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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

**PUBLIC COPY**

[REDACTED]

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FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: JAN 05 2011

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:

SELF-REPRESENTED

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a member church of the Universal Fellowship of Metropolitan Community Churches, a Protestant Christian denomination. 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 chaplain. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, lawful work experience immediately preceding the filing date of the petition.

On appeal, the petitioner argues that the beneficiary qualifies for relief under section 245(i) of the Act.

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 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 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.

The petitioner filed the Form I-360 petition on February 27, 2009. On the petition form, the petitioner did not claim that the beneficiary held any valid nonimmigrant status at the time of filing, and answered "yes" when asked whether the beneficiary had worked in the United States without authorization. The record indicates that the beneficiary entered the United States on January 1, 1997 as an F-1 nonimmigrant student. In an explanatory note, the petitioner stated that the beneficiary "is covered under 245i to adjust his status."

The director denied the petition on June 2, 2009, because the beneficiary admittedly worked without authorization during the two-year qualifying period. On appeal from the decision, the petitioner repeats the assertion that "the beneficiary is **eligible to adjust his status** under 245i." The petitioner, here, refers to section 245(i) of the Act, 8 U.S.C. § 1255(i), which 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.”<sup>1</sup>

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.

However, section 245(i) relief 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*

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<sup>1</sup> 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.]”

*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. We reject the argument that section 245(i) of the Act limits the application of the new "lawful employment" requirement.

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.<sup>2</sup> 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.

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 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).

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<sup>2</sup> P.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.

Although the petitioner does not specify which petition might give the beneficiary eligibility under section 245(i) of the Act, the record of proceeding contains the following prior petitions:

1. A Form I-130 Petition for Alien Relative filed by [REDACTED] on July 22, 1997 based on her marriage to the beneficiary. [REDACTED] subsequently withdrew the petition. The legacy Immigration and Naturalization Service (INS) Officer-in-Charge, Las Vegas, denied the petition on July 16, 2002, based on the withdrawal. This was the only petition filed on the beneficiary's behalf before the April 30, 2001 cutoff date for section 245(i) relief.
2. A Form I-130 Petition for Alien Relative filed by [REDACTED] on April 28, 2003 based on her marriage to the beneficiary. The filing lacked initial required evidence, including evidence of a bona fide marital relationship and the Form I-864 Affidavit of Support. [REDACTED] failed to respond to a detailed request for missing evidence. The legacy INS Acting District Director, Phoenix, denied the petition on January 9, 2006, based on [REDACTED]'s failure to submit required evidence and her abandonment of the petition.

For these reasons, the record does not establish that either Form I-130 petition was approvable when filed and 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).

With respect to the instant petition, 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 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), USCIS cannot approve the petition because the beneficiary's religious employment in the United States during the qualifying period was not authorized under U.S. 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.