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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF I-G-G-V-

DATE: NOV. 3, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT

The Petitioner, an individual, seeks to classify himself¹ as a special immigrant religious worker to perform services as a Music and Media Assistant for the [REDACTED] California. See Immigration and Nationality Act (the Act) § 203(b)(4), 8 U.S.C. § 1153(b)(4). The Director, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. RELEVANT LAW AND REGULATIONS

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,

¹ Part 1 of the Form I-360 petition identifies [REDACTED] as the petitioner. Review of the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, however, indicates that the Beneficiary is the Self-Petitioner. An applicant or petitioner must sign his or her application or petition. 8 C.F.R. § 103.2(a)(2). In this instance, Part 10 of the Form I-360, "Signature," has been signed not by any official of [REDACTED] but by the Beneficiary himself. Thus, the Beneficiary, and not the employer, has taken responsibility for the content of the petition. The petition was properly filed, because the U.S. Citizenship and Immigration Services regulation at 8 C.F.R. § 204.5(m)(6) allows a self-petitioner to file the Form I-360 petition on his or her own behalf. Also, the attorney who filed the appeal represents the self-Petitioner, and therefore the appeal has also been properly filed.

(II) before September 30, 2015, 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, 2015, 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).²

The regulation at 8 C.F.R. § 204.5(m) provides that in order to be eligible for classification as a special immigrant religious worker, the Petitioner must:

(1) For at least the two years immediately preceding the filing of the petition have been a member of a religious denomination that has a bona fide non-profit religious organization in the United States.

(2) Be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position in one of the following occupations as they are defined in paragraph (m)(5) of this section:

(i) Solely in the vocation of a minister of that religious denomination;

(ii) A religious vocation either in a professional or nonprofessional capacity;
or

(iii) A religious occupation either in a professional or nonprofessional capacity.

(3) Be coming to work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the United States.

(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. . . .

² Continuing Appropriations Act, 2016, Pub. L. No. 114-53, §§ 106(3), 132, 129 Stat. 502 (2015) extended the applicable date of September 30, 2015 to December 11, 2015.

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. . . .

However, on April 7, 2015, the Court of Appeals for the Third Circuit held that the lawful immigration status requirement in 8 C.F.R. 204.5(m)(4) and (11) is *ultra vires* and impermissibly conflicts with section 245(k) of the Act with respect to adjustment of status. *See Shalom Pentecostal Church v. U.S. Dep't of Homeland Sec.*, 783 F.3d 156, 165-67 (3d Cir. 2015). In accordance with this decision, U.S. Citizenship and Immigration Services (USCIS) will no longer deny special immigrant religious worker petitions based on the lawful status requirements at 8 C.F.R. 204.5(m)(4) and (11) in the Third Circuit. As a result of this decision and other district court cases, USCIS implemented a policy to apply the *Shalom Pentecostal Church* decision nationally, pending the issuance of amended regulations that will remove the lawful status requirements in 8 C.F.R. 204.5(m)(4) and (11). *See* USCIS Policy Memorandum PM-602-0119 *Qualifying U.S. Work Experience for Special Immigrant Religious Workers* (July 5, 2015), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0705_Lawful_Status_PM_Effective.pdf [hereinafter July 5, 2015, Policy Memorandum]. Accordingly, USCIS no longer requires that the qualifying religious work experience for the two-year period preceding the submission of a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, be in lawful immigration status.

II. PERTINENT FACTS AND PROCEDURAL HISTORY

On November 5, 2012, the Petitioner filed the Form I-360. The classification the Petitioner seeks makes visas available to foreign national ministers and non-ministers in religious vocations and occupations seeking to immigrate to or adjust status in the United States for the purpose of performing religious work in a full time compensated position. The Director issued a request for evidence (RFE), and ultimately denied the petition finding that the Petitioner did not submit materials demonstrating he was in a lawful immigration status as a religious worker for at least the two year period immediately before filing the petition in accordance with the regulation at 8 C.F.R. § 204.5(m)(11). On appeal, the Petitioner offers a brief and additional exhibits. On July 27, 2015, we issued an RFE, to which the Petitioner provides a response.

III. ANALYSIS

We conduct appellate review on a *de novo* basis. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3^d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2^d Cir. 1989). As explained below, we withdraw the Director's concerns over whether the Petitioner was in lawful status.

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A. Lawful Immigration Status

Although the issue of whether the Petitioner worked in unlawful status may be reviewed at a later date if the Petitioner files for adjustment of status, it is no longer a bar to eligibility for the instant petition. See July 5, 2015, Policy Memorandum; see also *Shalom Pentecostal Church*, 783 F.3d at 160 (describing the two-step process of first obtaining a visa, and then applying for permanent adjustment of status); *Matter of O*, 8 I&N Dec. 295 (BIA 1959) (the visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws). Therefore, notwithstanding the regulation at 8 C.F.R. 204.5(m)(4) and (11) as currently written, in accordance with the Policy Memorandum, whether the Petitioner had the required two years of continuous, qualifying work experience while in lawful status is not a proper basis for denial. The Director's decision to the contrary is withdrawn.

B. Other Issues

Within our July 27, 2015, RFE, we requested the following documentation relating to a qualifying position: (1) a letter from the [REDACTED] detailing the duties of the proposed employment and the hours per duty; and (2) evidence such as bylaws or similar official church material that demonstrates the [REDACTED] or the Assemblies of God denomination recognizes the position of Music & Media Assistant as a religious occupation within the denomination as defined at 8 C.F.R. § 204.5(m)(5). Pertaining to the Petitioner's qualifying experience, we also sought verifiable corroboration that during the two-year period immediately preceding the filing of the petition, that the Petitioner was continuously working in one of the positions described in 8 C.F.R. § 204.5(m)(2).

In response to our RFE, the Petitioner provides: (1) a statement from himself; (2) his resume; (3) a compact disc of his music; (4) a statement from [REDACTED] Executive Pastor of [REDACTED] (5) the Petitioner's 2008 Form 1040V, Payment Voucher (Form 1040V); (6) a photocopy of the front of one of the Petitioner's checks associated with the Form 1040V; and (7) a copy of the Petitioner's 2009 Form 1040, U.S. Individual Income Tax Return.

1. Qualifying Position

a. Regulatory Authority

The regulation at 8 C.F.R. § 204.5(m)(2) listed above provides the types of positions eligible under this immigrant classification. The regulation at 8 C.F.R. § 204.5(m)(5) includes the following definitions:

Religious occupation means an occupation that meets all of the following requirements:

- (A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination.

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(B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.

(C) The duties do not include positions that are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible.

(D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

Religious vocation means a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. The religious denomination must have a class of individuals whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion. Examples of individuals practicing religious vocations include nuns, monks, and religious brothers and sisters.

Religious worker means an individual engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister.

Therefore, the duties of any religious occupation must primarily relate to a traditional religious function and to carrying out the religious creed and beliefs of the denomination. Further, administrative or secular duties are not qualifying elements, and as such, cannot be factored into the full-time employment calculations.

b. Analysis

On the Employer Attestation, [REDACTED] indicated that it would employ the Petitioner in the full-time position of "Music & Media Assist." The proposed daily duties were described as: "Musician, Mixing Engineer Assistant." In Box Three, the Petitioner asserted that the "Musician" position would involve playing drums, guitar, and keyboard, and that the "Media" position would involve filling in when needed to mix sound. In an accompanying job offer letter, Pastor [REDACTED] stated that "[t]he role's main responsibilities will be that of participating in musical production organization wide," with no further description of the duties of the position.

In response to the Director's January 31, 2013, RFE, the Petitioner submitted a letter from the [REDACTED] that supported a previous Form I-360 petition the center filed on behalf of the Petitioner. The letter included a description of the Petitioner's proposed duties as "music minister" for that organization. The Petitioner did not provide any documentation relating to the

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offered position of Music and Media Assistant for the prospective employer, [REDACTED]

The appeal contains discussion relating to the decision in *Perez v. Ashcroft*, 236 F. Supp. 2d 899 (N.D. Ill. 2002), which held that the position of music director qualified as a religious occupation despite including limited administrative duties. The current regulations were published on November 26, 2008. As the court's interpretation applied to regulations which are no longer in effect, it is not relevant to the instant case. Although the current regulations allow for limited administrative duties incidental to religious functions, they require that the duties of the position must be primarily related to a religious function and must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination. The Petitioner indicates on appeal that *Perez* involved a music director, running the church's music program by organizing and directing several choirs and the youth music activities. The record contains no evidence that the Petitioner in the matter before us will be involved in such activities. The prospective employer's only descriptions of the proposed duties, quoted above, do not establish that the duties of the proffered position are primarily religious in nature. In response to our RFE, the prospective employer's letter from Pastor [REDACTED] states:

[The Petitioner's] duties include developing strong competent musicians and being apart [*sic*] of building a weekly worship service to minister to the [REDACTED] community. He is primarily involved in spreading Christian religious beliefs, spirituality and worship through music. He is also responsible for organizing, directing and producing the musical programs and presentations put on by the church in celebration of various religiously significant events and holidays.

The letter from the prospective employer did not comply with our RFE request that it provide a letter detailing the duties of the proposed employment and the hours the Petitioner would be spending performing each duty. Therefore, the Petitioner has not demonstrated that he will be performing full time work for the prospective employer in accordance with regulation at 8 C.F.R. § 204.5(m)(2).

Regarding our request as to whether the [REDACTED] or the [REDACTED] denomination recognizes the position of Music & Media Assistant as a religious occupation within the denomination, the Petitioner does not provide evidence such as bylaws or similar official church documentation. Although the Petitioner submits the letter from Pastor [REDACTED] this letter does not indicate if the church recognizes the position of Music & Media Assistant as a religious occupation within the denomination. Accordingly, the record does not demonstrate that the position of Music and Media Assistant qualifies as a religious occupation as defined at 8 C.F.R. § 204.5(m)(5).

2. Qualifying Experience

On the Employer Attestation portion of the petition, Pastor [REDACTED] left blank the space provided for a description of the Petitioner's qualifications for the position. The Petitioner submitted an undated letter from Mr. [REDACTED] but he did not indicate whether the Petitioner was currently or had previously been employed by [REDACTED]. Accompanying the petition, the Petitioner provided a copy of

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his resume stating that he was self-employed as a music producer and arranger as of 2007, served as music director for two churches between 2005 and the present, and served as a music teacher and instructor for a third entity as of 2005.

The Petitioner provided letters from several churches, but none specifically stated that he had been employed by the church for any specific period of time. Two letters reflected that the Petitioner's involvement in the respective churches was sporadic. In response to the Director's RFE, the Petitioner included copies of Forms 1099-MISC, Miscellaneous Income, from various sources for the relevant two-year qualifying period immediately preceding the filing of the petition. The forms reflected that in 2012 the Petitioner received \$5,650.00 from [REDACTED] \$285.00 from [REDACTED] and \$8,740 from [REDACTED]. The documents indicated that in 2011 the Petitioner received \$650.00 from [REDACTED] \$2,850.00 from [REDACTED] and \$1,200.00 from [REDACTED]. The materials also specified that in 2010 the Petitioner received \$8,875.00 from [REDACTED]. In addition, the Petitioner submitted Forms 1099-MISC for 2009 and other evidence of compensation prior to the start of the qualifying period. Lastly, the Petitioner offered an undated "Attestation" from [REDACTED] which the center prepared for a previous Form I-360 petition it filed, seeking to employ him as a music minister. The statement did not reflect whether [REDACTED] had previously employed the Petitioner.

On appeal, the Petitioner submits Forms 1099-MISC from several organizations for the calendar years included in the qualifying period. However, the amounts on these forms are not necessarily indicative of continuous employment and the Petitioner has not offered employer letters or other documentary evidence confirming dates of employment or sufficiently describing his schedule or the duties performed to establish either the continuity or the qualifying nature of the work. In response to our RFE, Pastor [REDACTED] letter only states:

We believe that [the Petitioner] is ultimately qualified for this position. He has a degree in music ministry . . . he received an additional degree in music production from the prestigious [REDACTED]. . . . While attending school and since receiving his degrees he has worked continuously in a capacity as a religious musical minister performer, director and producer.

This position requires an individual who has made a lifetime commitment to a religious way of life and embodies for our congregation a deeply spiritual individual who has been given gifts by God that allow him to express his devotion through melody and song.

Pastor [REDACTED] continues by listing some of the Petitioner's accomplishments. The record does not contain evidence to corroborate Pastor [REDACTED] recount of the Petitioner's work experience. Further, Pastor [REDACTED] does not indicate the Petitioner has worked for his church for the two years immediately before the Petitioner filed the petition, the employment for which he may have firsthand knowledge. The Petitioner has not demonstrated that he has complied with the regulation at 8 C.F.R. § 204.5(m)(4).

3. Employer as Qualifying Organization

a. Regulatory Authority

The regulation at 8 C.F.R. § 204.5(m)(3) provides that in order to be eligible for classification as a special immigrant religious worker, the Petitioner must be coming to work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the United States. 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:

Bona fide non-profit religious organization in the United States means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code and possessing a currently valid determination letter from the IRS confirming such exemption.

Tax-exempt organization means an organization that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the Internal Revenue Code . . .

The regulation at 8 C.F.R. § 204.5(m)(8) states:

Evidence relating to the petitioning organization. A petition shall include the following initial evidence relating to the petitioning organization:

- (i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or
- (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or
- (iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, as something other than a religious organization:

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(A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;

(B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;

(C) Organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization; and

(D) A religious denomination certification. The religious organization must complete, sign and date a religious denomination certification certifying that the petitioning organization is affiliated with the religious denomination. The certification is to be submitted by the petitioner along with the petition.

b. Analysis

The Form I-360 identified [REDACTED] as the Petitioner's prospective employer. Accompanying the petition, the Petitioner submitted a copy of an August 22, 2012, letter from the IRS which identified [REDACTED] Employer Identification Number. In the Director's RFE, she instructed the Petitioner to provide evidence that the prospective employer qualifies as a bona fide non-profit religious organization, including a valid determination letter from the IRS confirming the organization's 501(c)(3) tax-exempt status.

In an April 23, 2013, letter responding to the notice, the Petitioner stated: "The Pastor for [REDACTED] is unavailable at the present time. Upon the Pastor's return we willthe [sic] IRS stating that they are a tax-exempt organization." [REDACTED] is not the prospective employer identified on the instant petition. Therefore, it remains that the evidence of record does not establish that [REDACTED] is a qualifying organization as defined at 8 C.F.R. § 204.5(m)(5).

IV. CONCLUSION

As discussed above, the Petitioner has overcome the stated basis for the denial decision, but the petition is being dismissed as the Petitioner has not established: (1) that the offered position is a full time position; (2) that the position is recognized as a religious occupation within the denomination; (3) that the Petitioner was working in one of the positions described in 8 C.F.R. § 204.5(m)(2) for at least the two-year period immediately preceding the filing of the petition; and (4) that the Petitioner will work for a bona fide non-profit religious organization in the United States, or a bona fide organization which is affiliated with the religious denomination in the United States.

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In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of I-G-G-V-*, ID# 12434 (AAO Nov. 3, 2015)