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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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 07 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)

[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.

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 Assemblies of God 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 an associate pastor. The director determined that the petitioner had not established that had the required two years of lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel and supporting exhibits.

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) requires that qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

The petitioner filed the Form I-360 petition on January 9, 2009. Part 10 of the form advised the petitioner: "If you do not completely fill out this petition . . . the petition may be denied." Nevertheless, the petitioner did not completely fill out the petition. The petitioner provided a United States address for the beneficiary, but left blank the lines on Part 3 of the form relating to the beneficiary's nonimmigrant status. The petitioner also failed to answer the question, in Part 4, asking whether the beneficiary had worked in the United States without authorization.

In a letter dated April 12, 2006, , president and senior pastor of the petitioning church, stated that the beneficiary "has been with us since [M]ay of 2001."

On April 6, 2009, the director instructed the petitioner to submit additional documentation, including "evidence that the beneficiary was employed while in lawful status." The petitioner submitted a copy of the beneficiary's border crossing card (BCC), issued in 1996. As the name suggests, the BCC permits the holder to cross the border between Mexico and the United States. The BCC does not, however, authorize the holder to work in the United States. It is, in effect, a B-1/B-2 visitor's visa, which does not authorize employment. See 8 C.F.R. §§ 212.6 and 214.1(e). Furthermore, the beneficiary's BCC expired on June 3, 2006, more than two years before the petition's January 9, 2009 filing date. Therefore, the BCC does not show that the beneficiary was authorized to be in the United States at all, much less work for the petitioner, at any time during the 2007-2009 qualifying period.

The director denied the petition on June 15, 2009, stating that the petitioner had not shown that the beneficiary worked in lawful immigration status throughout the qualifying period. On appeal, counsel claims "the regulation cited by USCIS in denying the petition is invalid."

Counsel cites case law concerning the level of discretion that a federal agency enjoys when issuing regulations. Counsel cites no court decision, however, showing that any federal court has used the cited case law to strike down the regulations at 8 C.F.R. §§ 204.5(m)(4) and (11), which require that the alien's past employment in the United States must have been lawfully authorized. Counsel cannot nullify those regulations simply by noting the existence of general principles that limit a federal agency's discretion when issuing regulations.

It is well settled that the regulations which the Service [now USCIS] promulgates have the force and effect of law and are binding on the Service. Bridges v. Wixon, 326 U.S. 135, 153 (1945); Bilokumsky v. Tod, 263 U.S. 149, 155 (1923); Matter of A-, 3 I&N Dec. 714 (BIA 1949); cf. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Matter of Santos, 19 I&N Dec. 105 (BIA 1984); Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980); *Matter of L-*, 20 I&N Dec. 553, 556 (BIA 1992). The AAO is a component of USCIS, and therefore subject to USCIS regulations. Therefore, even if the AAO found counsel's arguments to be wholly persuasive (which we do not), we have no authority to overturn or change USCIS regulations.

Counsel contends: "If Congress intended to require lawful immigration status, it could have explicitly stated this requirement in INA 101(a)(27)(C)." Congress' interest in USCIS regulations is evident from the wording of section 2(b) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008):

> *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."

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.[1] On any of those occasions, Congress could have made substantive changes in response to the regulations they ordered USCIS to publish, 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's interpretation and application of those regulations.

Counsel notes the filing of two earlier Form I-360 petitions on the beneficiary's behalf. Another church filed a petition with receipt number [redacted] on April 30, 2001. The director denied that petition on March 12, 2002, and the church filed no appeal of that decision. The present petitioner filed a petition with receipt number [redacted]2 on or about December 14, 2006. The director denied that petition on August 9, 2007. The petitioner appealed that decision. Counsel claims that the appeal "is currently pending . . . with the Administrative Appeals Office," but the petitioner's own submission on appeal contradicts this claim. The AAO rejected the appeal as untimely on September

[1] 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.

18, 2008, and instructed the director to treat the appeal as a motion to reopen under 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*). A copy of the 2008 remand order accompanied the appeal, labeled exhibit C. The AAO's remand order remains in effect, although there is no evidence that the director has yet complied.

Counsel explains the relevance of the earlier filings:

> Unauthorized employment is a relevant issue in adjustment of status in light of INA 245(c), which bars aliens who have engaged in unauthorized employment . . . from adjusting their status to legal permanent residence.
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> However, INA 245(i) . . . allow[s] an alien barred under INA 245(c) to adjust status nonetheless if such alien is (1) the beneficiary of a qualifying immigrant petition filed on or before April 30, 2001; [and] (2) the qualifying immigrant visa petition . . . was properly filed or approvable when filed. . . .
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> In the present case, herein Beneficiary was the beneficiary of an immigrant visa petition . . . that was filed . . . on April 30, 2001. . . . The petition was properly filed. . . . Hence, Beneficiary is protected under INA 245(i).
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> Therefore, the requirement of lawful immigration status under 8 CFR 204.5(m) not only contradicts INA 101(a)(27)(C) but INA 245(i) as well.

As we have already noted, the AAO has no authority to strike down USCIS regulations. Furthermore, counsel's arguments are not persuasive. 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."[2] Counsel misquotes the last passage, stating that the petition must have been "properly filed *or* approvable when filed" (emphasis added). By changing the conjunction from "and" to "or," counsel falsely implies that a petition need not have been both "properly filed" and "approvable when filed."

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 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

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[2] 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.]."

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). Counsel'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 counsel's argument that section 245(i) of the Act limits the application of the "lawful employment" requirement. As we have already noted, Congress has revisited and reenacted the statute numerous times since 2008. On any of those occasions, Congress could have repudiated or modified the regulatory "lawful employment" requirement, but did not do so. Instead, Congress has repeatedly endorsed the current regulation – including the clauses disputed by counsel – 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 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).

Counsel claims that the beneficiary's 1998 Form I-360 petition meets these requirements. The record of proceeding now before the AAO does not contain the documentation from the 2001 petition, and the denial of that petition is, on its face, evidence that the director did not consider the 2001 petition to be approvable when filed. The 2001 petitioner never contested the denial by filing an appeal, and there is no evidence of any administrative or judicial finding, in any forum, that the 2001 petition was approvable when filed. We will not find that this denied petition permanently entitles the beneficiary not only to section 245(i) relief, but also to a waiver of regulations requiring his past employment to have been lawfully authorized.

The director denied the petition because the beneficiary did not meet a basic regulatory requirement. Rather than contest the director's finding, counsel has based the appeal entirely on the proposition that the director should not follow the regulations. We cannot find that the director erred by following the regulations. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission,* 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters*

Ltd. v. F.C.C., 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). Because the petitioner has not contested its failure to meet regulatory requirements, we agree with the director's decision.

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.