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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 15 2010
WAC 07 115 53011

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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]

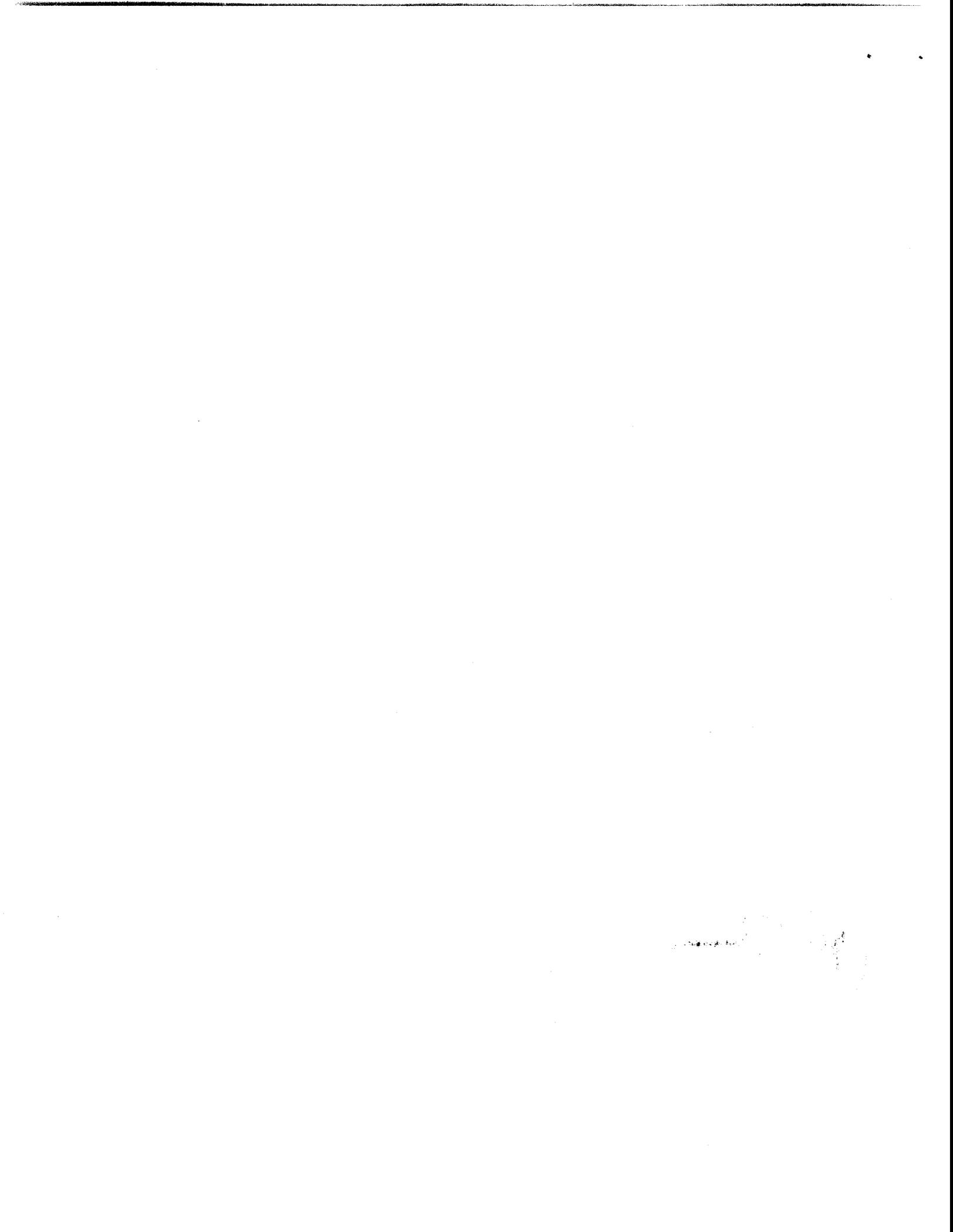
INSTRUCTIONS:

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.

Thank you,

[REDACTED]

Chief, Administrative Appeals Office



DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently remanded the petition to the director for a new decision based on revised regulations. The director again denied the petition and certified the decision to the AAO. The AAO will withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will remand the petition for further action and consideration.

The petitioner is a Sunni Islamic center that operates a mosque and a school. 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 an imam/chaplain and instructor. The director determined that the petitioner had not established that the beneficiary had two years of continuous work experience in the same position immediately preceding the filing date of the petition. In addition, the director determined that the petitioner had not established that "a single full-time religious worker position exists."

In response to the certified decision, the petitioner submits a brief from counsel, a statement from the beneficiary, witness letters, and other materials.

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 petitioner filed the Form I-360 petition on March 12, 2007. The director denied the petition on July 9, 2008, and the petitioner filed an appeal on August 6, 2008. The appeal was still pending when, on November 26, 2008, USCIS published new regulations that substantially revised the previous regulations governing special immigrant religious worker petitions. Supplementary information published with the new rule specified: "All cases pending on the rule's effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). In keeping with the above instructions, the AAO remanded the petition on January 15, 2009, instructing the director to issue "a new decision in accordance with the requirements of the new regulation[s]."

Following the remand order, the director issued a notice of intent to deny the petition (which we will discuss in greater detail further below) on March 26, 2010. After the petitioner submitted a timely response to this notice, the director again denied the petition on May 11, 2010. In the denial notice, the director stated: "The petitioner has submitted sufficient documentation in rebuttal to the Notice of Intent to Deny. However, the issues discussed by USCIS in the original denial . . . still remain and are revisited below." The remainder of the 2010 denial notice repeats, word for word, the bulk of the original 2008 denial notice.

The 2010 decision, which effectively reissued the 2008 decision without change, cannot stand. The director repeatedly cited obsolete regulations that are no longer in effect, and relied on arguments that the new regulations overrule or contradict. The director based most of the decision on the observation that the beneficiary's duties appear to have changed, and therefore the beneficiary was not "performing the same religious work continuously for at least the two-year period immediately preceding the filing of the petition." As counsel has noted, the new regulation at 8 C.F.R. § 204.5(m)(4) states: "The prior religious work need not correspond precisely to the type of work to be performed." Because the director simply repeated the old decision, rather than relying on the new regulations, the director disregarded this provision. The claimed change in the beneficiary's duties (which relates more to the proportion of instructional vs. ministerial duties, rather than to any radical shift in the nature of the duties themselves) cannot properly form a basis for denial of the petition.

The remaining ground for denial rests on a finding that the beneficiary sometimes acts as an imam (or minister), and sometimes as a religious teacher. The director, dissatisfied with the level of detail the petitioner provided regarding the beneficiary's work schedule, concluded that the beneficiary is neither a full-time imam nor a full-time teacher, and therefore there is no full-time job offer for the beneficiary in either position. In the director's words, "USCIS cannot determine whether a single full-time religious worker position exists."

The director's decision cannot stand. The director effectively found that, even if the beneficiary fulfills a variety of roles for a combined total of at least 35 hours per week, nevertheless he is ineligible because no one role amounts to full-time employment by itself. Whether or not the old



regulations would have supported such a finding is a moot question. The new regulations do not support such a finding. Section 101(a)(27)(C)(ii)(I) of the Act requires that the petitioner seeks to enter the United States solely for the purpose of carrying on the vocation of a minister, but the supplementary information published with the new regulations called for flexibility when considering the duties of a minister, because different religious denominations have differing views on the acceptable range of such duties. *See* 73 Fed. Reg. 72276, 72280 (Nov. 26, 2008).

In a March 6, 2007 letter accompanying the initial filing of the petition, Isljam Capric, vice president of the petitioning entity, stated:

[The beneficiary] will be working for this institution as minister, religious advisor, and religious teacher. . . .

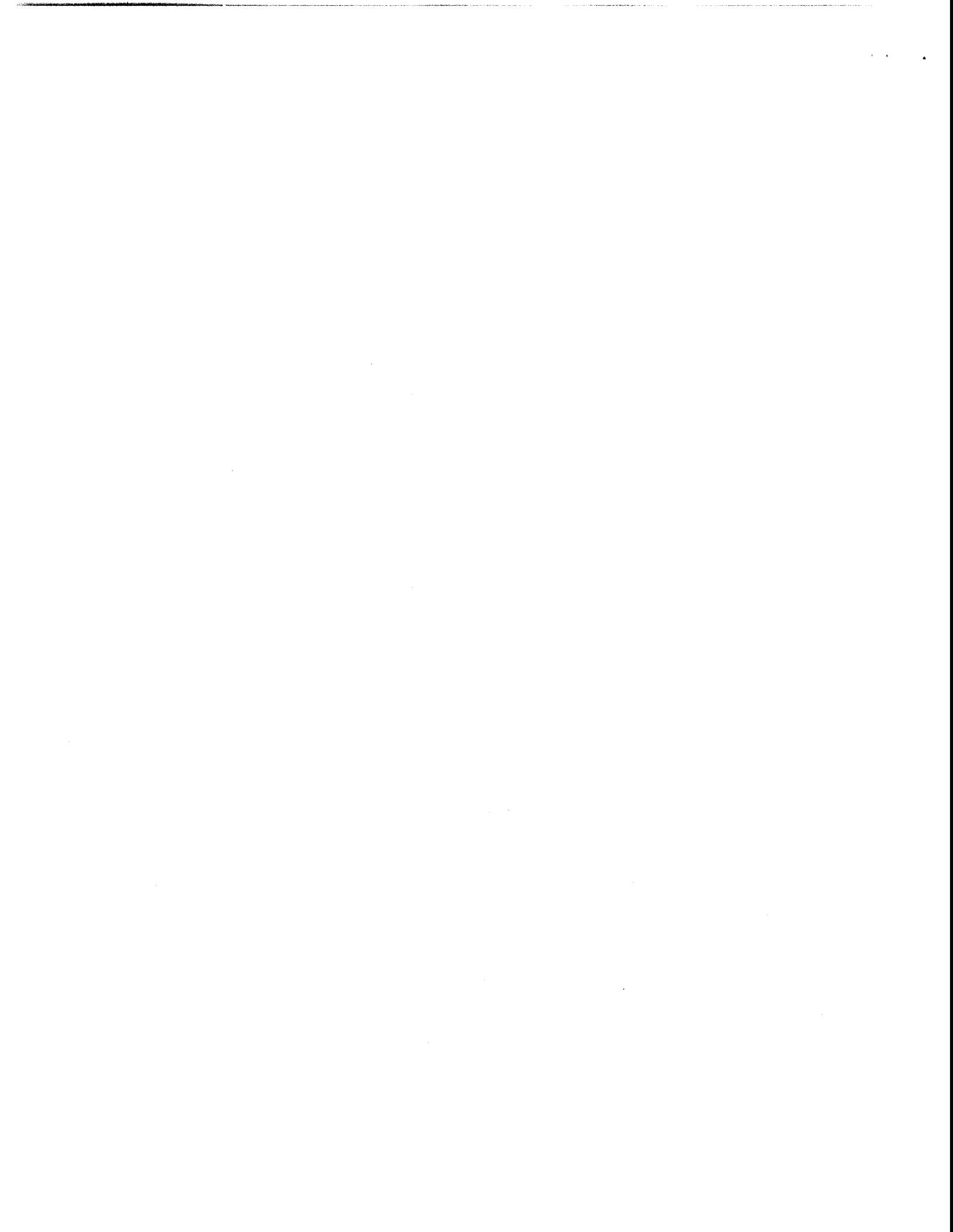
[The beneficiary] is employed by the Miraj Islamic School as a full time religious teacher and leader with a package of \$40,000 per year. . . . He has previously worked as an Imam and has performed religious services, taught scripture, visited patients in hospitals and worked with family problems. . . . "Imam" may be translated to English as minister, chaplain, or religious advisor.

[The beneficiary] will provide his services to our Mosque by leading religious services and counseling families. As the Imam, Chaplain and teacher of our Mosque, [the beneficiary] will be a spiritual leader and a teacher who will preside over religious ceremonies and life cycle events such as Friday services, funerals, weddings, etc. He will also counsel students on a regular basis and participates in interfaith community dialogue. He will oversee and teach in our Sunday School for both children and adults.

A separate, unsigned document indicated that the beneficiary's "duties include, but are not limited to, the following bulleted items:"

[The petitioning] Mosque – Imam/Chaplain

- Lead 5 daily prayers
- Offer weekly lectures
- Conduct Friday sermons
- Conduct religious services with respect to:
 - Deaths
 - Marriage
 - Holidays
 - Cultural events
- Publish and distribute worldwide Al-Miraj Magazine highlighting:
 - News, Culture and Religious viewpoints.
- Conduct Interviews



Miraj Islamic School – Instructor

- Teach Islamic Studies to over 200 students
- Create and enhance Islamic Studies curriculum
- Develop daily lesson plans, assignments and tests
- Assist in orchestrating special events (holiday parties, plays, etc.)
- Lead morning & afternoon assembly
- Provide assistance to fellow colleagues with respect to Islamic studies
- Partake in staff meetings

In a subsequent letter, Isljam Capric stated that teaching Islamic Studies is “one facet of being an[] Imam,” and that the imam “is the primary teacher and leader of the Islamic community. It may be noted that this role is similar to the role of a Rabbi in Judaism. . . . There is no specific ordination as there is in Christianity.” The director did not dispute the petitioner’s assertion that the duties of an imam involve an educational component.

We cannot agree with the finding that, because the beneficiary divides his time between educational and ministerial duties, he therefore works two part-time jobs rather than one full-time job. We therefore withdraw this finding.

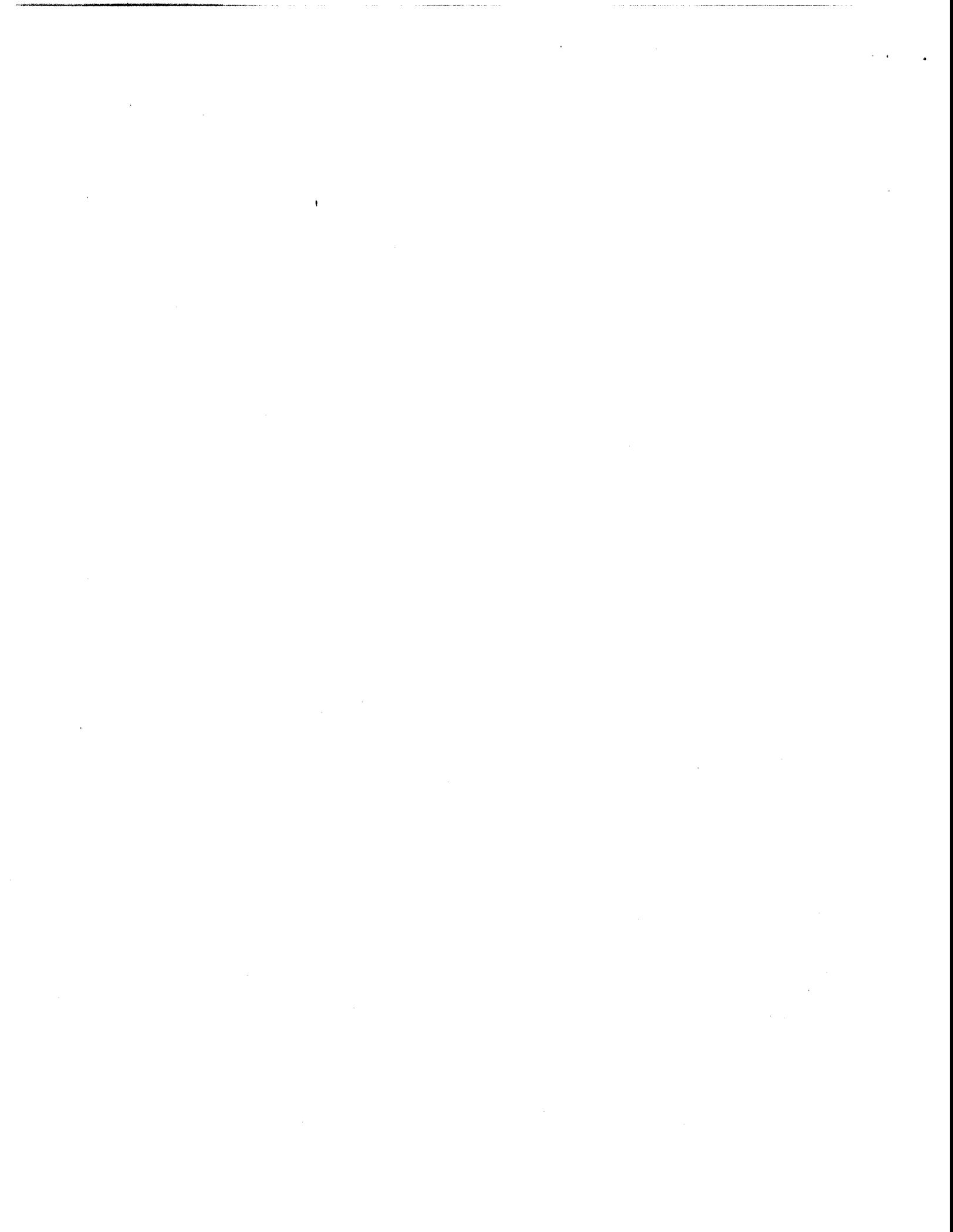
At the same time, however, we cannot ignore disqualifying information in the record. The new USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has undertaken qualifying religious work, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. The USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires that qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

In the March 26, 2010 notice of intent to deny the petition, the director stated:

On January 15, 2009, AAO dismissed the petitioner’s appeal of USCIS’s decision to deny the beneficiary’s H-1B non-immigrant visa extension. Therefore, effective June 17, 2006 [the date the beneficiary’s H-1B status expired], any employment the beneficiary engaged in would be unauthorized employment.

Therefore, the evidence establishes that the beneficiary has not been performing full-time work as an Imam for at least the two-year period immediately preceding the filing of the petition in lawful immigration status.

As we have noted above, the director found that the petitioner “submitted sufficient documentation in rebuttal to the Notice of Intent to Deny.” We disagree with that conclusion, as we shall now explain.



In response to the notice of intent to deny, counsel acknowledged the director's "claim of 268 days of unlawful work," but stated:

the Service fails to take into consideration the fact that the petitioner and the beneficiary had filed a timely application for an extension of the H-1B visa prior to the expiration of the beneficiary's H-1B status, which grants the beneficiary up to 240 days of lawful working status automatically after his working status was set to expire.

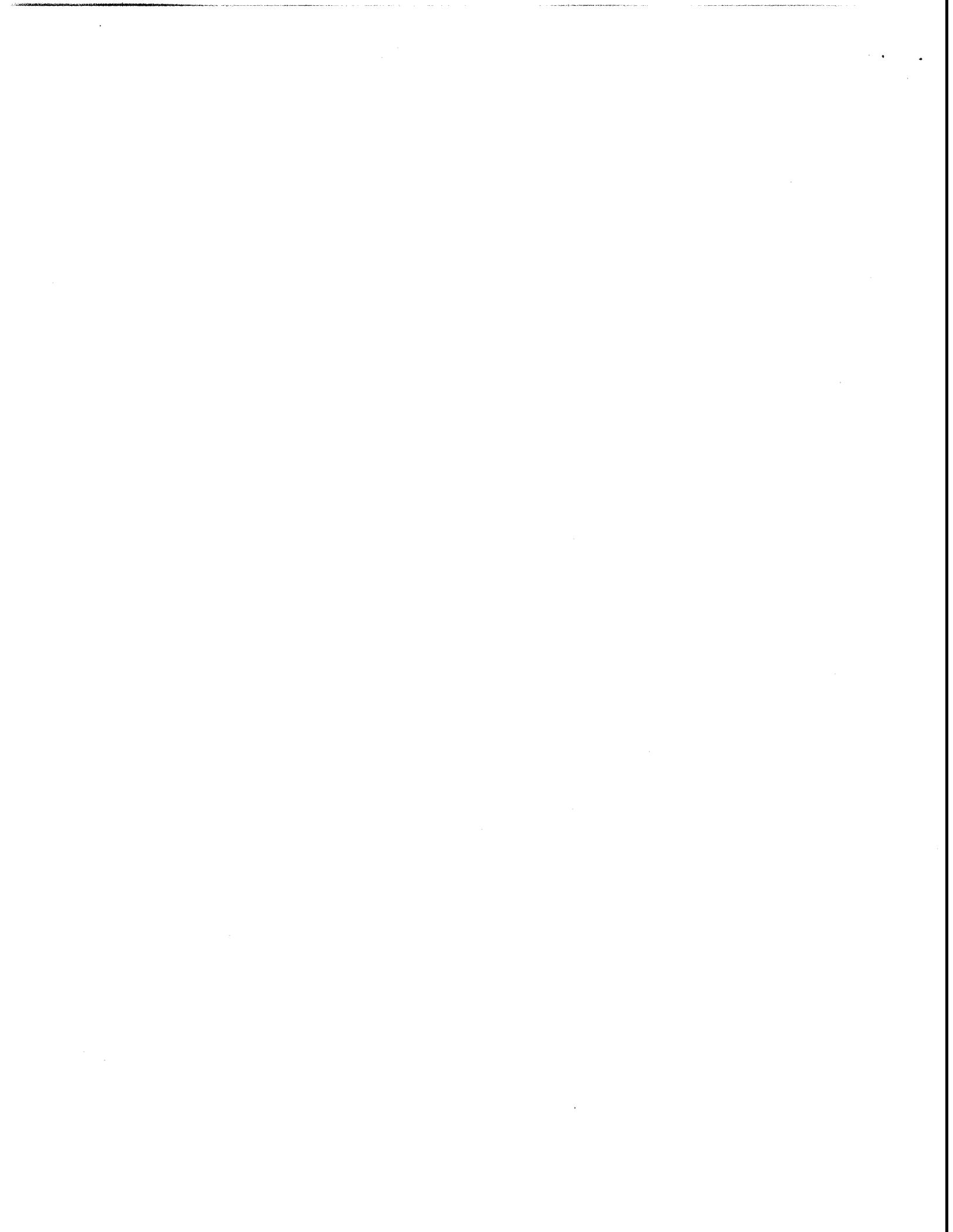
Counsel, here, correctly summarized the regulatory provision at 8 C.F.R. § 274a.12(b)(20). Still, this automatic extension of employment authorization expired on February 12, 2007, a month before the petitioner filed the Form I-360 petition. Therefore, the beneficiary lacked employment authorization for the last month of the two-year qualifying period. While he remained in the United States during that time, he could not lawfully have engaged in qualifying employment in the United States.

Counsel then states that, because the beneficiary filed a Form I-485 application to adjust status, he has "access to the relief of INA 245(k), which forgives up to 180 days of being out of status, working without authorization, or otherwise violating the terms of the alien's admission." However, section 245(k) of the Act relates to the adjudication of an adjustment application, applies to "[a]n alien who is eligible to receive an immigrant visa," and therefore presumes the approval of an underlying immigrant petition. Here, the beneficiary has no approved petition, is not eligible to receive an immigrant visa, and therefore he is not eligible to adjust status. Section 245(k) of the Act does not relate to adjudication of a Form I-360 petition, nor does it retroactively transform periods of unauthorized employment into qualifying employment for purposes of 8 C.F.R. § 204.5(m)(11) simply through the filing of a Form I-485 adjustment application with a related Form I-360 immigrant petition.

Counsel next cites *Ruiz-Diaz v. United States*, No. C07-1881RSL (W.D. Wash. June 11, 2009), stating "the U.S. District Court must issue retroactive employment authorization as the Service [improperly] prevented the simultaneous filings of I-485s with religious worker I-360 petitions." The petitioner, however, has not shown that the beneficiary qualifies for the retroactive relief described in *Ruiz-Diaz*. We quote, here, the relevant paragraphs of the Court's decision:

(3) Beneficiaries of petitions for special immigrant visas (Form I-360) whose Form I-485 and/or Form I-765 applications were rejected by defendants pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B) and who reapply under paragraph (2) of this Order are entitled to 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.

(4) 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 the United States Citizenship and Immigration Services ("CIS") 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.

Id. at 2. Paragraph (3), above, applies only to aliens who attempted to file a Form I-485 adjustment application concurrently with a Form I-360 petition, only for USCIS to reject the Form I-485. Here, the petitioner has submitted no evidence that USCIS rejected any Form I-485 filed by the beneficiary. USCIS records show that the beneficiary filed Form I-485, with receipt number WAC 09 197 51631, on or about July 8, 2009.

Paragraph (4) of the ruling waives a finding of unlawful employment "[f]or purposes of 8 U.S.C. § 1255(c) and § 1182(a)(9)(B)." The former statutory passage relates to adjustment of status; the latter passage relates to unlawful presence in the context of inadmissibility. The *Ruiz-Diaz* ruling does not require USCIS to approve any special immigrant religious worker petitions filed under 8 U.S.C. § 1153(b)(4), or to overlook any unlawful, non-qualifying employment that the beneficiary engaged in prior to the filing of such a petition.

More fundamentally, paragraph (4) of the ruling concerns unlawful employment from "the earlier of (a) the date the I-360 petition was filed on behalf of the individual or (b) November 21, 2007." *Id.* at 2. The ruling has no effect on unlawful employment that occurred before those specified points. Therefore, the ruling does not cover any unlawful employment that took place prior to the March 12, 2007 filing of Form I-360. Thus, even the most generous possible reading of the *Ruiz-Diaz* decision does not waive the beneficiary's unlawful employment in late February and early March of 2007, before the petitioner filed Form I-360.

In light of the above information, USCIS cannot approve the petition. The petitioner has not shown that the beneficiary held lawful immigration status and employment authorization throughout the entire two-year period preceding the petition's March 12, 2007 filing date. Any new decision by the director must take this disqualifying information into account.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

