

Identifying data deleted to
prevent identity unredacted
invasion of personal privacy

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



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



C1

Date: **DEC 14 2011** Office: CALIFORNIA SERVICE CENTER FILE:

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:



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 Administrative Appeals Office (AAO) remanded the matter for consideration under new regulations. The director again denied the petition and, following the AAO's instructions, certified the decision to the AAO for review. The AAO will affirm the director's decision.

The petitioner is a Buddhist temple. It seeks classification of 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 preacher. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition.

Counsel asserts on certification that as the petition was filed prior to the implementation of new regulations, it is not subject to the new evidentiary requirements. Additionally, counsel asserts that the requirement of lawful employment "is *ultra vires* because it prevents an INA § 245(i) eligible individual from obtaining the underlying immigrant visa petition necessary for adjustment of status." Counsel submits a brief on certification.

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 presented on certification is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious occupation or vocation for the two years immediately preceding the filing of the visa petition.

The 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 petition was filed on April 23, 2007. Therefore, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

The petitioner indicated on the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, that the beneficiary entered the United States on June 27, 1990 and that his status expired on December 27, 1990. The petitioner provided a copy of the beneficiary's visa, which indicates that he was approved for a B-1/B-2 nonimmigrant visitor's visa on June 14, 1990 which was valid until June 13, 1995. The beneficiary's Form I-94, Departure Record, indicates that he entered the United States as a B-2 temporary visitor for pleasure pursuant to that visa; however, the date of his entry is illegible.

The petitioner submitted a March 26, 2007 letter from [REDACTED] who certified that the beneficiary "has been serving this association for approximately 11 years and 3 months – from January[] 1, 1996 to March 26, 2007." The petitioner also submitted several photographs but did not identify them. It also provided a copy of a February 13, 2004 final determination letter from the U.S. Department of Labor addressed to [REDACTED] forwarding a certified Form ETA 750, Application for Alien Employment Certification. The Form ETA-750 indicated that the certified position was that of patternmaker. The petitioner provided uncertified partial copies of the beneficiary's unsigned and undated Internal Revenue Service (IRS) Form 1040, U.S. Individual Income Tax Return, for the years 2004 and 2005. The tax returns indicate that the beneficiary reported \$8,650 and \$8,680, respectively, in business income and identified his occupation as "worker." However, as the returns do not include copies of the Schedules C, the AAO cannot determine the reported source of this income.

In a June 19, 2007 request for evidence (RFE), the director instructed the petitioner to submit documentation to establish the beneficiary's qualifying work history. In response, the petitioner submitted a statement from the beneficiary, in which he stated that he started to work for the [REDACTED] in 1996 and for the petitioning organization in 2002. The petitioner resubmitted the uncertified and unsigned copies of the beneficiary's IRS Forms 1040.

The director denied the petition, finding that the petitioner had not established that the beneficiary worked continuously in a qualifying religious occupation or vocation for the two years immediately preceding the filing of the petition. The director noted the certified Form ETA 750 and found that the position of patternmaker is not a traditional religious function. On appeal, the petitioner, through [REDACTED] its authorized spokesman, stated in a December 27, 2007 letter that the beneficiary had been serving the petitioning organization as a preacher since 2002 and that in "early

2005,” he “took a full time position as a preacher with our Temple.” [REDACTED] stated that the beneficiary was compensated with “full room, board, and other living expenses” In his December 28, 2007 letter, counsel stated:

The ETA 750 was previously filed by a prospective employer who was seeking to offer the Beneficiary a position. The Beneficiary previously did have job experience in the garment industry. However, the Beneficiary chose to pursue employment in religious services and decline[d] the offer. Therefore, the Beneficiary’s previous ETA 750 filing is irrelevant and unrelated to decision process in these proceedings.

Pursuant to requirements under section 2(b)(1) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008), the U.S. Citizenship and Immigration Services (USCIS) issued new regulations for 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 this requirement, the AAO remanded the petition to the director on December 15, 2008, to give the petitioner an opportunity to meet the new requirements.

The new 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:

- (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.

In response to the director's Notice of Intent to Deny (NOID) issued pursuant to the AAO's remand, the petitioner resubmitted copies of the beneficiary's IRS Forms 1040 for 2004 and 2005 and provided uncertified copies of the beneficiary's unsigned and undated Forms 1040 for 2006, 2007, and 2008. The petitioner also submitted corresponding copies of IRS Form W-2 that it issued to the beneficiary for the same years and on which it reported wages of \$2,700, \$7,200 and \$8,400, respectively.

The director again denied the petition, finding that the petitioner had not established that the beneficiary had been lawfully employed in qualifying religious work throughout the qualifying period. The director stated that the beneficiary arrived in the United States on a B-2 visa that expired on December 27, 1990, and that as he did not have authorization to work, any period of employment in the United States was not in a lawful immigration status.

On certification, counsel asserts:

Due to the fact that the new regulations came into effect after Petitioner filed this petition, they should not be retroactively applied in his case. Under the prior regulations, this 'lawful employment' requirement . . . did not exist. Thus, based on the applicable regulations at the time of filing, this Form I-360 petition should be approved.

As previously discussed, supplementary information published with the new rule specified that all cases that were pending on the effective date of the rule would be adjudicated pursuant to the requirements of the new rule. As the petition was pending on the effective date of the rule, it is subject to the evidentiary requirements of the rule.

Counsel also argues:

No other immigrant visa petition requires an individual to be in lawful status for the petition to be approved. No other employment-based immigrant visa petition mandates that the qualifying work experience be "authorized under United States immigration law." Generally, issues of lawful immigration status and lawful employment fall under INA § 245, which governs adjustment of status. In fact, INA § 245(i) explicitly provides an exception for individuals who have failed to maintain lawful status or have engaged in unlawful employment in the United States. Thus, the Service's decision should be reversed because its application 8

C.F.R. 204.5 directly conflicts with the intent behind INA § 245(i) by preventing the beneficiary from adjusting status.

Counsel's argument regarding the requirements of other employment-based immigrant petitions is not relevant. The regulations establish separate requirements for each immigrant petition and differ for each visa classification. No statute or other controlling law mandates that the requirements of admission to the United States remain the same for each classification.

Counsel's argument regarding the application of section 245(i) of the Act is also without merit. The question of whether the 2001 ETA 750 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. There is no evidence that a petition was ever filed on behalf of the beneficiary prior to the instant petition. In fact, counsel alleges that the beneficiary declined the job offer that was the basis of the Form ETA 750.

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 USCIS 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, USCIS must 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.

Accordingly, for the reasons discussed above, the petitioner has not established that the beneficiary worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The AAO will affirm the certified denial 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. The petitioner has not sustained that burden.

ORDER: The director's decision of November 30, 2009 is affirmed. The petition is denied.