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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

WAC 09 133 50434

Office: CALIFORNIA SERVICE CENTER

Date:

MAR 17 2010

IN RE:

Petitioner:

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 Pentecostal Christian 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 its pastor and president. The director determined that the petitioner had not established that 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 and copies of documents already in the record.

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 . . . ; 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 U.S. Citizenship and Immigration Services (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 April 6, 2009. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two years immediately prior to that date.

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

(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.

On the Form I-360 petition, the petitioner indicated that the beneficiary arrived in the United States on June 17, 1995. Therefore, the beneficiary was in the United States throughout the entire two-year qualifying period. On the Form I-360, under "Current Nonimmigrant Status," the petitioner wrote "Overstay," which is not a lawful nonimmigrant status. The record shows that the beneficiary entered the United States as a B-2 nonimmigrant visitor for pleasure, a status that does not authorize employment in the United States. The beneficiary's B-2 status expired on December 16, 1995. The record contains no evidence that the beneficiary has ever held lawful nonimmigrant status since the 1995 expiration of his tourist visa.

The initial filing included what counsel described as "a copy of Notice of Action dated March 27, 2001 establishing eligibility for Section 245(i)(B)(i) of the Immigration and Nationality Act." That section of the Act pertains to adjustment applications, not to the visa petition process that precedes adjustment. The March 27, 2001 Notice of Action refers to the filing of a previous special immigrant religious worker petition filed on the beneficiary's behalf, with receipt number SRC 01 134 51303. The Director, Texas Service Center, denied that petition in 2003 and the petitioner did not appeal the denial.

The director denied the petition on July 8, 2009, noting that 8 C.F.R. § 204.5(m)(4) requires the beneficiary to have worked "in lawful immigration status in the United States," and that 8 C.F.R. § 204.5(m)(11) requires that the beneficiary's qualifying experience in the United States "must have been authorized under United States immigration law." The petitioner made no claim that the beneficiary held legal status while working for the petitioner in 2007-2009.

On appeal, counsel notes that the petitioner had previously filed a petition on the beneficiary's behalf in 2001. Counsel argues: "Section 245(i) of the Immigration and Nationality Act allows a person to apply to adjust status notwithstanding the fact that she entered without inspection, overstayed, or worked without authorization."

The question of whether the never-approved 2001 filing qualifies the beneficiary for section 245(i) relief lies outside the scope of this proceeding. Even if we were to find that the beneficiary qualifies for such relief, that finding would not change the outcome of the present proceeding.

Section 245(i) relief applies at the adjustment stage, not the petition stage. The present proceeding is not an adjustment proceeding. Section 245(i)(2)(A) of the Act requires that an alien seeking section 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 most certainly does not require USCIS to approve every petition filed on behalf of aliens who seek section 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 beneficiary's hypothetical eligibility for section 245(i) relief at the adjustment stage does not require us to approve the petition before the beneficiary has even reached that stage.

The petitioner does not dispute the director's finding that the beneficiary engaged in unauthorized employment during the two-year qualifying period. Rather, the petitioner, through counsel, has argued that this unauthorized employment should not disqualify the beneficiary. For the reasons explained above, we reject this argument. Under 8 C.F.R. §§ 204.5(m)(4) and (11), the petition cannot be approved, because the beneficiary's religious employment in the United States during the qualifying period was not authorized under United States immigration law.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.