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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**



C1

FILE:  Office: CALIFORNIA SERVICE CENTER Date: FEB 03 2011

IN RE: 

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:

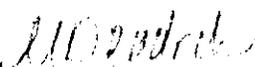


INSTRUCTIONS:

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 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 determined that the petitioner had failed to submit required evidence, and therefore the director again denied the petition and certified the decision to the AAO. The AAO will affirm the director's decision.

The petitioner is a regional conference of the United Methodist Church (UMC). 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 pastor of a UMC congregation in Spencer, Oklahoma. The director determined that the petitioner had not established the beneficiary's qualifications as a minister, or that the beneficiary had the required two years of continuous, lawful work experience immediately preceding the filing date of the petition.

The petitioner filed the Form I-360 petition on October 6, 2006. The director initially denied the petition on January 16, 2008, and the petitioner appealed that decision. While the petitioner's appeal was pending, U.S. Citizenship and Immigration Services (USCIS) published 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). On December 16, 2008, the AAO remanded the petition to the director for issuance of a new decision consistent with the revised regulations.

The director again denied the petition on March 27, 2009, and certified the decision to the AAO for review. As required by the USCIS regulation at 8 C.F.R. § 103.4(b)(2), the director allowed the petitioner 30 days in which to submit a brief in response to the certified decision. To date, nearly two years later, the record contains no further correspondence from the petitioner or from counsel. We will therefore consider the record to be complete as it now stands.

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).

Under the USCIS regulation at 8 C.F.R. § 204.5(m)(9), if the alien is a minister, the petitioner must submit the following:

(i) A copy of the alien's certificate of ordination or similar documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination; and

(ii) Documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination, as well as evidence that the alien has completed any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological institution is accredited by the denomination.

In a letter accompanying the initial filing, [REDACTED] stated that the beneficiary studied at Saint Paul School of Theology in Kansas City, Missouri, earning a Master of Divinity degree in 1992, followed by a Master of Theology degree in 1994. [REDACTED] stated that the beneficiary's

ministerial training with the [REDACTED] [REDACTED] began in 1983. In 1985 he was ordained in the [REDACTED] . . . and then in 1988 he was ordained in the order of Elder. . . .

Following his ordination in 1988, [the beneficiary] was authorized and entrusted to: . . . read the Holy Scriptures in the Church of God, to preach the Word of God, and to administer the Holy Sacraments in the Congregation. . .

[REDACTED] went on to list the beneficiary's subsequent pastoral and chaplain positions, which we will address elsewhere in the context of his employment history.

The petitioner submitted photocopies of the beneficiary's diplomas and transcript from [REDACTED]. A February 9, 1985 certificate indicated that the beneficiary "has been ordained [REDACTED]." The ordination certificate includes the passage quoted in [REDACTED]' letter. The 1985 date on the certificate contradicts [REDACTED] claim that the beneficiary was ordained as an elder in 1988; the certificate itself has greater weight than the bishop's assertion many years after the fact.

On July 13, 2007, USCIS issued a request for evidence (RFE), instructing the petitioner to submit further documentation to show the UMC denomination's requirements for ordination, and to show that the beneficiary has met those requirements. In response, [REDACTED] superintendent of the petitioning conference, stated that candidates for ordination

shall have served full time under Episcopal appointment for at least three full annual conference years following the completion of the educational requirements – Bachelor's Degree in an accredited college, Master of Divinity Degree in an approved seminary. They shall satisfy the board of ordained ministry regarding physical, mental, and emotional health. They shall prepare and preach at least one written sermon on a biblical passage specified by the board of ordained ministry and present a plan and outline for teaching a book or books of the Bible. They shall respond to a written or oral doctrinal examination administered by the board of ordained ministry. The candidate should demonstrate the ability to communicate clearly in both oral and written form. (Paragraph 335, 2004 Book of Discipline)

[The beneficiary] can provide documentation of his ordination by the Liberia Conference.

The petitioner submitted additional copies of documentation submitted previously, including the beneficiary's 1985 ordination certificate.

In the January 2008 denial notice, the director noted that the beneficiary earned his degrees in the early 1990s, several years after his 1985 ordination as an elder, which contradicts the petitioner's claim that an intending elder must earn those degrees first, in order to qualify for ordination.

On appeal, [REDACTED] asserted that the [REDACTED] would not appoint any person to serve as a pastor if that person does not have the requisite qualification," and that the beneficiary "is very well qualified as a United Methodist Minister/Pastor." [REDACTED] asserted that the beneficiary received the required training at Gbarnga School of Theology before his ordination.

The petitioner submitted photocopied excerpts from the [REDACTED] stating that each conference has authority "[t]o make such rules and regulations for the administration of the work within their boundaries including such changes and adaptations of the General Discipline as the conditions in the respective areas may require." [REDACTED] asserted that, because "there are no

graduate seminaries in Liberia, United Methodist Ministers in Liberia are not required to complete the Master of Divinity degree before they are ordained, as Elders.”

Following the AAO’s December 2008 remand order, the director issued a new RFE on February 4, 2009. The 2009 RFE did not address the issue of the beneficiary’s credentials as a minister, and therefore the petitioner’s response did not address that issue either.

In the March 2009 denial notice, the director stated: “According to the petitioner’s requirement for ordination, the petitioner has not established the beneficiary has the requisition of the education requirement by the petitioner prior to certificate of ordained Elder was issued, or the beneficiary has been ordained after completion of his education in 1992 and 1994.”

We acknowledge the director’s concern that the beneficiary’s 1985 ordination predates his 1992 and 1994 degrees. Nevertheless, we must also consider the totality of the evidence presented. The petitioner must establish eligibility by a preponderance of evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied the standard of proof. *Matter of Chawathe* at 376, citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

Under a preponderance of evidence standard, the mere suggestion of doubt does not automatically discredit the petitioner’s evidence or mandate denial of the petition, provided the petitioner has submitted reliable documentary evidence. The petitioner has submitted copies of the beneficiary’s ordination documents, and ample evidence that the UMC has long recognized the beneficiary as a qualified member of the clergy. The director’s only stated basis for questioning the beneficiary’s credentials comes from statements by [REDACTED] regarding the usual order of events in the ordination process. The director does not explain why [REDACTED] is apparently credible only when stating that an elder’s degree must precede his ordination, and not when stating, in the same letter, that the beneficiary is an ordained elder who has already served as a pastor.

The record indicates that individual conferences have some discretion in terms of ordination. The record consistently indicates that the petitioning conference recognizes, rather than questions, the beneficiary’s ordination under another UMC conference. Documentation from the UMC’s West Africa Central Conference (with jurisdiction over Liberia) would have shed light on this issue, but the absence of such documentation (which USCIS never requested) does not automatically discredit the beneficiary’s ordination certificate. We find that the preponderance of evidence in this proceeding strongly favors the conclusion that the beneficiary is an ordained elder, authorized to perform the duties of ordained clergy in the UMC denomination. The record does not support the alternative finding that the beneficiary’s ordination certificate is either forged or undeserved, or that numerous UMC congregations have, knowingly or otherwise, employed the services of an unqualified pastor.

We will withdraw the director's finding that the petitioner has not established that the beneficiary is a qualified minister in his religious denomination.

The second issue under consideration concerns the beneficiary's past experience. 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 USCIS regulation at 8 C.F.R. § 204.5(m)(11) reads:

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 [Internal Revenue Service] 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.

As noted previously, the petitioner filed the Form I-360 petition on October 6, 2006, meaning that the petitioner must establish the beneficiary's continuous employment since October 6, 2004. Bishop Hayes, in his introductory letter, described the beneficiary's claimed employment history:

He continuously served as [REDACTED] from 1986 to December, 1990. He was the Pastor in charge and performed the full range of minister's duties.

... [The beneficiary] worked as [REDACTED] continuously from December 1, 1993 to May 31, 1995.

[The beneficiary] completed his employment with the Missouri Department of Corrections/Missouri State Penitentiary on May 27, 2004. . . .

He was then appointed as associate pastor [REDACTED] through the [petitioning] Conference . . . in June 2004, through May, 2005. He was appointed [REDACTED] . . . in June of 2005 to present.

... He will be compensated at the rate of \$39,000.00 wages per year, and benefits of \$10,800.00.

[REDACTED] listed the beneficiary's duties in table form, showing the number of hours that the beneficiary performed each duty in an average week. For instance, [REDACTED] stated that the beneficiary devoted eight hours per week to "Preparations and delivery of sermons," five hours per week to "Preparation and teaching of weekly Bible studies," and one hour per week "Teaching Youth Sunday school." The hours claimed for all of the listed duties add up to 43½ hours per week.

The petitioner submitted a copy of a June 3, 2004 letter, jointly signed by [REDACTED] and [REDACTED] appointing the beneficiary "as associate pastor [REDACTED]"

Copies of IRS Form W-2 Wage and Tax Statements showed the following compensation:

Year	Amount
2003	\$32,336.00
2004	20,000.29
2004	11,338.62
2005	7,225.00
2005	10,952.99

The 2005 Form W-2 from Spencer UMC mentioned additional compensation, specifically a \$4,900 "Housing Exclusion" and \$3,431 for "Dependent care benefits," not counted as salary for tax purposes. Uncertified copies of the beneficiary's 2003 and 2004 income tax returns show higher amounts, but these figures include the beneficiary's spouse's income as a nurse's aide.

In the July 2007 RFE, USCIS instructed the petitioner to submit further documentation of the beneficiary's prior experience, including evidence of compensation. In response, the petitioner submitted copies of previously submitted IRS Forms W-2.

The petitioner also submitted a letter from [REDACTED] chairperson of Spencer UMC's Administrative Board, who stated that the beneficiary "has served our church as pastor since June 2005." In a separate, but almost identically worded letter, [REDACTED], senior pastor of First UMC in Owasso, stated that the beneficiary "served our church as our associate pastor from June, 2004, to May, 2005." Both letters reproduced the previously submitted list of the beneficiary's duties, showing a 43½ hour work week.

The director, in the January 2008 denial notice, observed that the beneficiary's 2004 and 2005 compensation was well below the rate specified in [REDACTED] initial letter. The director stated: "Without clarification, the above inconsistencies suggest that the beneficiary may not have been employed on a full time basis" during the qualifying period. The director noted that the petitioner had claimed that the beneficiary works a 43-hour week, but found that the petitioner had submitted no evidence to support that claim.

On appeal, [REDACTED] maintained that the beneficiary worked continuously and full-time throughout the 2004-2006 qualifying period. He stated that any perceived discrepancy in the beneficiary's compensation arose because "a certain portion of the minister/pastor's salary is non taxable." A "Church Pastor Compensation Report" dated December 2005 and effective January 1, 2006, indicated that, out of a "Gross Total" of \$36,360 to be paid to the beneficiary, only \$20,964 would count as "Taxable Wages" owing to various exclusions, such as clergy housing. This is not a description of the beneficiary's previous compensation, but a plan for his future compensation.

We acknowledge that some of the beneficiary's compensation is non-taxable. Nevertheless, the beneficiary's IRS Forms W-2 from 2004 and 2005 show total compensation significantly below even the reduced amount shown on the compensation report. The "Gross Total" on the compensation report, meanwhile, is less than the \$39,000 annual figure, even without taking into account the additional \$10,800 in claimed non-salary benefits.

The director's 2009 RFE, following the AAO's remand order, quoted in full the USCIS regulation at 8 C.F.R. § 204.5(m)(11). In response, the petitioner submitted another copy of the 2004 letter from Bishop Blake and Rev. Ball, confirming the beneficiary's appointment as the associate pastor at First UMC in Owasso. The petitioner also submitted copies of IRS Forms W-2, indicating that Spencer UMC paid the beneficiary \$24,686.16 in 2007 and \$25,129.00 in 2008. These years fell after the 2004-2006 qualifying period.

[REDACTED] stated that the beneficiary's "salary package includes \$37,510, annual salary, plus a parsonage (pastor's free housing), and a pension of \$8,009.69." In an accompanying attestation, [REDACTED] stated: "The total salary package per year is \$36,960, plus a parsonage (pastor's free housing), [and] \$8,760 pension." The petitioner did not explain this simultaneous submission of two different sets of figures relating to the beneficiary's compensation, each of which is lower than the petitioner's original description of the job offer.

In the certified 2009 denial notice, the director repeated language from the 2008 denial notice, noting that the beneficiary's IRS Forms W-2 show compensation "substantially below the approximate

\$39,000 + \$10,800 additional benefit that should have appeared on the W2's for an annual income. Without clarification, the above inconsistencies suggest that the beneficiary may not have been employed on a full time basis." The director also repeated the finding that, despite requests for "a weekly breakdown of duties of time spent performing the religious occupation," "[t]he petitioner merely listed the beneficiary's duties with a total of 43 hours."

The director also noted: "the beneficiary was employed as [REDACTED] from December 1, 1993 to May 27, 2004, or not employed in the same denomination as the petitioner." The beneficiary's work as a prison chaplain ended more than two years before the petition's October 2006 filing date, and therefore does not affect the question of the beneficiary's employment during the two-year qualifying period.

Because the record contains no response to the certified denial notice, we must base our decision on the petitioner's prior submissions, and on analysis of the director's reasoning in the certified denial notice. The director did not explain the difference between a list of the beneficiary's weekly duties, showing the hours devoted to each task, and "a weekly breakdown of duties." It is not clear, therefore, how the information the petitioner provided is insufficient in this regard. In a similar vein, the low totals on the beneficiary's IRS Forms W-2 for 2004 and 2005 do not automatically show that the beneficiary lacks the required experience. There is no dispute that much of the beneficiary's compensation package is in the form of non-taxable benefits, which would not appear as salary on IRS Forms W-2.

Of greater concern is the general lack of evidence regarding payment of the beneficiary's non-salary benefits. The petitioner has asserted that these benefits amount to a significant percentage of the beneficiary's overall compensation, but only one IRS Form W-2 mentions these benefits at all. It is not clear whether the omission of benefits from other Forms W-2 is the result of non-payment of those benefits, or error by the preparers of those forms. Either way, the petitioner has not fully satisfied the regulatory requirement at 8 C.F.R. § 204.5(m)(11)(ii), which requires IRS documentation of non-salaried compensation if available.

Also significant is the issue of the beneficiary's legal status during the two-year qualifying period. As we have already noted, the regulation at 8 C.F.R. § 204.5(m)(4) requires the beneficiary to have been working in lawful immigration status during the time he worked in the United States, and the regulation at 8 C.F.R. § 204.5(m)(11) requires that qualifying experience, if acquired in the United States, must have been authorized under United States immigration law.

On Form I-360, the petitioner did not claim that the beneficiary was then in lawful immigration status. The petitioner listed "TPS" (temporary protected status) under the beneficiary's "Current Nonimmigrant Status," but when asked for the expiration date of that status, the petitioner stated "Expired." The petitioner then seemed to contradict this information by answering "No" when asked whether the beneficiary had ever worked in the United States without authorization.

The director, in the 2009 RFE, advised the petitioner that the beneficiary must have worked under lawful status during the two-year qualifying period. In response, ██████████ stated:

[The beneficiary] entered the U.S. in January, 1990 in . . . F-1 student status, and remind on that status until he was granted TPS. Previous filing by ██████████ ██████████ on April 8, 1996 was prior to the Life Act deadline, which “grandfathers” this filing that is pending. . . . This filing was done knowing that we would file under the existing Life Act Provision. We believe that [the beneficiary] would adjust his status based on 245i Provision. We are appealing to your offices that since our previous filing was done before the new rule went into effect, our case should be adjudicated under the standards of the old rule and not the new rule.

Section 245(i) of the Act, 8 U.S.C. § 1255(i), states, in pertinent part:

Adjustment of Status for Aliens Physically Present in the United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States –

(A) who –

- (i) entered the United States without inspection ; or
- (ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary . . . of –

- (i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001

* * *

(C) who, in the case of a beneficiary of a petition for classification . . . that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000 [enacted December 21, 2000];

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling \$1,000 as of the date of receipt of the application

Section 245(i) of the Act permitted certain aliens who were physically present in the United States on December 21, 2000, and who were otherwise ineligible to adjust their status, such as aliens who entered the United States without inspection or failed to maintain lawful nonimmigrant status, to pay

a penalty and have their status adjusted without having to leave the United States. Section 245(i) of the Act expired as of April 30, 2001, except for those aliens who are “grandfathered.” “Grandfathered alien” is defined in 8 C.F.R. § 245.10(a) to include “an alien who is the beneficiary . . . of . . . [a] petition for classification,” such as a Form I-360 petition, “which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed.”¹

The regulation at 8 C.F.R. § 245.10(a) provides, in pertinent part:

- (2) *Approvable when filed* means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act . . . , the qualifying petition . . . was properly filed, meritorious in fact, and non-frivolous (“frivolous” being defined herein as patently without substance). This determination will be made based on the circumstances that existed at the time the qualifying petition or application was filed.

Section 245(i) relief, however, applies to adjudication of a Form I-485 adjustment application, not to adjudication of the underlying immigrant petition. Specifically, section 245(i)(2)(A) of the Act mandates that an alien seeking section 245(i) relief be “eligible to receive an immigrant visa.” See *INS v. Bagamasbad*, 429 U.S. 24, 25 n. (1976) (per curiam); *Lee v. U.S. Citizenship & Immigration Servs.*, 592 F.3d 612, 614 (4th Cir. 2010) (describing the legislative history of 8 U.S.C. § 1255(i)).

The law does not require aliens to adjust their status on every grandfathered immigrant petition, nor does the law require every grandfathered immigrant petition to be approved. However, in order to seek relief under section 245(i) of the Act based on classification under section 204 of the Act, the alien in this case must first have an approved immigrant petition and an approvable when filed immigrant petition or labor certification filed on or before April 30, 2001.

The law does not require USCIS to approve every immigrant petition filed on behalf of an alien who intends to seek section 245(i) relief. Rather, such relief presupposes an already-approved immigrant petition. Without an approved immigrant petition, the beneficiary in this case has no basis for adjustment of status, and therefore section 245(i) relief does not apply.

The new 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 immigrant petition based on the regulatory requirements at 8 C.F.R. §§ 204.5(m)(4) and (11). The petitioner’s assertion that the beneficiary is eligible for section 245(i) relief at the adjustment stage does not require us to approve the underlying immigrant petition before the beneficiary has even reached that stage.

¹ The regulation at 8 C.F.R. § 245.10(a)(2) defines “properly filed” to mean that “the application was physically received by the Service on or before April 30, 2001, or if mailed, was postmarked on or before April 30, 2001, and accepted for filing as provided in § 103.2(a)(1) and (a)(2) of [8 C.F.R.].”

The wording of the 2008 legislation, which led to the new regulations, demonstrates Congress's interest in USCIS regulations and the agency's commitment to combating immigration fraud. Section 2(b) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008), reads, in pertinent part:

Regulations – Not later than 30 days after the date of the enactment of this Act, the Secretary of Homeland Security shall –

- (1) issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status for special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(C)(ii))

In proposing the requirement that all prior qualifying employment have been authorized and “in conformity with all other laws of the United States” such as the Fair Labor Standards Act of 1938 and “tax laws,” USCIS explained that “[a]llowing periods of unauthorized, unreported employment to qualify an alien toward permanent immigration undermines the integrity of the United States immigration system.” 72 Fed. Reg. 20442, 20447-48 (April 25, 2007). Accordingly, the adoption of the final rule requiring that all prior qualifying employment have been lawful clearly comports with the explicit instructions from Congress to “eliminate or reduce fraud.” As we have previously noted, USCIS applied the new regulations to already-pending cases as well as new filings.

The October 2008 legislation extended the special immigrant nonminister religious program only until March 5, 2009. From the wording of the statute, it is clear that this extension was so short precisely because Congress sought to learn the effect of the new regulations before granting a longer extension. Congress has since extended the life of the program three times.² On any of those occasions, Congress could have made substantive changes in response to the regulations they ordered USCIS to promulgate, but Congress did not do so. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). We may therefore presume that Congress has no objection to the new regulations as published, or to USCIS' interpretation and application of those regulations.

We therefore reject the petitioner's argument that section 245(i) of the Act limits the application of the new “lawful employment” requirement. Congress has repeatedly endorsed the current regulation – including the clauses disputed by the petitioner – by renewing the statute without substantive change, precisely the situation covered by *Lorillard*.

Furthermore, there is no evidence that the beneficiary would be eligible for section 245(i) relief. In order to qualify for section 245(i) relief, an alien must be the beneficiary of a petition or labor

² Pub. L. No. 111-9 § 1 (March 20, 2009) extended the program to September 29, 2009. Pub. L. No. 111-68 § 133 (October 1, 2009) extended the program to October 30, 2009. Pub. L. No. 111-83 § 568(a)(1) (October 28, 2009) extended the program to September 29, 2012.

certification that was approvable when filed on or before April 30, 2001. 8 C.F.R. § 245.10(a)(1)(i)(A). That is, the petition must have been properly filed, meritorious in fact, and non-frivolous. 8 C.F.R. § 245.10(a)(3).

The petitioner has claimed that an April 5, 1996 Form I-360 petition (receipt number [REDACTED] [REDACTED]), meets these requirements. The beneficiary's A-file record of proceeding contains documentation from that petition. The petitioner has acknowledged that the director, Nebraska Service Center, denied that petition for abandonment because First UMC of Bethany refused to submit evidence necessary to continue that proceeding. Therefore, the 1996 petition was not approvable when filed, as it was not meritorious in fact. *Ogundipe v. Mukasey*, 541 F.3d 257, 263 (4th. Cir. 2008) (finding that a Form I-360 petition was not "approvable when filed" for purposes of section 245(i) of the Act because much of the evidence required by regulation was absent from the record).

In the certified denial notice, the director acknowledged that First UMC of Bethany had filed a petition on the beneficiary's behalf in 1996. The director also held, however, that an abandoned petition would not make the beneficiary a "grandfathered alien" for purposes of section 245i relief. The petitioner has not contested this finding, or shown that the beneficiary's hypothetical intent to seek section 245i relief at the adjustment stage should require USCIS to approve a petition on his behalf, so that he can then apply for adjustment. The petitioner has not shown that the beneficiary held USCIS employment authorization throughout the 2004-2006 qualifying period.

Based on the above discussion, we will affirm the director's finding that the petitioner has not sufficiently demonstrated the beneficiary's required two years of continuous, lawfully authorized experience immediately preceding the petition's filing date.

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 affirm the denial of the petition.

ORDER: The director's decision of March 27, 2009 is affirmed. The petition is denied.