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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: **MAR 28 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 matter is now before the Administrative Appeals Office (“AAO”) on appeal. The AAO will dismiss the appeal.

The petitioner is a Pentecostal Christian 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 senior pastor. On June 21, 2010, the petitioner filed a Form I-360 petition. On August 18, 2010, the director denied the petition, on the ground that the petitioner failed to establish that the beneficiary had been continuously working in lawful status as a senior pastor for at least the two year period immediately preceding the filing of the petition.

On appeal, the petitioner submits a brief and additional evidence.

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 here is whether the beneficiary possesses two years of continuous lawful work experience immediately prior to the filing of the form I-360 petition. 8 C.F.R. § 204.5(m)(4) states that:

(m) *Religious workers.* This paragraph governs classification of an alien as a special immigrant religious worker as defined in section 101(a)(27)(C) of the Act and under section 203(b)(4) of the Act. To be eligible for classification as a special immigrant religious worker, the alien (either abroad or in the United States) 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.  
(Emphasis added)

Further, 8 C.F.R. § 204.5(m)(11) states that:

(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.  
(Emphasis added)

The current Form I-360 petition was filed on June 21, 2010. According to the regulation above, the beneficiary must have been continuously working in lawful status for two years prior to the filing of the petition, from June 21, 2008 to June 21, 2010. In a letter dated June 14, 2010, the petitioner stated that the beneficiary has worked continuously as a full-time Senior Pastor for its organization since 2005. However, the beneficiary entered the United States without inspection on or about February 4, 2000 and has never had authorization for employment. Therefore, the petitioner did not satisfy the regulation at 8 C.F.R. § 204.5(m)(4), which required that the beneficiary be in lawful immigration status, and the regulation at 8 C.F.R. § 204.5(m)(11) which required that the beneficiary's work experience be authorized under United States immigration law.

On appeal, counsel asserts that Congress clearly did not intend to limit qualifying work experience for I-360 special immigrant religious workers to work that occurred in lawful immigration status. Counsel contends that it is clear that Congress had no intent to restrict employment to only those in lawful status and therefore that an analysis under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984) is not necessary. Counsel points to the provisions of 245(i) and 245(k) of the Act in support of her argument. Counsel's argument is not persuasive as neither section applies here.

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) 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."<sup>1</sup> 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)).

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<sup>1</sup> 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.]."

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.

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.

Similarly, section 245(k) of the Act relates to the adjudication of an adjustment application, applies to “[a]n alien who is eligible to receive an immigrant visa,” and therefore also presumes the approval of an underlying immigrant petition. Here, again, the beneficiary has no approved petition, is not eligible to receive an immigrant visa, and therefore is not eligible to adjust status.

Sections 245(i) and (k) of the Act do 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) and (k) 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). Counsel’s assertion that the beneficiary is eligible for relief under these sections of the Act at the adjustment stage does not require USCIS to approve the underlying immigrant petition before the beneficiary has even reached that stage.

Since the October 2008 legislation that extended the special immigrant nonminister religious program until March 5, 2009, Congress has revisited and reenacted the statute numerous times. On any of those occasions, Congress could have repudiated or modified the regulatory “lawful employment” requirement, but did not do so. Instead, Congress has repeatedly endorsed the current regulation, including the clauses disputed by counsel, by renewing the statute without substantive change.<sup>2</sup> The AAO must assume that Congress was aware of the agency’s treatment of employment at 8 C.F.R. § 204.5(m)(4) when it extended the program. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law).

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<sup>2</sup> P.L. No. 111-9 § 1 (March 20, 2009) extended the program to September 29, 2009. Pub. L. No. 111-68 § 133 (October 1, 2009) extended the program to October 30, 2009. Pub. L. No. 111-83 § 568(a)(1) (October 28, 2009) extended the program to September 29, 2012.

Counsel then asserts that even if Congress was silent as to the issue of lawful employment experience for immigrant workers, USCIS regulations are not a permissible construction of the statute. First, USCIS regulations are binding on all USCIS officers and the AAO does not have the authority to reject a USCIS regulation based on an analysis under *Chevron* or any other principle. Regardless, the AAO does not find counsel's *Chevron* analysis persuasive. As the AAO and counsel are in agreement on the issue of Congress' silence regarding the lawful employment requirement, an analysis under the first step of *Chevron* is not necessary. As it relates to the second step of the *Chevron* analysis, the AAO is not persuaded by counsel's assertion that the regulations are neither a logical nor permissible construction of the statute. The plain language of section 101(a)(27)(C) requires that a beneficiary have been a member of the sponsoring religious organization "for at least two years preceding the application for admission" and have "been carrying on such vocation, professional work, or other work" for that religious organization during that same two-year time period. Section 101(a)(27)(C) clearly requires employment, even if it does not include the exact term "employment." The statute also requires that a beneficiary have "been carrying on such vocation, professional work, or other work" for a sponsoring religious organization "for at least two years" before the Form I-360 special immigrant religious worker visa petition is filed. The AAO reads the statute to mean that the beneficiary must have been employed by the sponsoring religious organization for at least two years before the Form I-360 is filed. The AAO finds it reasonable for the regulation to require that *if* the vocation or work is completed within the United States for the sponsoring religious organization, that such vocation or work must be conducted pursuant to authorized immigration status. A reasonable interpretation of the statutory requirement is that if the beneficiary's qualifying work experience takes place inside the United States, the work experience must have been authorized by U.S. immigration law. Furthermore, the regulation does not require that such work experience, if it took place within the United States, has been pursuant to a salaried employment arrangement – only that the petitioner provide proof regarding the salary and establish that such employment was authorized by U.S. immigration laws. And even if the "vocation or work" does not fall into the traditional definition of an employment relationship, with a prevailing wage, the immigration law requires authorization for "carrying on that vocation or work" for a religious organization. This requirement is reasonable because it decreases the chances that petitioners will file fraudulent petitions, decreases the likelihood that USCIS will approve fraudulently filed petitions, and it is consistent with the requirements for adjustment of status, which is the ultimate goal for beneficiaries of special immigrant religious worker petitions. *See* sections 245(c) and (k) of the Act.

The evidence submitted does not establish that the beneficiary continuously worked in lawful status or was authorized to work under United States immigration law for the two years prior to the filing of the Form I-360 petition. As a result, the appeal will be dismissed.

Beyond the director's decision, the AAO also finds that petitioner failed to establish its ability to compensate the beneficiary. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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 (9<sup>th</sup> 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 regulation at 8 C.F.R. § 204.5(m)(10) requires that the petitioner submit verifiable evidence of how the petitioner intends to compensate the alien. The petitioner has stated that the beneficiary has been working full time for its organization since 2005. Further, the petitioner set forth the proffered wage for the beneficiary as \$77,646 per year, of which the petitioner stated that “3,200/month is salary and the remaining amount is intended as a housing allowance. Please see paycheck stubs for precise breakdown.” The AAO interprets this to mean that the beneficiary will earn a salary of \$38,400 per year and will receive a housing allowance of \$39,246 per year. In the petitioner’s letter dated June 18, 2010, the petitioner stated that it submitted a copy of the beneficiary’s paycheck stubs for 2010 and a copy of the beneficiary’s Form W-2s for 2008 and 2009. However, while pay check stubs and the IRS Forms W-2 are in the file, they are addressed to [REDACTED]. Nowhere else in the record is the beneficiary named [REDACTED] even though it bears a resemblance to the beneficiary’s last name. It is unclear who this person is. Even if the AAO assumed that this person is the beneficiary as the petitioner claims, the salaries in the Forms W-2 are below the salary set forth in the Form I-360 petition. Further, the petitioner submitted a copy of its income and expense statements for 2009. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to compensate the beneficiary. Because the petitioner has not submitted any reliable documents demonstrating its financial status at the end of the year, the AAO is unable to determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary. Further, the petitioner failed to submit proof that it compensated the entire housing amount to the beneficiary in the past years. The few pay stubs that the petitioner submitted are not sufficient to demonstrate an entire year of payment of housing benefits, since a few pay stubs does not correlate to an entire year, and it is unclear whether [REDACTED] is the beneficiary. Therefore, the AAO finds that the evidence submitted by the petitioner is insufficient to show that it has the ability to compensate the beneficiary.

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.

**ORDER:** The appeal is dismissed.