

identifying data deleted to
prevent identity misrepresentation
in violation of personal privacy

PUBLIC COPY

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

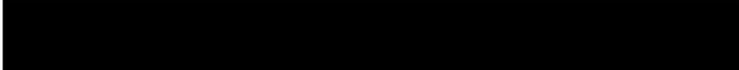


**U.S. Citizenship
and Immigration
Services**



C,

Date: **APR 02 2012** Office: CALIFORNIA SERVICE CENTER 

IN RE: Petitioner: 
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:



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 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 missionary. The director determined that the petitioner had not established that the beneficiary had the requisite 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, copies of USCIS communications regarding the decision in *Ruiz-Diaz v. U.S.*, (W.D. Wash., June 11, 2009), and a copy of a Service Motion from counsel regarding the denials of the Form I-485 applications for the beneficiary and her family.

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 petitioner filed the petition on September 2, 2005. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two-year period immediately preceding that date.

The USCIS regulation at 8 C.F.R. § 204.5(m)(11) provides:

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.

In a letter dated August 19, 2005, the petitioner states that the beneficiary has served as a missionary since December 18, 1998, when she was granted R-1 nonimmigrant status to work for the petitioner. The letter also states that the beneficiary was working full-time in this position for a salary of \$2,000 per month throughout the two-year period immediately preceding the filing of the petition. Processed checks from the petitioner to the beneficiary in the amount of \$2,000 each were also submitted for every month from May, 2003, to May, 2005.

According to the Form I-360 as well as the director's findings, the beneficiary's R-1 nonimmigrant status expired on August 31, 2000, and service records do not indicate that she held any lawful status in the United States after the expiration of her nonimmigrant status that would have authorized her to work for the petitioner during the qualifying two-year period. Accordingly, any

work performed by the beneficiary during that time is not considered qualifying prior experience under 8 C.F.R. § 204.5(m).

On appeal, the petitioner does not refute the director's findings regarding the beneficiary's lack of lawful status. Rather, the petitioner argues that the director was wrong to apply the requirement of lawful status to the beneficiary because the regulations in effect at the time the petition was filed contained no such requirement. The petitioner also argues that the beneficiary meets the pertinent conditions under the *Ruiz-Diaz* litigation, citing *Ruiz-Diaz v. United States*, C07-1881RSL (W.D. Wash. June 11, 2009).

In a brief accompanying the appeal, counsel for the petitioner states the following:

On November 26, 2008, the U.S. Citizenship and Immigration Services (USCIS) issued a final rule amending the regulations that add or revise definitions and evidentiary requirements for both the religious organization and religious workers.

Based on the November 26, 2008 amendment, the USCIS denied the form I-360 petition solely because the evidence was insufficient to establish the beneficiary had been in lawful immigration status during the qualifying two year period of September 2, 2003 to September 2, 2005. The retroactive application of this law constitutes impermissible rule making and is moreover unconstitutional.

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))

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.^[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’ interpretation and application of those regulations.

Counsel for the petitioner also argues on appeal that the beneficiary is protected from the accrual of unlawful presence and unauthorized employment under the *Ruiz-Diaz* decision. Counsel refers to a case in which the district court addressed the issue of the concurrent filing of the Form I-485, Application to Register Permanent Resident or Adjust Status, with the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. The court invalidated the USCIS regulation at 8 C.F.R. § 245.2(a)(2)(i)(B), which permits concurrent filing of the Form I-485 under certain provisions of the Act, including under section 203(b)(4), only after approval of the petition or application. On June 11, 2009, the court ordered:

Beneficiaries of petitions for special immigrant visas (Form I-360) whose Form I-485 and/or Form I-765 applications were rejected by [USCIS] pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B) and who reapply under paragraph (2) of this Order are entitled to a [*sic*] have their applications processed as if they had been submitted on their original submission date. Any employment authorization that is granted shall be retroactive to the original submission date.

For purposes of 8 U.S.C. § 1255(c) and § 1182(a)(9)(B), if a beneficiary of a petition for special immigrant visa (Form I-360) submits or has submitted an adjustment of status application (Form I-485) or employment authorization application (Form I-765) in accordance with the preceding paragraphs, no period

^[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.

of time from the earlier of (a) the date the I-360 petition was filed on behalf of the individual or (b) November 21, 2007, through the date on which [USCIS] issues a final administrative decision denying the application(s) shall be counted as a period of time in which the applicant failed to maintain continuous lawful status, accrued unlawful presence, or engaged in unauthorized employment.

The accrual of unlawful presence, unlawful status, and unauthorized employment time against the beneficiaries of pending petitions for special immigrant visas (Form I-360) shall be STAYED for 90 days from the date of this Order to allow the beneficiaries and their family members time in which to file adjustment of status petitions (Form I-485) and/or applications for employment authorization (Form I-765).

The AAO notes that on August 20, 2010, the Ninth Circuit of Appeals reversed and remanded the district court's decision. *Ruiz-Diaz v. U.S.*, 618 F.3d 1055 (9th Cir. 2010). Nonetheless, in accordance with the district court's decision, USCIS implemented a policy tolling the accrual of unlawful status and unauthorized employment until September 9, 2009. The requirements for tolling unlawful presence and unauthorized work is set forth in a memorandum from Donald Neufeld, Acting Associate Director of the USCIS Office of Domestic Operations, *Clarifying Guidance on the Implementation of the District Court's Order in Ruiz-Diaz v. United States, No. C07-1881RSL (W.D. Wash. June 11, 2009)* (August 5, 2009):

1. For those who had previously submitted a concurrently filed Form I-360 with a Form I-485 or Form I-765 and whose applications were rejected pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B), and who refiles the Form I-360 and Form I-485, the period of unlawful presence and unauthorized work was tolled from either the filing date of the Form I-360 or November 21, 2007, whichever was earlier, until September 9, 2009.
2. For any alien who had an approved or pending Form I-360 with USCIS as of June 11, 2009 (the date of the district court's decision), the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed until September 9, 2009.
3. For any alien who filed a new Form I-360 on or after June 11, 2009, the period of unlawful presence and unauthorized work was tolled from the date the Form I-360 was filed to September 9, 2009.

The record does not reflect that the beneficiary had previously filed a Form I-485 or Form I-765 that was rejected pursuant to 8 C.F.R. § 245.2(a)(2)(i)(B). The instant petition was filed on September 2, 2009. Accordingly, any unauthorized employment by the beneficiary was tolled only from the date the Form I-360 was filed (September 2, 2009) to September 9, 2009. Therefore, the tolling of

unlawful status under *Ruiz-Diaz* has no effect in this case on the beneficiary's unlawful status during the two-year qualifying period.

The beneficiary lacked employment authorization and lawful immigration status during the two years immediately preceding the filing of the petition. Therefore, the petition does not meet the regulatory requirements of 8 C.F.R. §§ 204.5(m)(4) and (11). The director properly denied the petition on that ground and the AAO will affirm that decision and dismiss the appeal for that reason.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.