

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



C1

DATE:

MAY 23 2012

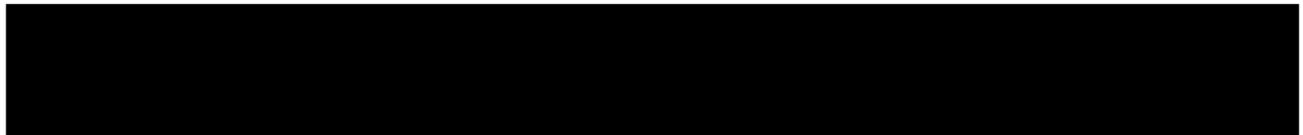
Office: CALIFORNIA SERVICE CENTER

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:

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 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, 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 Act, 8 U.S.C. § 1153(b)(4), to perform services as a senior 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.

The petitioner alleges on appeal that as the beneficiary of a previously approved Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, the beneficiary is “grandfathered under INA 245(i).” The petitioner submits a letter and additional documentation in support of the appeal.¹

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

¹ The petitioner was represented during the initial stages of this proceeding by [REDACTED] who also signed the Form I-290B, Notice of Appeal or Motion. On September 28, 2011, subsequent to the filing of the instant appeal, [REDACTED] was suspended from practice before the immigration courts for a period of eight years. Accordingly, the petitioner will be considered as self-represented during this appeal. [REDACTED] will be referred to as “prior counsel” in this decision.

continuously for at least the 2-year period described in clause (i).

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 October 5, 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 [Internal Revenue Service] documentation that the alien received a salary,

such as an IRS Form W-2 [Wage and Tax Statement] 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 [U.S. Citizenship and Immigration Services].

If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

The petitioner stated on the Form I-360 that the beneficiary arrived in the United States on January 27, 1991 pursuant to a B-1 nonimmigrant visitor's visa and that his period of authorized stay expired on July 26, 1991. The petitioner provided copies of two IRS Form 1099-MISC, Miscellaneous Income, issued to the beneficiary in 2008 by the [REDACTED] reflecting that it paid the beneficiary \$28,809 and \$1,250 in nonemployee compensation, and an IRS Form W-2 indicating that the organization paid the beneficiary \$40,776 in wages during the same year. The uncertified copy of the beneficiary's unsigned and undated IRS Form 1040, U.S. Individual Income Tax Return, and Form 1, Massachusetts Resident Tax Return, for 2008 reflect the wages indicated on the Form W-2 and \$1,320 in self-employment income. The tax returns do not reflect the \$28,809 in nonemployee compensation and no explanation of the omission appears in the record. The petitioner submitted a copy of a pay stub for the period December 15 to December 21, 2007, indicating a year-to-date salary for the beneficiary of \$86,649. The petitioner also provided a copy of the beneficiary's Form 1099-MISC and the beneficiary's tax return for 2006. However, as these documents fall outside of the qualifying period, they provide no evidence of the beneficiary's qualifying work experience. The petitioner submitted no documentation of the beneficiary's qualifying work experience for 2009.

In a February 2, 2010 Notice of Intent to Deny (NOID) the petition, the director advised the petitioner of the requirements of the regulation at 8 C.F.R. § 204.5(m)(11) and instructed the petitioner to "Submit Documentation showing the beneficiary's lawful status and lawful employment with the petitioner . . . 2 years prior to filing the I-360 and 485." In response, the petitioner submitted a copy of an IRS Form W-2 reflecting \$1,699 in wages paid to the beneficiary by [REDACTED] and an IRS Form 1099-MISC reflecting that the beneficiary received \$58,916 in nonemployee income from [REDACTED] for the year 2009. Regarding the beneficiary's immigration status, prior counsel stated:

There is no dispute that during the period at issue, [the beneficiary] did not have any immigration status. However, [he] is grandfathered under INA 245(i). On or about September 9th, 1997, I-360 was filed by the [redacted] on behalf of [the beneficiary]. He was the beneficiary of that petition. That petition was approved on April 2, 1998. Based on the grandfathering rules pursuant to INA Section 245(i), [he] is entitled to adjust his status without the need of him and his family leaving the United States.

The petitioner submitted a copy of an April 2, 1998 Form I-797C, Notice of Action, advising the [redacted] that its I-360 petition on behalf of the beneficiary had been approved and a December 15, 1999 Form I-797C acknowledging receipt of the beneficiary's I-485, Application to Adjust to Permanent Resident Status.

The director denied the petition without addressing the petitioner's argument regarding the grandfathering provision of section 245(i) of the Act.

On appeal, prior counsel renews his argument that the beneficiary is grandfathered under section 245(i) of the Act.

[The beneficiary] was the Beneficiary of a properly filed I-360 on or about September 9th, 1997. . . . That petition was approved on April 2nd, 1998. The approval of that petition is clear and convincing evidence that at its initial filing, the petition was approvable. Whether the petition or application is later denied, withdrawn, or revoked, such actions do not affect the grandfathering of the beneficiary of that petition.

Counsel's argument is without merit. Section 245(i) of the Act, 8 U.S.C. § 1255(i) 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.

The previous Form I-360 (USCIS receipt number [REDACTED] petition was filed on September 9, 1997 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 director revoked approval of the petition on March 25, 2004. Despite prior counsel's assertions to the contrary, revocation of a previously approved petition suggests that there was a deficiency in the evidence that should have prevented the initial approval of the petition. Prior counsel offers no authority to support his conclusion that a revocation, denial or withdrawal of a petition has no effect on the grandfathering provision of section 245(i) of the Act.

Additionally, the question of whether the revoked petition 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. 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 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. 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.

The petitioner does not dispute the director's finding that the beneficiary engaged in unauthorized employment during the two-year qualifying period. Rather, the petitioner has argued that this unauthorized employment should not disqualify the beneficiary. For the reasons explained above, the AAO rejects this argument. Under 8 C.F.R. §§ 204.5(m)(4) and (11), the petition cannot be approved because the beneficiary's religious employment in the United States during the qualifying period was not authorized under United States immigration law.

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.