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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 23 2010**

IN RE:

Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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 \$585. 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, 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 [REDACTED]. 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 had the requisite two years of continuous, qualifying work experience immediately preceding the filing date of the petition.

On appeal, the petitioner submits arguments from counsel and copies of various documents attesting to the beneficiary's identity and other issues.

Counsel notes that the petitioner had filed an earlier petition on the beneficiary's behalf, with receipt number SRC 08 087 54332. The Director, Texas Service Center, denied that petition, and the AAO dismissed both the petitioner's appeal and its subsequent motion to reopen. Counsel "request[s] reconsideration of our motion to reopen the AAO previously denied." The present appeal, however, relates to a separate proceeding: an appeal of the denial of a different petition. The filing of an appeal in the present proceeding does not obligate the AAO to revisit its decision in an earlier, unrelated proceeding that involves the same parties. Section 286(m) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to recover the full cost of providing adjudication services. The petitioner has paid one fee and filed one Form I-290B Notice of Appeal or Motion in this proceeding, and we will limit our appellate adjudication to the petition to which that appeal pertains.

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 . . . ; 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 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 USCIS regulation at 8 C.F.R. § 204.5(m)(11) requires that 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. If the prior experience was acquired in the United States, the work must have been authorized under United States immigration law.

The petitioner filed the Form I-360 petition on January 2, 2009, shortly after the above-cited regulations went into effect on November 26, 2008. On the Form I-360, the petitioner indicated that the beneficiary entered the United States on June 28, 1991, and that his nonimmigrant status expired on March 27, 1992.¹ The petitioner acknowledged that the beneficiary had “[n]o status” as a lawful nonimmigrant as of the filing date, and that the beneficiary had worked in the United States without authorization.

The director denied the petition on March 9, 2009, on the grounds that “the beneficiary was not in lawful immigration status” while working for the petitioner during the 2007-2009 qualifying period.

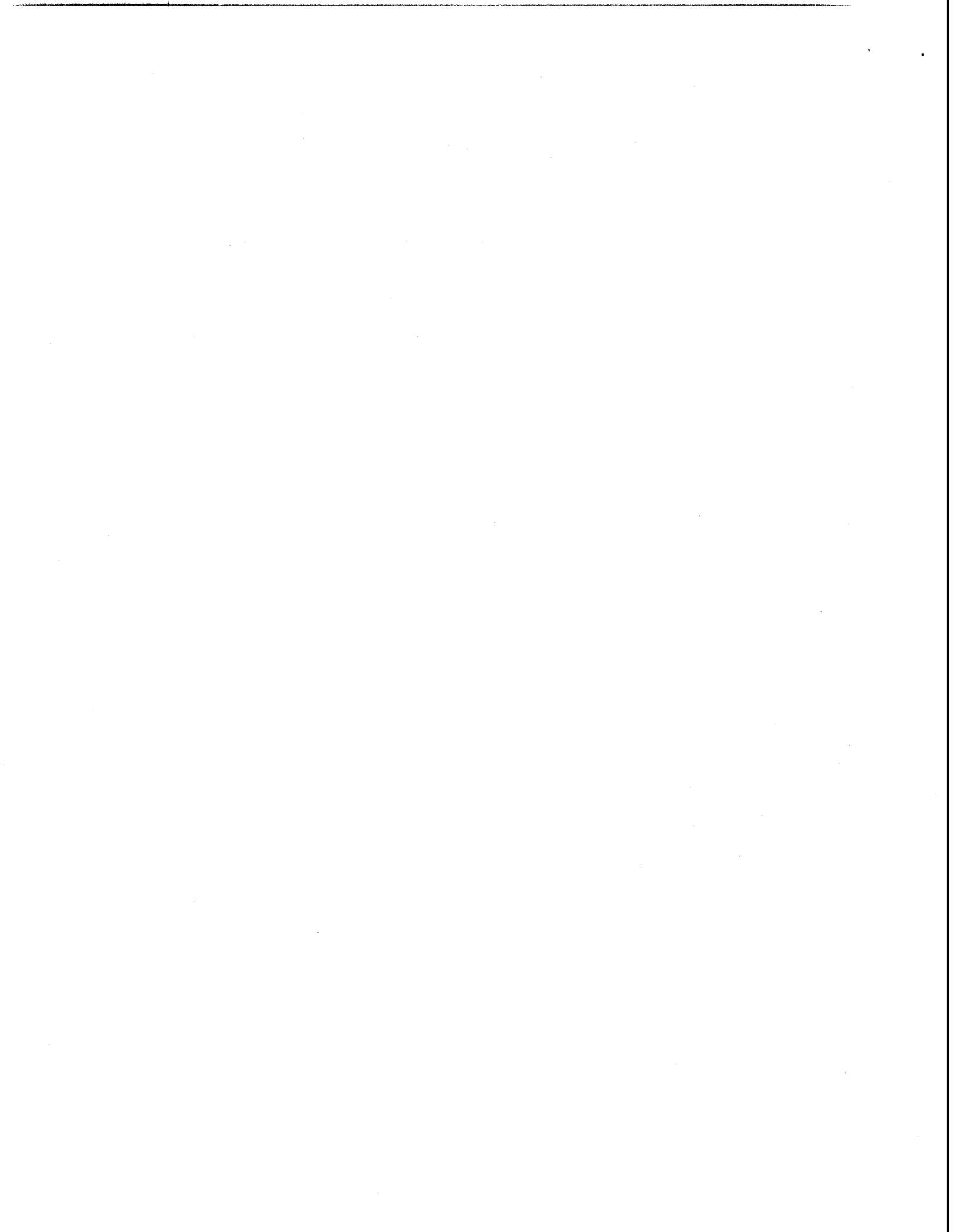
On appeal, counsel states:

The Petitioner acknowledges that Beneficiary’s work during the qualifying 2 year period prior to the submission of this petition has not been in lawful nonimmigrant status; however, this should not bar the Beneficiary from establishing that he has fulfilled the qualifying period of work experience.

First, the regulations at 8 C.F.R. § 204.5(m)(11) should not be applied to disqualify such work retroactively when, as here, the religious worker had accumulated the requisite experience before the regulation was promulgated. The statutory experience requirement is to confirm sincerity of religious commitment, not to test past immigration compliance.

USCIS revised its special immigrant religious worker regulations effective November 26, 2008. Therefore, the new regulations at 8 C.F.R. §§ 204.5(m)(4) and (11) were already in effect when the petitioner filed the petition in January 2009. 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

¹ A copy of the beneficiary’s Form I-94 Departure Record shows that he entered the United States as a B-1 nonimmigrant visitor for business. A B-1 visitor may be initially admitted to the United States for no more than one year. 8 C.F.R. § 214.2(b)(1). Furthermore, a B-1 visitor may not enroll in a course of study and may not engage in local employment or labor for hire in the United States. 8 C.F.R. § 214.2(b)(7); 22 C.F.R. § 41.31(b)(1).



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 –

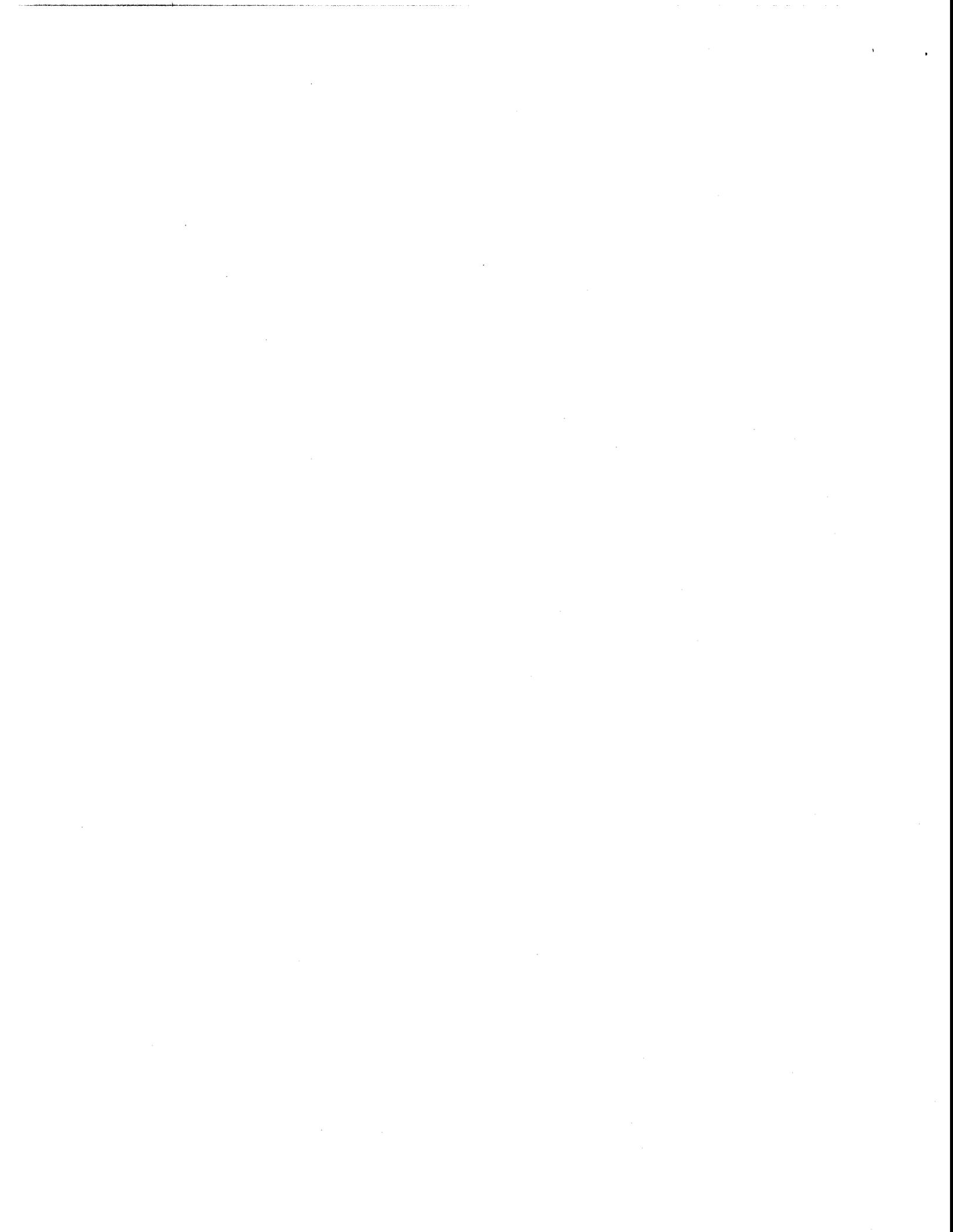
- (1) issue final regulations to eliminate or reduce fraud related to the granting of special immigrant status for special immigrants described in subclause (II) or (III) of section 101(a)(27)(C)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(C)(ii))

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 we have 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.² 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). We may therefore presume that Congress has no objection to the new regulations as published, or to USCIS' interpretation and application of those regulations.

Counsel continues:

² 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.



Second, in any event, based on petitions filed in 1998 and 2001 . . . , [the beneficiary] will be eligible to apply for adjustment of status under INA § 245(i), which specifically credits religious worker petitions under INA § 101 (a)(27)(C), and it is clear that Congress did not intend, nor expect, for USCIS to disqualify aliens, otherwise eligible for immigration as religious workers under § 245(i), through a non-statutory, retroactively applied requirement of religious work in lawful status.

Section 245(i) of the Act, 8 U.S.C. § 1255(i), states, in pertinent part:

Adjustment of Status for Aliens Physically Present in the 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 . . . of –

- (i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001

* * *

(C) who, in the case of a beneficiary of a petition for classification . . . that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000 [enacted December 21, 2000];

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling \$1,000 as of the date of receipt of the application

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.”³

³ 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 regulation at 8 C.F.R. § 245.10(a) provides, in pertinent part:

- (2) *Approvable when filed* means that, as of the date of the filing of the qualifying immigrant visa petition under section 204 of the Act . . . , the qualifying petition . . . was properly filed, meritorious in fact, and non-frivolous (“frivolous” being defined herein as patently without substance). This determination will be made based on the circumstances that existed at the time the qualifying petition or application was filed.

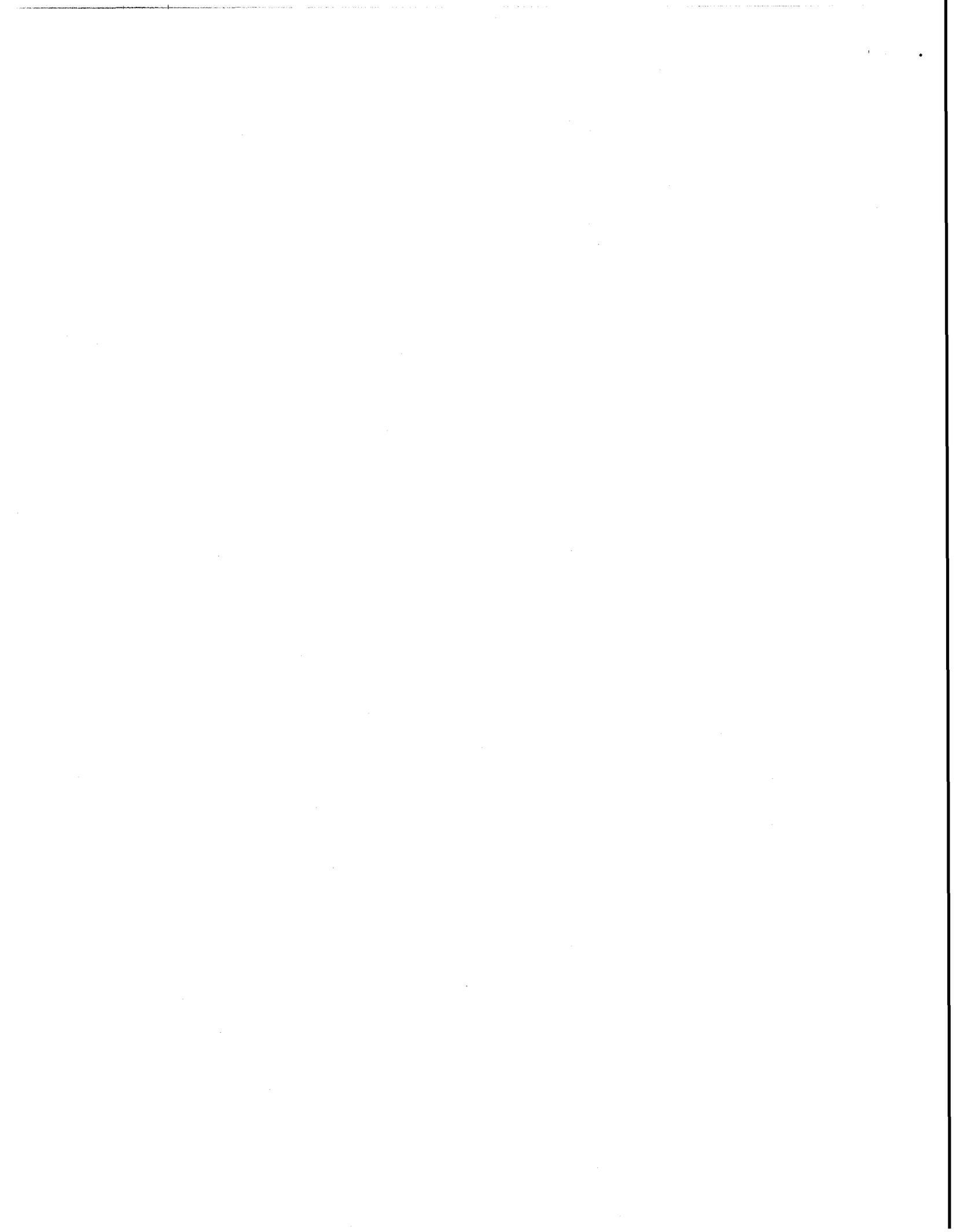
However, section 245(i) relief applies to adjudication of a Form I-485 adjustment application, not to adjudication of the underlying immigrant petition. Specifically, section 245(i)(2)(A) of the Act mandates that an alien seeking section 245(i) relief be “eligible to receive an immigrant visa.” See *INS 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.

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 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 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 section 245(i) relief at the adjustment stage does not require us to approve the underlying immigrant petition before the beneficiary has even reached that stage. We reject counsel’s argument that section 245(i) of the Act limits the application of the new “lawful employment” requirement. As we have already noted, Congress has revisited and reenacted the statute numerous times since 2008. 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, precisely the situation covered by *Lorillard*.

There is no evidence that the beneficiary would be eligible for section 245(i) relief. In order to qualify for section 245(i) relief, an alien must be the beneficiary of a petition or labor certification that was



approvable when filed on or before April 30, 2001. 8 C.F.R. § 245.10(a)(1)(i)(A). That is, the petition must have been properly filed, meritorious in fact, and non-frivolous. 8 C.F.R. § 245.10(a)(3).

Counsel claims that the beneficiary's 1998 Form I-360 petition meets these requirements. That Form I-360 petition (EAC 98 087 51360) was filed on January 22, 1998 and is contained within the beneficiary's A-file record of proceeding. A review of the 1998 petition reveals that it was a skeletal filing supported solely by documents relating to the beneficiary.⁴ The 1998 petition lacks any of the initial evidence required under the regulation at 8 C.F.R. § 204.5(m)(3) (1998), including evidence that the 1998 petitioner is a qualifying non-profit organization and a letter from an authorized official of the religious organization in the United States identifying its denomination, establishing the beneficiary's qualifications and prior experience, and listing his proposed duties. In addition, the 1998 petition lacks required initial evidence establishing the petitioner's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2), another requirement in effect in 1998. In short, the 1998 filing is so devoid of basic information that it is not possible to tell the denomination to which the 1998 petitioner and beneficiary belong, whether the 1998 petitioner is a qualifying tax-exempt organization, the title of the proffered position, the nature of the beneficiary's prior qualifying employment (he lists no prior employment on his Form G-325A), or the amount or nature of the beneficiary's intended compensation.

The service center issued a detailed request for all of the missing required evidence on March 27, 1998; however, the 1998 petitioner failed to respond and on July 13, 1998, the service center denied the petition due to abandonment. Accordingly, despite counsel's assertions, the beneficiary has not established that he would qualify for section 245(i) relief even at the adjustment stage based on the 1998 filing of a skeletal and unapprovable Form I-360 petition that the 1998 petitioner abandoned within months of its filing. For these reasons, at the time of the filing, the Form I-360 petition was not approvable when filed as it was not meritorious in fact. *Ogundipe v. Mukasey*, 541 F.3d 257, 263 (4th Cir. 2008) (finding that a Form I-360 petition was not "approvable when filed" for purposes of section 245(i) of the Act because much of the evidence required by regulation was absent from the record).

With respect to the instant petition, 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, through counsel, has argued that this unauthorized employment should not disqualify the beneficiary. For the reasons explained above, we reject this argument. Under 8 C.F.R. §§ 204.5(m)(4) and (11), USCIS cannot approve the petition because the beneficiary's religious employment in the United States during the qualifying period was not authorized under U.S. immigration law.

⁴ The 1998 filing includes a copy of the beneficiary's passport, his Form I-94 Departure Record, two certificates of ordination and a related transcript, a copy of his diploma for a two-year course in mechanical engineering completed in Nigeria, a Form G-325A (Biographic Information), and additional documents relating to the beneficiary's birth records.



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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed.

