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

(b)(6)

U.S. Citizenship and Immigration Services

Date: JAN 2 5 2013 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,

Ron Rosenberg
Acting 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 a women's ministry director. The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits a brief from counsel, a letter from the petitioner, a weekly schedule for the beneficiary, a letter from pastor of and printouts from the petitioner's website.

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
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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 United States 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 March 13, 2012. Therefore, the petitioner must establish that the beneficiary was continuously performing qualifying religious work in lawful immigration status throughout the two-year period immediately preceding that date.

The regulation at 8 C.F.R. § 204.5(m)(5) states, in pertinent part:

> (5) Definitions. As used in paragraph (m) of this section, the term:
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> *Minister* means an individual who:
>
> > (A) Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct such religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;
> >
> > (B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;
> >
> > (C) Performs activities with a rational relationship to the religious calling of the minister; and
> >
> > (D) Works solely as a minister in the United States, which may include administrative duties incidental to the duties of a minister.

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:
>
> > (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 a letter accompanying the Form I-360 petition, the petitioner asserted that the beneficiary was ordained as a minister on October 7, 2006, and has "worked part time as a voluntary worker since 1996 within our ministry." On the petition, the petitioner stated that the beneficiary arrived in the United States on January 16, 1996, and listed her current nonimmigrant status as "None." The record does not indicate that the beneficiary held any lawful immigration status or employment authorization during the two-year qualifying period immediately preceding the filing of the petition. Accordingly, any work performed during that time would not be considered qualifying experience under 8 C.F.R. § 204.5(m)(4) and (11).

The petitioner submitted a copy of the beneficiary's ordination certificate, as well as copies of other certificates related to religious training in the United States dating back to September 1, 1997. The petitioner also submitted photographs, some of which identified dates and locations of services and events in which the beneficiary purportedly participated. Additionally, the petitioner submitted letters of recommendation written on the beneficiary's behalf. A letter from an official of the stated the following:

> I have been working alongside for approximately the past 6 years (2005-2011) at , and have experienced her dedication and devotion first hand. …
>
> Any ministry, or church would be blessed beyond measure to have preaching the Gospel of Jesus Christ in their church and/or conference as she has done many times for the past 6 years.

In another letter, who identified himself as a pastor but did not identify his church, asserted that he has known the beneficiary "for a long time," and that she "is a pastor and has also ministered at our church numerous times." An unsigned, third letter from stated that the beneficiary "has preached the word of God in our Women's Conference this year of 2011."

On May 4, 2012, USCIS issued a Notice of Intent to Deny the petition (NOID), instructing the petitioner to submit evidence to establish that the beneficiary maintained lawful immigration status throughout the two-year qualifying period immediately preceding the filing of the petition.

In a letter responding to the notice, counsel for the petitioner stated the following:

> You requested evidence of qualifying prior religious work "since at least March 14, 2010 in lawful immigration status". However, in compliance with 8 C.F.R. § 204.5(m)(11)(iii), "received no salary but provided for his or her own support," and the attached income taxes constitute "verifiable evidence" to "show how support was maintained". She was supported by her and her husband's cleaning business.
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> Furthermore, both "unauthorized employment" and also "unlawful immigration status" referenced at INA § 245(c)(2) are explicitly waived by INA § 245(i). is grandfathered under INA § 245(i), regardless of the fact that the petition filed in 2001 was later denied due to abandonment, per 8 C.F.R. § 245.10(a)(3).
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> On February 1, 2012, a Federal Court ruled that "requiring the beneficiary of a Form I-360 petition to have been employed 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, are ultra vires to the Immigration and Nationality Act. Accordingly the application of 8 C.F.R. § 204.5(m)(4), (11) to Plaintiff's Form I-360 was contrary to law." See Pages 17-18 of the attached ruling, *Shia Association of Bay Area, et al., v. U.S., et al.*, ___ F. Supp. 2d ___ (N.D. Cal. 2012). Thus, requiring the same of would likewise be contrary to law.

The petitioner submitted an uncertified copy of the beneficiary's 2009 Form 1040 tax return, filed jointly with her husband. The tax return indicated that the couple received gross income of $47,777 from a cleaning business, and both individuals identified their occupation as "Cleaning."

On July 2, 2012, the director denied the petition, finding the petitioner's evidence insufficient to establish that the beneficiary was continuously engaged in qualifying religious work throughout the two years immediately preceding the filing of the petition.

In a letter submitted on appeal, the petitioner asserts that the beneficiary "has been a member of this Ministry" since 1996 and has "over two years of continuous work" for the petitioning church. As clarification as to the duties the beneficiary has performed, the petitioner submits a schedule describing 37.5 hours of weekly duties. The petitioner submits a letter from identified as pastor for , which asserts that the beneficiary took part in that organization's Women's Conference in September, 2011, and that she was given a "love offering" of $200 "for the night that she preached the Word of God." Additionally, the petitioner submits printouts from its website which include photographs of the beneficiary.

On appeal, counsel for the petitioner again asserts that the beneficiary has not received a salary for her work with the petitioning church, and instead provided her own support. Counsel notes that the beneficiary "is sometimes compensated for her participation at various church conferences."

Counsel argues: "The service should not narrowly interpret her designation of her occupation as 'cleaning' as evidence that she was not working as a religious worker for the Petitioner."

The AAO agrees with the director's finding that the petitioner has not demonstrated that the beneficiary was continuously engaged in qualifying employment during the two years immediately preceding the filing of the petition.

Regarding the petitioner's claim of the beneficiary's volunteer work within the United States, such work is not considered to be qualifying experience. In the preamble to the proposed rule, USCIS recognized that although "legitimate religious work is sometimes performed on a voluntary basis . . . allowing such work to be the basis for . . . special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program." *See* 72 Fed. Reg. 20442, 20446 (April 25, 2007). The regulation at 8 C.F.R. § 204.5(m)(11) specifically requires that the alien's prior experience have been compensated either by salaried or non-salaried compensation (such as room and board), but can also include self-support under limited conditions. In elaborating on this issue in the final rule, USCIS determined that the sole instances where aliens may be uncompensated are those aliens "participating in an established, traditionally non-compensated, missionary program." *See* 73 Fed. Reg. at 72278. *See also* 8 C.F.R. § 214.2(r)(11)(ii). The petitioner has neither claimed nor established that the beneficiary was participating in such a program. Accordingly, any time the beneficiary may have spent in the United States "working" as a volunteer for the petitioner cannot be considered qualifying employment. The beneficiary's purported occasional compensation for participation in church conferences does not satisfy the requirement of continuous, compensated employment under 8 C.F.R. § 204.5(m)(11).

The AAO additionally finds that the petitioner failed to establish that the beneficiary held lawful immigration status and employment authorization throughout the qualifying period as required under 8 C.F.R. § 204.5(m)(4) and (11).

In response to the May 4, 2012 NOID, counsel did not argue that the beneficiary held lawful immigration status or employment authorization, but rather that the beneficiary qualifies for relief 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. However, the question of whether the beneficiary qualifies for section 245(i) relief lies outside the scope of this proceeding.

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 AAO, in this proceeding, does not bar the beneficiary from ever receiving benefits under section 245(i) of the Act. Rather, the AAO finds that the beneficiary's lack of lawful status during the two-year qualifying period prevents the approval of the present petition.

In response to the NOID, counsel alternately asserted that the requirements of lawful immigration status and employment authorization under 8 C.F.R. § 204.5(m)(4) and (11) are unlawful, citing the decision of the United States District Court for the Northern District of California in *Shia Association of Bay Area v. United States*, No. 11-1369 SC (N.D. Cal. Feb. 1, 2012). However, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Accordingly, the cited decision is not a relevant precedent decision.

Finally, the statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. The Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. Matter of Varughese, 17 I&N Dec. 399, 402 (BIA 1980).

Further, the 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 during the qualifying period, and the regulation at 8 C.F.R. § 204.5(m)(5) defines "minister" as one who "[w]orks solely as a minister in the United States." The petitioner has consistently indicated that the beneficiary was working as an ordained minister, and the Form I-360 petition stated, in Part 2. Classification Requested, that the beneficiary's position is ministerial. However, the petitioner has also submitted evidence, and counsel has asserted, that the beneficiary and her husband ran a cleaning business throughout the qualifying period. Counsel asserts on appeal that the beneficiary's outside employment as a cleaner should not be considered "evidence that she was not working as a religious worker for the Petitioner." However, in addition to the lack of compensation and the lack of lawful immigration status, the AAO finds that the beneficiary's purported work as a minister cannot be considered qualifying experience as she was not working "solely as a minister" during the qualifying period as required by the regulations. *See Matter of Faith Assembly Church,* 19 I&N 391, 393 (Comm'r. 1986). The Ninth Circuit Court of Appeals, whose jurisdiction includes the California Service Center, has upheld the AAO's interpretation of the two-year experience requirement. *See Hawaii Saeronam Presbyterian Church v. Ziglar,* 243 Fed. Appx. 224, 226 (9th Cir. 2007).

For the reasons discussed above, the AAO agrees with the director's determination that the petitioner failed to establish that the beneficiary has the requisite two years of continuous, qualifying work experience immediately preceding the filing 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.