

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

[Redacted]

C1

DATE: DEC 20 2012

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (CSC), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now again before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner describes itself as “a Religious Institute within the Roman Catholic 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 minister. 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. The AAO affirmed the director’s decision.

On motion, the petitioner submits a brief in which counsel asserts that USCIS cannot apply revised regulations retroactively, and that the beneficiary qualifies for relief under section 245(i) of the Act, 8 U.S.C. § 1255(i).

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 U.S. Citizenship and Immigration Services (USCIS) 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion must be accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding. 8 C.F.R. § 103.5(a)(1)(iii)(C). The motion includes no such statement, and therefore the petitioner has not properly filed the motion. This, by itself, would be grounds for dismissal of the motion under 8 C.F.R. § 103.5(a)(4). Nevertheless, the AAO will consider the merits of the motion.

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, 2015, 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, 2015, 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 under consideration concerns the beneficiary's immigration status prior to the petition's filing date. The 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 date of the petition. The USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires that qualifying prior experience, if acquired in the United States, must have been authorized under United States immigration law.

In the second half of 2010, the CSC repeatedly received and rejected the Form I-360 petition; the record shows receipt dates of July 26, August 10, November 12 and December 17 of that year. Following a congressional inquiry and further discussion, the CSC ultimately assigned the petition a filing date of October 12, 2010, although that date appears nowhere on the petition form. On Part 3, line 13 of the petition form, the petitioner provided the following information:

Date of Arrival: 01/15/1990
Current Nonimmigrant Status: 245(i) adjustment applicant
Expires on: N/A [not applicable]

The petitioner did not claim or establish that the beneficiary possessed lawful immigration status or employment authorization during the two years preceding the petition's filing date. Instead, the petitioner acknowledged that the beneficiary had worked in the United States without permission, and indicated that the beneficiary was concurrently filing a Form I-485 adjustment application "[u]nder 245(i) eligibility and provisions of [REDACTED]"

The director denied the petition on January 20, 2011, stating: "The beneficiary clearly has an unlawful stay from January 16, 1991 to the present," and therefore cannot satisfy the requirement of two years of lawful, authorized experience immediately preceding the filing date of the petition.

The petitioner appealed the decision, stating that the denial of the petition "runs counter to Congress' clear intent because the two-year period associated with this I-360 began on October 12, 2008, clearly before the effective date of the new Regulation. In addition, the beneficiary was grandfathered under Sec. 245(i) prior to the effective date November 26, 2008 version of 8 C.F.R. Sec. 204.5(m)."

The AAO dismissed the appeal on May 16, 2012, stating that USCIS published revised regulations in 2008 with the proviso that the revisions apply to all pending petitions. 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

RETROACTIVITY

Most of counsel's assertions on motion revolve around the proposition that USCIS cannot declare a regulation to have retroactive effect without specific authorization from Congress. There is no need, however, to discuss these assertions in detail. As noted previously, the revised regulations took effect on November 26, 2008. The petitioner filed the petition late in 2010. The most recent receipt stamp is dated December 17, 2010; the October 12, 2010 receipt date appears to be the result of negotiation rather than documentation.

December 17, 2010 was more than two years after the regulations changed, and in such an instance, there would clearly be no basis to discuss retroactivity. Even accepting the October 12, 2010 filing date, less than seven weeks of the 2008-2010 qualifying period would have occurred before the revised regulations took effect. The vast majority of the qualifying period – more than 22 out of 24 months – took place after USCIS published new, congressionally-mandated regulations that stated, effective immediately, unlawful and unauthorized employment would not count toward the statutory requirement of two years' qualifying experience. While the beneficiary was working for the petitioner in 2010, 2009, and the last five weeks of 2008, the regulations at 8 C.F.R. §§ 204.5(m)(4) and (11) were already in place and in force.

Counsel has offered no persuasive reason to conclude that a 2008 regulation applied to unlawful employment in 2009 and 2010 is somehow "retroactive." Even if the first weeks of the qualifying period occurred before November 26, 2008 (which is debatable), and even assuming counsel is correct that the provisions cannot apply to work performed before that date (which the AAO does not stipulate), those few weeks of unlawful presence and unauthorized employment do not drape a protective mantle over the beneficiary's subsequent work, such that the 2008 regulations do not apply to work performed in 2009 and 2010. Counsel has contended that the beneficiary is a "grandfathered" alien for purposes of section 245(i) relief, but there is no comparable "grandfather clause" in the new regulations. The regulations do not apply only to unlawful employment that commenced after November 25, 2008.

It is well settled that the regulations which the Service [now USCIS] promulgates have the force and effect of law and are binding on the Service. *Bridges v. Wixon*, 326 U.S. 135, 153 (1945); *Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *Matter of A-*, 3 I&N Dec. 714 (BIA 1949); cf. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984); *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

Matter of L-, 20 I&N Dec. 553, 556 (BIA 1992). The AAO cannot overturn or disregard USCIS regulations, nor can it overturn or disregard a statute where, as counsel has alleged, "Congress has run afoul" of constitutional principles.

Whatever the situation before November 26, 2008, any religious work performed in the United States after that date must have been authorized under United States immigration law. Application of this mandatory standard to work performed in 2009 and 2010 is not "retroactive" in any

reasonable sense of the word, regardless of when the unlawful work first began. Counsel implies, in effect, that the lawful employment clauses of the regulations did not take effect until November 26, 2010. Such a position is untenable on its face and unsupported by any relevant case law.

SECTION 245(i)

Apart from the language regarding retroactive application of the regulations, counsel's chief assertion on motion is that the petitioner qualifies for relief under section 245(i) of the Act. That section of law reads, in pertinent part:

Adjustment of Status for Aliens Physically Present in the United States

(i) 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.

The AAO, in its dismissal notice, stated:

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) relief applies to adjudication of a Form I-485 adjustment application, not to adjudication of the underlying immigrant petition. . . .

. . . 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.

Section 245(i) of the Act 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. . . . [T]he 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).

(Footnotes omitted.) On motion, counsel states: "A scenario involves the Director's finding that but for unlawful presence and/or employment, the I-360 is approvable. In this instance, the INA § 245(i) kicks in to carry the day. This is clear and need not be a point of contention." Counsel fails to explain how section 245(i) of the Act, which relates to the adjustment stage, compels the approval of an underlying immigrant petition.

Counsel asserts that the beneficiary qualifies as a grandfathered alien based on a Form I-130 Petition for Alien Relative filed on the beneficiary's behalf on April 30, 1990 and approved a month later. The record now before the AAO does not include documentation of this claimed approved petition, but the AAO will not contest this claim for the purposes of this proceeding. If the beneficiary is, as claimed, a grandfathered alien with an approved immigrant petition, then the beneficiary remains eligible to adjust status under section 245(i) of the Act. Neither the director nor the AAO stated otherwise. The beneficiary may, as before, adjust status through the approval of a new petition filed on his behalf.¹ This was true before and it remains true now. Nothing in any decision in this proceeding purports to disqualify the beneficiary from seeking section 245(i) relief at the adjustment stage. It does not logically follow, however, that the beneficiary's status as a grandfathered alien requires USCIS to waive eligibility requirements for other petitions that are entirely unrelated to his status as a grandfathered alien.

The AAO repeats its finding from the May 2012 dismissal order: Section 245(i) relief waives a ground of inadmissibility at the adjustment stage. It does not require the approval of any petition for which the beneficiary fails to meet basic eligibility requirements. Counsel, on motion, dismisses this holding but cites no statute, regulation or case law to rebut it. Counsel merely declares that "INA § 245(i) kicks in to carry the day." It cannot suffice for counsel to say, however often and however emphatically, that the beneficiary qualifies for adjustment of status under section 245(i). The matter under discussion is not an adjustment proceeding, and the denial rests not on a finding of

¹ In a statement in the record, the beneficiary states that the relative who had petitioned on his behalf died in 1997. Under the USCIS regulation at 8 C.F.R. § 205.1(a)(3)(1)(C), the death of the petitioner is grounds for automatic revocation of the approval of the petition unless another qualifying relative takes the place of the original petitioner under terms described in the regulation at 8 C.F.R. § 205.1(a)(3)(1)(C)(2).

inadmissibility (relevant at the adjustment stage), but rather on the beneficiary's failure to meet regulatory requirements that were in effect long before the petition's filing date.

There is no dispute that, on November 26, 2008, revised regulations took effect that required qualifying employment to be authorized under immigration law. Likewise, there is no dispute that the beneficiary lacked lawful immigration status and engaged in unauthorized employment in 2008, 2009 and 2010. The beneficiary's unlawful employment after the regulations took effect is, by itself, self-evident and sufficient grounds for denial of the petition, and counsel has not shown otherwise.

Counsel, on motion, has failed to establish that the director's decision was based on an incorrect application of law or USCIS policy, or that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, the motion does not meet the requirements of a motion to reconsider, and the regulation at 8 C.F.R. § 103.5(a)(4) requires dismissal of the motion.

ORDER: The motion is dismissed.