



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

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

MATTER OF A-O-C-

DATE: NOV. 20, 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 pastor. *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, concluding that the Petitioner had failed a site inspection and did not establish that the Beneficiary had the requisite two years of qualifying religious work experience while in lawful immigration status. 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, 8 U.S.C. § 1153(b)(4), 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 [December 11<sup>1</sup>], 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

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<sup>1</sup> 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.

(III) before [December 11], 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]) 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).

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

The regulation at 8 C.F.R. § 204.5(m)(7) states, in pertinent part, that the prospective employer must specifically attest to the following:

(vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien's proposed daily duties;

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(xi) That . . . any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and

(xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

The regulation at 8 C.F.R. § 204.5(m)(10) states:

*Evidence relating to compensation.* Initial evidence must include verifiable evidence of how the petitioner intends to compensate the alien. Such compensation may include salaried or non-salaried compensation. This evidence may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS [U.S. Citizenship and Immigration Services]. If IRS [Internal Revenue Service] documentation, such as IRS Form W-2 [Wage and Tax Statement] or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.

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 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. . . .

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, 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,<sup>2</sup> 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* 1-2 (July 5, 2015), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0705\\_Lawful\\_Status\\_PM\\_Effective.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0705_Lawful_Status_PM_Effective.pdf). 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

The record shows that the Beneficiary was initially issued an R-1 nonimmigrant religious worker visa on January 30, 2007, with an expiration date of January 25, 2008, to work for a church in Florida. The petitioning organization subsequently filed a Form I-129, Petition for a Nonimmigrant Worker, which was approved on October 25, 2010, granting the Beneficiary R-1 nonimmigrant status from October 14, 2010, until July 30, 2012. On April 15, 2013, the Petitioner filed the instant Form I-360 seeking to classify the Beneficiary as a special immigrant religious worker.

The Director issued a Request for Evidence (RFE) and a Notice of Intent to Deny (NOID) the petition, requesting, among other things, additional documentation regarding the Beneficiary's lawful immigration status. The Director noted that signage at the church identified the Beneficiary as the pastor before he was granted R-1 status to work for the Petitioner. In response to the RFE and NOID, the Petitioner submitted a brief and additional evidence including, but not limited to, copies of the Beneficiary's 2011 tax return and paychecks.

The Director denied the petition, concluding that the Petitioner failed to establish the Beneficiary had the requisite two years of qualifying religious work experience in lawful immigration status. In addition, the Director found that the Petitioner did not rebut the findings of the site visit which found that it had improperly employed the Beneficiary without authorization. The Petitioner filed a timely appeal.

While the appeal was pending, as noted above, USCIS issued a Policy Memorandum to the effect that we will no longer require that the two-year work experience requirement be in lawful immigration status. *See* USCIS Policy Memorandum PM-602-0119, *supra*, at 1-2. Therefore, on August 21, 2015,

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<sup>2</sup> *See Congregation of the Passion v. Johnson*, 2015 WL 518284 (N.D. Ill. Feb. 6, 2015); *Shia Ass'n of Bay Area v. United States*, 849 F.Supp.2d 916 (N.D. Cal. 2012).

we issued an RFE, providing the Petitioner 33 days (including three days for mailing) to address unexplained inconsistencies in the record regarding the Petitioner's intent and ability to compensate the Beneficiary as claimed. To date, we have not received any response to our RFE.

### 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 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989). We afforded the Petitioner 33 days in which to reply to our RFE. However, more than 80 days have passed and we have not received a response. Consequently, we may summarily dismiss the appeal as abandoned, on the record, or for both reasons. See 8 C.F.R. § 103.2(b)(13). We will dismiss on both of these bases.

#### A. Lawful Immigration Status

In this case, the record shows the Beneficiary entered the United States as an R-1 nonimmigrant religious worker and worked as a pastor for at least the two-year period immediately preceding the date the Petitioner filed the Form I-360 (i.e., April 15, 2011, through April 15, 2013). As the Director found, the record shows the Beneficiary was employed and compensated by the Petitioner beginning in August 2010 until the petition was filed. The record includes, but is not limited to, tax records, copies of the front and back sides of paychecks issued from the Petitioner to the Beneficiary for approximately three years, and letters from co-workers and other church members, all showing that the Beneficiary worked for, and was paid by, the Petitioner as a pastor from at least April 15, 2011, until the date the Form I-360 was filed on April 15, 2013. The site inspection report and signage at the church further show that the Beneficiary was employed by the Petitioner as a pastor, as the Petitioner claims.

Although the issue of whether the Beneficiary worked in unlawful status may be reviewed at a later date if he files for adjustment of status, it is no longer a bar to eligibility for the instant petition. See USCIS Policy Memorandum PM-602-0119, *supra*, at 1-2; 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, we find that the Petitioner has established that the Beneficiary had the required two years of continuous, qualifying work experience immediately preceding the filing date of the petition. The Petitioner has, therefore, also overcome the findings of the failed site visit. The Director's decision to the contrary is withdrawn.

#### B. Compensation

Nonetheless, the petition remains denied. On the Form I-360, the petitioning organization stated it would compensate the Beneficiary \$15,000 annually. However, the record shows that the Petitioner has paid the Beneficiary less in more recent years than it had previously. Although IRS tax documentation in the record indicates the Petitioner compensated the Beneficiary \$14,996 in 2011,

copies of the front and back sides of twelve checks from the Petitioner to the Beneficiary show that the Petitioner compensated the Beneficiary only \$12,000 in 2012. For 2013, copies of the front and back sides of seven checks from January through April of 2013 show the Petitioner paid the Beneficiary only \$4,100. The consistent decline in the Petitioner's compensation to the Beneficiary does not indicate that the Petitioner will pay the Beneficiary the \$15,000 per year it claims it will pay.

We issued an RFE requesting documentation of the Petitioner's ability and intent to compensate the Beneficiary as claimed, including IRS tax documentation for 2012 and 2013. However, the Petitioner did not respond to our request. The Petitioner has not provided verifiable evidence of how it intends to compensate the Beneficiary and therefore has not met the requirements of 8 C.F.R. § 204.5(m)(10).

#### IV. CONCLUSION

The Petitioner did not respond to our RFE, and has consequently abandoned the appeal. Further, the Petitioner has not provided the required documentation to establish how it intends to compensate the Beneficiary.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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 A-O-C-*, ID# 12454 (AAO Nov. 20, 2015)