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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

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DATE: **MAY 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 with the field office or service center that originally decided your case by filing a 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, (“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 Roman Catholic religious institute. 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. On December 17, 2010, the petitioner filed a Form I-360 petition. On January 20, 2011, the director denied the petition, finding that the petitioner failed to establish that the beneficiary had been continuously working in lawful status for at least the two year period immediately preceding the filing of the petition.

On appeal, the petitioner submits a brief.

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 is whether the beneficiary possesses two years of continuous lawful work experience immediately prior to the filing of the form I-360 petition. The regulation at 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, the regulation at 8 C.F.R. § 204.5(m)(11) states that:

*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 Form I-360 petition was filed on December 17, 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 December 17, 2008 to December 17, 2010. The record shows that the beneficiary entered the United States in B-2 nonimmigrant status on January 15, 1990 and that status was extended until January 15, 1991. The record does not reflect that the beneficiary has held any lawful status after that date. Therefore, the petitioner did not satisfy the regulation at 8 C.F.R. § 204.5(m)(4), which requires that the beneficiary be in lawful immigration status, and the regulation at 8 C.F.R. § 204.5(m)(11) which requires that the beneficiary's work experience be authorized under United States immigration law.

On appeal, counsel does not challenge the director's finding that the beneficiary was out of status, but rather argues that the regulation itself should not apply retroactively. Additionally, counsel argues that the beneficiary is qualified under section 245(i) of the Act. Counsel states:

The Director's application of the version of the Regulation, 8 C.F.R. § 204.5(m), whose effective date is November 26, 2008, is unconstitutional as applied to petitioner's I-360, because it denies petitioner due process of law. The November 26, 2008 effective date of this Regulation is after the October 12, 2008 beginning of the two-year period underlying the petitioner's I-360 in question. Thus, the prior version of the Regulation should apply to petitioner's I-360 petition. This prior version does not require employment authorized by USCIS for the qualifying two-year period underlying petitioner's I-360. It also, in effect, permits qualification of grandfathered aliens under INA § 245(i), for concurrently filed I-360 petitions with I-485 applications.

The AAO is not persuaded by counsel's argument regarding the retroactive application of the provision regarding lawful employment. Counsel argues that the new regulation should not apply to the petitioner because the new regulation was enacted during the beneficiary's two year period immediately prior to the filing of the petition. If USCIS had not intended the lawful employment requirement to be retroactive, it would have phased in the requirement or specified that it applies only to employment that took place after November 26, 2008. Instead, supplementary information published with the new rule specified: "All cases pending on the rule's effective date and all new filings will be adjudicated under the standards of this rule." 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008). Thus, the regulations and standards provided within were to be applied immediately and retroactively, and include work performed before the effective date.

The wording of the relevant legislation demonstrates Congress' interest in USCIS regulations and the agency's commitment to combating immigration fraud. Section 2(b) of the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391 (Oct. 10, 2008) reads, in pertinent part:

*Regulations* – Not later than 30 days after the date of the enactment of this Act, the Secretary of Homeland Security shall –

(1) issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status for special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(C)(ii))

In proposing the requirement that all prior qualifying employment have been authorized and “in conformity with all other laws of the United States” such as the Fair Labor Standards Act of 1938 and “tax laws,” USCIS explained that “[a]llowing periods of unauthorized, unreported employment to qualify an alien toward permanent immigration undermines the integrity of the United States immigration system.” 72 Fed. Reg. 20442, 20447-48, (April 25, 2007). Accordingly, the adoption of the final rule requiring that all prior qualifying employment have been lawful clearly comports with the explicit instructions from Congress to “eliminate or reduce fraud.” As previously noted, USCIS applied the new regulations to already-pending cases as well as new filings.

The October, 2008 legislation extended the special immigrant nonminister religious program only until March 5, 2009. From the wording of the statute, it is clear that this extension was so short precisely because Congress sought to learn the effect of the new regulations before granting a longer extension. Congress has since extended the life of the program three times.<sup>1</sup> On any of those occasions, Congress could have made substantive changes in response to the regulations they ordered USCIS to promulgate, but Congress did not do so. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The AAO may therefore presume that Congress has no objection to the new regulations as published, or to USCIS' interpretation and application of those regulations.

The petitioner filed the instant petition nearly two years after the effective date and then asserts that those provisions should not be applicable. The AAO is not persuaded by this argument.

The AAO is also not persuaded by counsel's argument regarding section 245(i) of the Act. 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

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<sup>1</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.

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>2</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)).

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.

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. 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) 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 this section 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.

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.

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<sup>2</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.]”

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.