

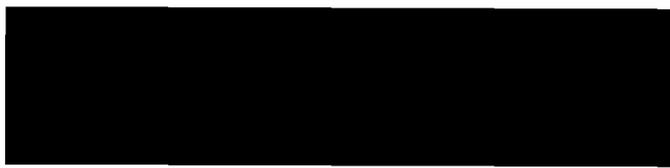
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



C1

DATE: **APR 23 2012**

OFFICE: CALIFORNIA SERVICE CENTER

FILE:

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, (“the director”) denied the employment-based immigrant visa petition. The petitioner timely filed an appeal to the denied petition. The Administrative Appeals Office (“AAO”) dismissed the appeal. The matter is currently before the AAO on a motion to reconsider. The motion to reconsider will be dismissed.

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 an assistant pastor. On January 9, 2009, the petitioner filed a Form I-360 petition. On June 15, 2009, the director denied this petition because she found that the beneficiary had not been continuously working in lawful status for at least the two-year period immediately preceding the filing of the petition. The petitioner filed an appeal to the AAO. On appeal, counsel for the petitioner argued that the director erred in denying the petitioner’s I-360 petition because the regulation cited by the director in denying the petition is invalid. Counsel states that the USCIS regulation is invalid because it contradicted the requirements under section 101(a)(27)(C) of the Act and that the beneficiary should have lawful status because he was eligible to be “grandfathered” under the provisions of section 245(i) of the Act. On January 7, 2011, the AAO dismissed the appeal. In dismissing the appeal, the AAO found that the petitioner had not contested its failure to meet the regulatory requirements; rather the petitioner argued that the regulations were an impermissible construction of the statute. The director did not err by following USCIS regulations. As a result, the AAO upheld the director’s decision.

The regulation at 8 C.F.R. § 103.5(a)(3) states that: "A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

On February 7, 2011, the petitioner filed a motion to reconsider the AAO’s decision. On motion, counsel raises the same arguments that he made on appeal. First, counsel again argues that the regulations contradict the requirements under section 101(a)(27)(C) of the Act. Next, counsel argues that the beneficiary should have had lawful status because he is eligible to be grandfathered under section 245(i) of the Act.

Counsel cites *Ogundipe v. Mukasey*, 541 F. 3d 257 (4th Cir. 2008) in support of the motion. Counsel’s reliance on *Ogundipe* is misplaced. In *Ogundipe*, the applicant already had an approved Form I-360 petition and afterwards was placed into removal proceedings. He applied for adjustment of status on the basis that he was grandfathered due to section 245(i) of the Act, because he had an earlier Form I-360 petition which was denied prior to April 30, 2001. In that case, the court dealt with the issue of whether an earlier denied petition made the beneficiary eligible for benefits under section 245(i) of the Act. The AAO notes that this was in the context of an adjustment of status case, not in the context of a Form I-360 petition.

In *Ogundipe*, the court never decided that 245(i) eligibility abrogated the requirements of the regulations in the regulations, more specifically the regulations at 8 C.F.R. §§ 204.5(m)(4) and (m)(11). The court did not have to decide that because the applicant in that case already had an approved Form I-360 petition. The court in that case did not address section 245(i)'s impact on USCIS regulations. Section 245(i) does not apply here. Therefore, the AAO finds that *Ogundipe* does not apply here, and will dismiss the motion to reconsider on this basis.

Section 245(i) relief applies at the adjustment stage, not the petition stage. The present proceeding is not an adjustment proceeding. Section 245(i)(2)(A) of the Act requires that an alien seeking section 245(i) relief must be "eligible to receive an immigrant visa"; that is, the alien must be the beneficiary of an approved immigrant visa petition. The law most certainly does not require USCIS to approve every petition filed on behalf of aliens who seek section 245(i) relief. Rather, such relief presupposes an already-approved petition. Without an approved petition, the beneficiary has no basis for adjustment of status, and therefore section 245(i) relief never becomes an issue.

The 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 petition. The beneficiary's hypothetical eligibility for section 245(i) relief at the adjustment stage does not require USCIS to approve the petition before the beneficiary has even reached that stage.

The petitioner does not dispute the director's finding that the beneficiary was not authorized to engage in employment during the two-year qualifying period. Rather, the petitioner, through counsel, has argued that the beneficiary's unauthorized employment should not disqualify the beneficiary. For the reasons explained above, USCIS must reject this argument. Under 8 C.F.R. §§ 204.5(m)(4) and (11), the petition cannot be approved, because the beneficiary's employment in the United States during the qualifying period was not authorized under United States immigration law.

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. Here, that burden has not been met.

ORDER: The motion to reconsider is dismissed.