



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

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

MATTER OF T-N-W-C-O-T-C-, INC.

DATE: NOV. 5, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a church, seeks to classify the Beneficiary as a special immigrant religious worker to perform services as a Priestess. *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 sustained.

The classification the Petitioner seeks on behalf of the Beneficiary 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 determined that the Petitioner did not establish that the Beneficiary was in a lawful immigration status when she gained her experience while in the United States. On appeal, the Petitioner submits a brief.

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,

(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;¹ 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).

A. Experience Gained While in a Lawful Immigration Status

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 Beneficiary 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. . . .

¹ 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 January 28, 2013, the Petitioner filed a Form I-360 seeking to classify the Beneficiary as a special immigrant religious worker. The Director issued a request for additional evidence, requesting, among other things, additional documentation addressing the Beneficiary's work history and evidence that the Beneficiary was employed while in lawful immigration status.

The Director found that the Petitioner did not submit evidence that the Beneficiary worked in lawful immigration status during the two-year period immediately preceding the filing of the Form I-360. Therefore, the Director concluded that the Beneficiary did not have the requisite two years of continuous religious work experience in lawful immigration status as required under 8 C.F.R. § 204.5(m). The Director denied the petition accordingly.

On appeal, the Petitioner discusses the Beneficiary's immigration status history and requests *nunc pro tunc* consideration of the Form I-360. The Petitioner asserted in response to the Director's RFE that the Beneficiary has been working as a religious worker since 2003, eventually as an ordained priestess for which the Petitioner provides a list of duties. As a priestess, she served as a spiritual counselor and liaison and conducted sanctuary services, among other duties. The record contains her 2007 ordination

certificate, pay statements covering the two year period prior to the filing date of the petition, and the Beneficiary's certified tax returns.

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 Beneficiary was in lawful status.

A. Lawful Immigration Status

Although the issue of whether the Beneficiary worked in unlawful status may be reviewed at a later date within an adjustment of status adjudication, 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). As a result, the Petitioner's request for *nunc pro tunc* consideration of this petition is moot. 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 Beneficiary had the required two years of continuous, qualifying work experience while in lawful status is not a proper basis for denial. The record contains the Petitioner's confirmation of the Beneficiary's experience with their church, corroborated by pay statements and the Beneficiary's certificated tax returns. The Director's decision to the contrary is withdrawn.

IV. CONCLUSION

As discussed above, the stated basis for the denial decision has been deemed *ultra vires* and is no longer applicable.

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 met that burden.

ORDER: The appeal is sustained.

Cite as *Matter of T-N-W-C-O-T-C-, Inc.*, ID# 16164 (AAO Nov. 5, 2015)