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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PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

Date: FEB 15 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:

SELF-REPRESENTED

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 an assistant pastor. 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 and copies of the receipt notices for the Form I-290B Notice of Appeal, filed June 2, 2010, and for a previous Form I-360 filed for the beneficiary on April 9, 2001.

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;
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> (ii) seeks to enter the United States –
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> > (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
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> > (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
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> (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 petition was filed on August 31, 2009. 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:
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> > (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.
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> > (ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.
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> > (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.
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> If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

In the decision issued on May 6, 2010, the director found that the petitioner had failed to establish that the beneficiary had been employed in a full-time religious occupation throughout the qualifying two-year period immediately preceding the filing of the petition as required by 8 C.F.R. § 204.5(m)(4). The director also found that the petitioner had failed to show that the beneficiary had been in lawful immigration status during the qualifying period as required under the same regulation.

The first issue is whether the petitioner established that the beneficiary engaged in the requisite two years of continuous, full-time employment in a religious occupation immediately preceding the filing of the petition. On the Form I-360 petition, petitioner states that "the Beneficiary has many years of experience as Assistant Pastor" and refers to the "attached Petition Letter." The referenced letter only states that the beneficiary is highly qualified for the position "by virtue of his experience and educational background," without providing any further details about the beneficiary's work

experience. The only other evidence submitted relating to the beneficiary's employment during the relevant period is a collection of photocopies of processed checks showing weekly payments of $300.00 from the petitioner to the beneficiary during the period from January to mid-August of 2009. These checks cover less than 9 months of the two-year qualifying period. On the form G-325A submitted by the beneficiary with his Form I-485 application to adjust status, the beneficiary indicates that he has been employed by the beneficiary as a pastor since March, 2004. Therefore, he was employed by the petitioner throughout the two-year qualifying period. However, the petitioner did not submit any IRS documentation of the beneficiary's compensation, nor did it provide an explanation as to why such documentation was not available. The petitioner did not submit any additional evidence regarding this issue on appeal. We therefore agree with the director's determination that the petitioner has failed to submit sufficient evidence to establish the beneficiary's qualifying prior employment in a religious occupation.

The second issue in this case is the beneficiary's immigration status during the two-year period immediately preceding the filing of the petition. The petitioner does not refute the director's findings regarding the beneficiary's lack of lawful immigration status, but instead argues that the beneficiary qualifies for protection under section 245(i) of the Act and under the decision in *Ruiz-Diaz v. U.S.*, (W.D. Wash., June 11, 2009).

In the brief submitted on appeal, the petitioner notes that a previous I-360 was filed for the beneficiary on April 9, 2001. The petitioner asserts that the beneficiary is therefore granted protection under section 245(i) of the Act. Section 245(i) of the Act permits certain aliens to adjust status in the United States despite otherwise disqualifying unlawful presence. The question of whether the 2001 Form I-360 petition (later withdrawn) qualifies the beneficiary for section 245(i) relief lies outside the scope of this proceeding. Even if we were to find that the beneficiary qualifies for such relief, that finding would not change the outcome of the present proceeding as the 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 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 does not require USCIS to approve every petition filed on behalf of aliens who seek 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 comes into play.

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. We agree with the director's finding.

As mentioned above, in the appeal brief, the petitioner also states that the petition was filed "in accordance with" the USCIS memorandum implementing the district court order in *Ruiz-Diaz v.*

U.S., (W.D. Wash., June 11, 2009). In that case, the 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.
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> 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 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.
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> 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 indicates that the beneficiary's most recent entry into the United States was on March 15, 2001, in B-1 nonimmigrant visitor status which expired on December 31, 2001. 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 August 31, 2009. Accordingly, any unauthorized employment by the beneficiary was tolled only from the date the Form I-360 was filed (August 31, 2009) to September 9, 2009. Thus, any work performed by the beneficiary prior to August 31, 2009 was in an unauthorized status and therefore does not constitute qualifying work experience under 8 C.F.R. §§ 204.5(m)(4) and (11).

The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.