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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  
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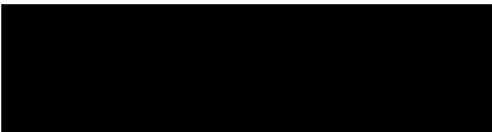
FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

JAN 10 2011

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 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 a religious counselor. The director determined that the petitioner had not established that the beneficiary had the required two years of lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits arguments from counsel.

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 petitioner filed the Form I-360 petition on June 18, 2007. The petitioner indicated that the beneficiary arrived in the United States on September 22, 1992, and claimed that the petitioner's "Current Nonimmigrant Status" was that of a B-2 nonimmigrant visitor for pleasure. The form instructed the petitioner to state the expiration date of that status, but the petitioner left that line blank. Asked whether the beneficiary had ever worked without authorization, the petitioner answered "Yes."

At the time of filing, the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(m)(1) required that an alien seeking classification as a special immigrant religious worker must have been performing qualifying religious work continuously for at least the two-year period immediately preceding the filing of the petition. The regulation at 8 C.F.R. § 204.5(m)(3)(ii)(A) required the petitioner to submit a letter from an authorized official of the religious organization to establish that the beneficiary had the required two years of experience.

██████████ pastor and general overseer of the petitioning church, stated that the beneficiary “has . . . been a full time paid employee of our church since 2001,” having worked first as an outreach coordinator and then, starting January 2003, as a religious counselor. The petitioner submitted copies of processed checks and Internal Revenue Service (IRS) documentation consistent with Bishop Reid’s claim that the beneficiary “is paid \$300.00 per week.” The documentation included IRS Form W-2 Wage and Tax Statements for 2003, 2004 and two forms dated 2006, but none for 2005. The submission did include copies of processed checks from 2005.

While the petition was pending, USCIS published new regulations for special immigrant religious worker petitions. The new 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 the beneficiary’s qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

On March 30, 2009, the director denied the petition, stating that the petitioner submitted no evidence that the beneficiary had ever lawfully worked in the United States. Under the regulation at 8 C.F.R. § 214.1(e), a B-2 nonimmigrant is not allowed to accept employment in the United States. Furthermore, while the beneficiary entered the United States as a B-2 nonimmigrant, she entered 15 years before the petition’s filing date, and B-2 nonimmigrant status, unless renewed, expires no more than one year after entry. *See* 8 C.F.R. § 214.2(b)(1). The petitioner did not claim that the beneficiary had ever renewed her B-2 nonimmigrant status. Therefore, the record gives no indication that the beneficiary had any authorization even to be in the United States at all after 1993.

On appeal, counsel does not contest the beneficiary’s unlawful employment. Instead, counsel contends that the director “violate[d] the due process rights of the petitioner” by taking too long to adjudicate the petition. Counsel notes that the Administrative Procedure Act requires that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” 5 U.S.C. § 555(b). Counsel asserts that the petition’s “adjudication period of one year and nine months does not constitute a reasonable time.” Counsel does not, however, cite any statute, regulation, or case law to show that the remedy for an “unreasonable” adjudication time is to apply obsolete regulations no longer in effect.

Counsel cites various court decisions, such as *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), that “establish[] a presumption against statutory retroactivity.” A presumption, however, is not an outright

prohibition. If USCIS had not intended the lawful employment requirement to be retroactive, it would have phased in the requirement or specified that it applies only to employment that took place after November 26, 2008. Instead, supplementary information published with the new rule specified: “All cases pending on the rule’s effective date and all new filings will be adjudicated under the standards of this rule.” 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). Thus, the regulations and standards provided within were to be applied immediately and retroactively, and include work performed before the effective date.

The wording of the relevant legislation demonstrates Congress’ 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))

Congress called for prompt publication of new regulations, and did not provide any kind of “grandfather clause” to exempt older petitions from any of the new regulations. The injunction “to eliminate or reduce fraud” implies a broad, rather than narrow, focus to the required regulations.

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). Congress’s awareness of the 2007 proposed rule is evident from its instruction to USCIS to issue “final regulations” rather than “proposed regulations” or “interim regulations.” 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.<sup>1</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.

Counsel asserts:

The petition was filed with the expectation that the beneficiary of the petition would be eligible for 245(i) relief and thus eligible to adjust her status and become a legal permanent resident of the United States.

The regulation is ultra vir[e]s to the statute at INA 101(a)(27)(C) and contrary to the purpose and effect of 245(i). . . . Denying religious organizations access to the ameliorative provisions of 245(i) obliterates its remedial provisions.

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

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<sup>1</sup> 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.

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>2</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 *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 every grandfathered immigrant petition to be approved. 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

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<sup>2</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.]”

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 new "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*.

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).

USCIS records show that the petitioner filed an earlier Form I-360 petition (receipt number EAC 98 008 51626) on or about October 10, 1997. USCIS denied that petition on or about June 1, 1998. The petitioner appealed that denial, and the AAO dismissed the appeal on or about November 15, 1999. The petitioner then moved to reopen or reconsider the decision, and the AAO affirmed the denial of the petition on or about June 28, 2000. Following a second motion, the AAO again affirmed the denial on or about August 8, 2001. Therefore, while the record of proceeding of the petitioner's 1997 petition is not currently before the AAO, we have no reason to presume that the petition was approvable when filed. The AAO reviewed that petition on three separate occasions and found it wanting.

The petitioner has not disputed the director's finding that the beneficiary engaged in unauthorized employment during the two-year qualifying period. The petitioner has presented no persuasive argument that the controlling regulations should not apply in this proceeding. We therefore agree with the director's finding that the beneficiary's unauthorized employment disqualifies her for the benefit sought.

We note an additional deficiency in the record. The AAO may identify additional grounds for denial beyond what the Service Center identified in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(m)(7) requires the petitioner to submit a detailed employer attestation, containing information about the employer, the beneficiary, and the job offer. The record does not contain this required attestation, and this deficiency presents a second ground for denial of the petition.

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.