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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

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

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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAR 01 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:

[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 Christian church of the Brethren in Christ 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 teacher and sign language interpreter. The director determined that the petitioner had not established that the beneficiary had the required two years of continuous, lawful, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel and copies of previously submitted materials.

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).

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.

The petitioner filed the Form I-360 petition on September 2, 2008. On the form, the petitioner indicated that the beneficiary had been in the United States since October 16, 2001. Although the form instructed the petitioner to specify the beneficiary's current nonimmigrant status and the expiration date of that status, the petitioner left both those lines blank. Asked whether the beneficiary had ever worked in the United States without authorization, the petitioner answered "No." [REDACTED] senior pastor of the petitioning church, signed Form I-360, thereby certifying under penalty of perjury "that the petition and the evidence submitted with it is all true and correct."

The petitioner's initial submission included copies of IRS Form 1099-MISC Miscellaneous Income statements indicating that the petitioner paid the beneficiary \$18,200 in 2005, \$18,720 in 2006 and \$19,240 in 2007.

While the petition was pending, 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).

The revised 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 during the two years immediately preceding the petition, if acquired in the United States, must have been authorized under United States immigration law.

On May 9, 2009, the director requested additional evidence, including "evidence of the beneficiary's current status." In response, a letter attributed to counsel but signed by a "Legal Assistant . . . in attorney's absence" indicated that "the beneficiary is not currently in status." The petitioner submitted documentation showing that the beneficiary had entered the United States on October 16, 2001 under the Visa Waiver Program (VWP). Aliens admitted under the VWP may remain in the United States for no more than 90 days. *See* section 217(a)(1) of the Act, 8 U.S.C. § 1187(a)(1). Aliens admitted as tourists under the VWP are not eligible to extend their stay (*see* 8 C.F.R. § 214.1(c)(3)(i)), change nonimmigrant status (*see* 8 C.F.R. § 248.2(a)(5)), or work in the United States (*see* 8 C.F.R. § 214.1(e)).

The director denied the petition on July 21, 2009, because the beneficiary admittedly lacked lawful immigration status and employment authorization during the two-year qualifying period. On appeal, counsel contends that, because the petitioner filed the petition before the new regulations took effect,

USCIS cannot apply those regulations to this petition without clear evidence that Congress intended the regulatory changes to be retroactive.

The wording of the relevant legislation 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.

Congress did not instruct USCIS to limit consideration to future petitions, or to phase in new requirements over two years (which would be the only way accommodate out-of-status aliens who had worked unlawfully before the new regulations went into effect). 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 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's interpretation and application of those regulations.

Counsel contends: “the new finalized rule places an undue burden on those individuals who otherwise have a bona fide I-360 petition submitted on their behalf, are not legally authorized to work, but are

¹ 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.

grandfathered under section 245(i) of the Immigration and Nationality Act (“INA”) and therefore eligible to adjust status through an approved petition.

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

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.]”

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 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. 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 [REDACTED]

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 have been physically present in the United States on December 21, 2000, and 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). In this instance, the beneficiary entered the United States on October 16, 2001, and the petitioner has not submitted any evidence that the beneficiary was in the United States on December 21, 2000, or that any petitioner had filed a petition on the beneficiary’s behalf on or before April 30, 2001. There is no evidence that the beneficiary is a grandfathered alien, eligible for section 245(i) relief.

Counsel cites “an article on a well known website for immigration law, Immigration Law Weekly, [which] states that stakeholders were informed by USCIS that the **regulation was not retroactive**” (emphasis in original; footnote omitted). The petitioner submits a printout of a December 5, 2008 blog

post available online at <http://blogs.ilw.com/gregsiskind/2008/12/uscis-will-not-make-r1-current-visa-holders-file-i129s-.html>, which reads:

USCIS WILL NOT MAKE R-1 CURRENT VISA HOLDERS FILE I-129'S

While this question was not addressed in the recently issued R-1 regulation, USCIS has just notified some of the stakeholder organizations that a worker who holds a valid R-1 issued before November 26th *may* travel on that visa for the duration of the visa. The regulation is NOT retroactive. USCIS has indicated that CBP will be issuing instructions to the ports of entry along these lines. USCIS will also be updating its FAQ document to reflect this.

(Emphasis in original.) We note that the above message is not an official USCIS communication, but rather a blog entry by an immigration attorney. Even then, when read in context, it is clear that the message refers to aliens who already held R-1 nonimmigrant status as of November 26, 2008. The regulation was “not retroactive” in the sense that employers of R-1 nonimmigrants would not have to file new petitions in order for the aliens to maintain their existing R-1 nonimmigrant status.

In the present instance, the beneficiary was not an R-1 nonimmigrant when the regulations changed. Rather, she entered the United States more than seven years earlier, under the Visa Waiver Program which allowed her to stay no longer than 90 days with no opportunity to extend her stay, change her nonimmigrant status, or work in the United States.

When USCIS revised its regulations on Congressional orders in 2008, it did not invent a new violation and retroactively apply it to aliens who had acted in good faith under previous requirements. Rather, USCIS altered and narrowed the circumstances under which aliens could qualify for particular immigration benefits. The mandated intent for the revisions was to combat widespread fraud and abuse within the special immigrant religious worker program, and the lawful employment requirement has no effect on aliens who had complied in good faith with prior immigration laws and regulations.

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.