

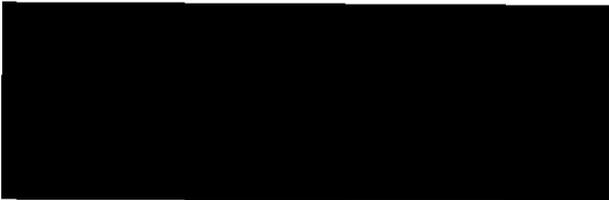
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



C1

DATE: JUL 16 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 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
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition and it 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 a pastor. The director determined that the petitioner had not established that the beneficiary worked continuously in a qualifying religious occupation or vocation for two full years prior to the filing of the petition.

On appeal, counsel asserts that the beneficiary gained his experience abroad and that:

He is INA Section 245(i) grandfathered based on the immigrant petition filed for him prior to April 30, 2001. He is also a beneficiary of [REDACTED] [REDACTED] Accordingly, the beneficiary is eligible to adjust if Petition is approved.

Counsel submits a brief in support of the appeal.

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).

In her decision, the director referred to a petitioner and beneficiary and also to a self-petitioner. On appeal, counsel asserts:

In view of the conflicting requirement by the District Director that BOTH the petitioner and the beneficiary must be lawfully employed as a religious worker for at least two years prior to filing the Petition, the District Director must be reversed and the case remanded to the District Director to issue a decision consistent with the law.

The AAO finds that while the director erroneously referred to the beneficiary as both the petitioner and the beneficiary, the error is harmless and did not affect the petitioner's ability to prepare its appeal. The AAO notes that a previous petition (U.S. Citizenship and Immigration Services (USCIS) receipt number [REDACTED]) and appeal filed by the petitioner on behalf of the beneficiary were dismissed on the same grounds as the instant petition.

Counsel states that the director "should be directed to issue a Notice of Intent to Deny and accord the Petitioner an opportunity to respond to the Notice of Intent to Deny." The regulation at 8 C.F.R. § 103.2(b)(8) provides:

Request for Evidence; Notice of Intent to Deny –

- (i) *Evidence of eligibility or ineligibility.* If the evidence submitted with the application or petition establishes eligibility, USCIS will approve the application or petition, except that in any case in which the applicable statute or regulation makes the approval of a petition or application a matter entrusted to USCIS discretion, USCIS will approve the petition or application only if the evidence of record establishes both eligibility and that the petitioner or applicant warrants a favorable exercise of discretion. If the record evidence establishes ineligibility, the application or petition will be denied on that basis.
- (ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.
- (iii) *Other evidence.* If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be

submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

The above-cited regulation does not require the director to issue a Notice of Intent to Deny (NOID) the petition. As noted above, the petitioner, represented by current counsel, filed a previous petition on behalf of the beneficiary which was denied on the same issue. The director did not abuse her discretion by declining to issue a NOID in the instant petition.

The issue presented is whether the petitioner has established that the beneficiary worked continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the visa petition.

The regulation at 8 C.F.R. § 204.5(m) provides that to be eligible for classification as a special immigrant religious worker, the alien must:

(4) Have been working in one of the positions described in paragraph (m)(2) of this section, either abroad or in lawful immigration status in the United States, and after the age of 14 years continuously for at least the two-year period immediately preceding the filing of the petition. The prior religious work need not correspond precisely to the type of work to be performed. A break in the continuity of the work during the preceding two years will not affect eligibility so long as:

- (i) The alien was still employed as a religious worker;
- (ii) The break did not exceed two years; and
- (iii) The nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the alien must have been a member of the petitioner's denomination throughout the two years of qualifying employment.

Therefore, the petitioner must show that the beneficiary worked 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 December 17, 2009. Accordingly, the petitioner must establish that the beneficiary was continuously employed in qualifying religious work throughout the two-year period immediately preceding that date.

The 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 Part 3 of the Form I-360, the petitioner stated that the beneficiary arrived in the United States on January 14, 1991. The petitioner did not identify an immigration status for the beneficiary. In its December 1, 2009 letter submitted in support of the petition, the petitioner, through its [REDACTED] stated:

[The beneficiary] has used his sever[al] years experience as a member of the [petitioning organization] and his seven years experience as an Assistant Pastor of the [REDACTED] [The beneficiary's] duties at the church included conducting church prayers, preaching, conduct fellowships, counseling officiating marriages, birth, baptism, funerals, and anointing members and conducting fund raising in addition to conducting several religious functions for the church.

[The beneficiary's] compensation is paid form the church funds at \$1,200.00 per month. . . .

The petitioner submitted no documentation in accordance with the above-cited regulation to establish the beneficiary's qualifying work experience. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The director denied the petition, finding that the petitioner had failed to submit documentation to establish that the beneficiary worked full-time as a religious worker during the two years immediately preceding the filing of the petition. The director stated that USCIS records did not reveal that the beneficiary had entered the United States after inspection or that he had changed his status at any time since his entry.

On motion, counsel asserts that “[n]othing in the law requires the petitioner to be lawfully employed as a religious worker for at least two years preceding the petition.” Counsel asserts that this should be a basis for the AAO to remand the matter for issuance of a new decision “consistent with the law.” As discussed previously, a reading of the director’s decision and the documentation submitted with the petition and on appeal do not reveal an error that is harmful to the petitioner. It is also clear from the decision that the director was not attempting to impose a requirement that the petitioning organization must have qualifying work experience, and counsel’s argument is of no value to the appeal or to the petitioner.

Counsel further asserts that “the beneficiary obtained his initial experience abroad.” However, the petitioner submitted no documentation of the beneficiary’s qualifying work experience either abroad or in the United States.

Counsel also asserts that the beneficiary benefits from the grandfather provision of section 245(i) of the Act, 8 U.S.C. § 1255(i) which provides:

(i) Adjustment in status of certain aliens physically present in United States

(1) 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 (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of –

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General [now the Secretary of Homeland Security] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

A previous Form I-360 petition [USCIS receipt number WAC 01 203 55718] was filed on April 25, 2001 under section 203(b)(4) of the Act, 8 U.S.C. § 1153(b)(4) and not under section 204(a), 8 U.S.C. § 1154. The petition was denied for abandonment on November 26, 2002. The question of whether the never-approved 2001 filing qualifies the beneficiary for section 245(i) relief lies outside the scope of this proceeding. Even if the AAO were to find that the beneficiary qualifies for such relief, that finding would not change the outcome of the present proceeding.

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 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 comes into play.

The regulation 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.

Ruiz-Diaz refers to a case in which the district court invalidated the USCIS regulation at 8 C.F.R. § 245.2(a)(2)(i)(B), which barred religious workers from concurrent filing the Form I-485, Application to Register Permanent Resident or Adjust Status, with the Form I-360. On June 11, 2009, the court ordered that the accrual of unlawful presence, unlawful status, and unauthorized employment time against the beneficiaries of pending petitions for special immigrant visas be stayed for 90 days to allow time for beneficiaries and their families to file adjustment of status applications and/or applications for employment authorization. The court specified that unlawful

presence and unauthorized work would be tolled “[f]or purposes of 8 U.S.C. § 1255(c) and § 1182(a)(9)(B).” The former statutory passage relates to adjustment of status and the latter relates to unlawful presence in the context of inadmissibility.

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. Like the district court’s ruling, the USCIS policy waives the accrual of unlawful presence in relation to adjustment applications. It does not waive or nullify the regulations at 8 C.F.R. §§ 204.5 (m)(4) and (11), which require an alien’s qualifying experience in the United States to have been authorized under United States immigration law. The beneficiary lacked employment authorization and lawful immigration status during a portion of the two-year qualifying period.

Counsel appears to acknowledge that the benefits of section 245(i) of the Act and *Ruiz-Diaz* apply only at the adjustment stage of the proceedings, stating that “the beneficiary is eligible to adjust If Petition is approved.”

The AAO therefore agrees with the director’s finding that the petitioner has not established that the beneficiary has the requisite two years of continuous and lawful work experience immediately preceding the filing date of the petition.

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.