & N. Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I. & N. Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I. & N. Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I. & N. Dec. 151 (BIA 1965). As the petitioner made no proffer as to other evidence available, the AAO has reviewed the record as presented.

The evidence submitted and counsel's arguments do not establish that the beneficiary worked in lawful status or was authorized to work under United States immigration law for the two years prior to the filing of the Form I-360 petition. For this reason, the petition must be denied.

Beyond the directors' decision, the AAO also finds that petitioner has failed to establish its ability to compensate the beneficiary. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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 8 C.F.R. § 204.5(m)(10) requires that the petitioner submit verifiable evidence of how the petitioner intends to compensate the alien. If the beneficiary was receiving a salary, the regulation requires that the petitioner submit verifiable proof of this, such as an IRS forms W-2 or certified tax returns. In the present case, in the Form I-360, the petitioner states, "Pastor W. Walker worked between the hours of 40-60 hours per week. He received a flat rate of $400.00 weekly." However, despite these assertions, it did not submit any tax returns or proof of payment to show that it was paying the beneficiary this amount. The petitioner's claim of past compensation is not sufficient to support its claim of future ability to compensate the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

Further, the petitioner did not submit any letters or any reasons explaining its absence or other evidence such as budgets with monies set aside. Therefore, the petitioner has not shown that it has the ability to compensate 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.

ORDER: The appeal is dismissed