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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

[Redacted]

DATE: **AUG 13 2012** Office: CALIFORNIA SERVICE CENTER [Redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition. On further review, the director determined that the petitioner was not eligible for the visa preference classification. Accordingly, the director properly served the petitioner with a Notice of Intent to Revoke (NOIR) approval of the petition and her reasons for doing so on October 22, 2010 and subsequently exercised her discretion to revoke approval of the petition on March 23, 2011. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal 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 associate pastor. The director determined that the petitioner had failed to demonstrate that the beneficiary had engaged in continuous, lawful employment during the two-year period immediately preceding the filing date of the petition.

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the Department of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

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 issue on appeal is whether the petitioner has demonstrated that the beneficiary had engaged in continuous, lawful employment during the two-year period immediately preceding the filing date of the petition.

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 April 26, 2010. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work throughout the two years immediately prior to that date.

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

(11) *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.

On the Form I-360 petition, the petitioner indicated that the beneficiary arrived in the United States on February 20, 1999. Therefore, the beneficiary was in the United States throughout the entire two-year qualifying period. Under "Current Nonimmigrant Status," the petitioner wrote "Out of Status/Overstay (245i Eligible)." The record shows that the beneficiary entered the United States as a B-2 nonimmigrant visitor, a status that does not authorize employment in the United States. 8 C.F.R. § 214.1(e). The beneficiary's B-2 status expired on August 19, 1999.

The director noted in her March 23, 2011 decision that the petitioner responded to the USCIS NOIR on November 22, 2010 with copies of the beneficiary's Employment Authorization Document (EAD) cards. These cards were dated October 30, 2007 and October 30, 2008 respectively. The director also stated that the petitioner provided documentation regarding the beneficiary's participation in academic courses in the fall of 2009 and the spring of 2010 during the qualifying period.

The director noted that the petitioner had previously filed a separate Form I-360 on behalf of the beneficiary [REDACTED] on February 20, 2007, which formed the basis for filing the beneficiary's Form I-485 [REDACTED] and Form I-765 [REDACTED]. The director found that, when USCIS denied the Form I-360 [REDACTED] on November 6, 2007, it effectively rendered the beneficiary's corresponding EAD null and void. The director noted that the beneficiary possessed an approved Form I-129 [REDACTED] to work for the petitioner from June 8, 2009 to January 27, 2012. The director concluded that the beneficiary had possessed authorization to work in the United States from June 8, 2009 until April 26, 2010 during the qualifying period, but that the beneficiary did not possess authorization to work from April 26, 2008 to June 7, 2009. Thus, the director found that the petitioner had failed to establish that the beneficiary qualifies for the approved classification.

On appeal, counsel contends that the beneficiary's two EAD cards, dated October 30, 2007 and October 30, 2008, were based upon his wife's approved Form I-140 rather than upon a Form I-485 based upon the beneficiary's previous Form I-360. Counsel then states that the director incorrectly

found that the beneficiary possessed an approved Form I-129 to work for the petitioner from June 8, 2009 onwards. The AAO concurs with the petitioner on this particular issue and withdraws the director's statements regarding this singular point, as USCIS records instead indicate that WAC0901950726 was approved for a different beneficiary to work for the petitioner, not the beneficiary.

Regardless, counsel concedes that the beneficiary was engaged in unauthorized employment for the petitioner during the qualifying period. Specifically, the beneficiary's second EAD card expired on October 29, 2009, and the petitioner did not file the instant petition until April 26, 2010. Any unauthorized employment is disqualifying pursuant to 8 C.F.R. § 204.5(m)(4) and (11).

Counsel additionally argues that the beneficiary has been working for the petitioner's church since 2004 as a paid employee when he possessed work authorization and then as a volunteer when he did not. Counsel states that the beneficiary also attended Master's degree classes. Counsel highlights that the beneficiary performed two years of authorized work for the petitioner when he possessed work authorization from his October 30, 2007 and October 30, 2008 EAD cards. The AAO finds that these two periods of authorized work did not directly and continuously precede the petition's filing date.

Moreover, the petitioner's claims of the beneficiary's voluntary employment are not qualifying. In supplementary information published with the proposed rule in 2007, USCIS stated:

The revised requirements for immigrant petitions and nonimmigrant status require that the alien's work be compensated by the employer because that provides an objective means of confirming the legitimacy of and commitment to the religious work, as opposed to lay work, and of the employment relationship. Unless the alien has taken a vow of poverty or similarly made a formal lifetime commitment to a religious way of life, this rule requires that the alien be compensated in the form of a salary or in the form of a stipend, room and board, or other support so long as it can be reflected in a W-2, wage transmittal statements, income tax returns, or other verifiable IRS documents. USCIS recognizes that legitimate religious work is sometimes performed on a voluntary basis, but allowing such work to be the basis for an R-1 nonimmigrant visa or special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program. In this rule, USCIS is proposing to implement bright lines that will ease the verification of petitioner's claims in the instances where documentary evidence is required.

72 Fed. Reg. 20442, 20446 (April 25, 2007). When USCIS issued the final version of the regulation, the preamble to that final rule incorporated the above assertion by reference: "The rationale for the proposed rule and the reasoning provided in the preamble to the proposed rule remain valid and USCIS adopts the reasoning in the preamble of the proposed rule in support of the promulgation of this final rule." 73 Fed. Reg. 72275, 72277 (Nov. 26, 2008).

The self-support referred to in 8 C.F.R. § 204.5(m)(11)(iii) relates to nonimmigrant religious workers who are part of an established missionary program. 8 C.F.R. § 214.2(r)(11)(ii). In this instance, the record does not establish that the beneficiary was in a missionary program. Accordingly, the petitioner's voluntary work in the United States does not count toward the two-year continuous work requirement.

Counsel also refers to the beneficiary's enrollment in Master's Degree classes. Although the regulation does contemplate breaks for further religious training, the petitioner must show the beneficiary was still employed as a religious worker and that such work was not unauthorized. In this instance, counsel concedes that the beneficiary was both unauthorized and a volunteer at various points in the two-year period. As such, the beneficiary's Master's Degree classes do not appear to be a qualifying break in the continuity of the beneficiary's work.

Counsel additionally asserts that the beneficiary's periods of unauthorized employment should be covered under § 245(i) of the Act. This section 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."¹¹ 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.

¹¹ 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.]."

Section 245(i) does not retroactively transform periods of unauthorized employment into qualifying employment for purposes of 8 C.F.R. §§ 204.5(m)(4) and (11) simply through the filing of a Form I-485 adjustment application with a Form I-360 immigrant petition. 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 sections 245(i). 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. Counsel's assertion that the beneficiary is eligible for relief under these sections of the Act at the adjustment stage does not require the AAO to approve the underlying immigrant petition before the beneficiary has even reached that stage.

The regulation at 8 C.F.R. § 204.5(m)(4) prohibits USCIS from considering work that was not "in lawful immigration status" and any "unauthorized work in the United States." The regulation at 8 C.F.R. § 204.5(m)(11) requires that "qualifying prior experience . . . must have been authorized under United States immigration law." Therefore, the regulations, separately and together, require that USCIS must have affirmatively authorized the beneficiary to perform any claimed religious employment while in the United States. The record reflects that the beneficiary was not in an authorized immigration status allowing him to work in the two-year period immediately preceding the filing of the visa petition.

Under 8 C.F.R. §§ 204.5(m)(4) and (11), the petition cannot be approved, because the beneficiary's religious employment in the United States during the qualifying period was not authorized under United States immigration law.

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.