



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

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

MATTER OF F-B-C-

DATE: OCT. 13, 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 an evangelist. *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 remanded.

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 he gained his 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; 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. . . .

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 15 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 March 13, 2014, the Petitioner filed a Form I-360 seeking to classify the Beneficiary as a special immigrant religious worker. The Director issued a notice of intent to deny (NOID), requesting, among other things, additional documentation addressing the Beneficiary's work history and evidence that the Beneficiary was employed while in lawful immigration status. In response to the NOID, the Petitioner submitted the district court decision for *Shalom Pentecostal Church*.

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 notes that the Third Circuit upheld the district court's decision. *Shalom Pentecostal Church v. U.S. Dep't of Homeland Sec.*, 783 F.3d at 165-67.

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 if the Beneficiary 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 Beneficiary 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. Issues on Remand

1. Two Years of Experience

While we withdraw the Director's concerns regarding whether the Beneficiary was lawfully employed, the Petitioner must still demonstrate that the Beneficiary has the necessary two years of experience. Section 203(B)(4)(iii) of the Act; 8 C.F.R. § 204.5(m)(4), (11). The Beneficiary's tax returns reflect self-employment solely as a travel guide in 2013. The Director may wish to consider whether the Petitioner has documented that the Beneficiary has the necessary two years of experience.

2. Compensation

The regulation at 8 C.F.R. § 204.5(m)(10) provides the initial requirements relating to the Petitioner's ability to compensate the Beneficiary. The regulation allows the Petitioner to provide past compensation for similar positions, and requires documentation from the Internal Revenue Service (IRS) or an explanation in its absence in addition to comparable and verifiable evidence. The record does not contain the Petitioner's documentation from the IRS, nor did the Petitioner submit an explanation for its absence. The Petitioner did provide its Statement of Activities financial documents. The Director may wish to consider whether the Statement of Activities constitutes comparable and verifiable documentation of the Petitioner's ability to compensate the Beneficiary.

3. Full Time Position

The regulation at 8 C.F.R. § 204.5(m)(2) provides that, in order to be eligible for classification as a special immigrant religious worker, a beneficiary must: "Be coming to the United States to work in a full time (average of at least 35 hours per week) compensated position . . ." The Director may wish to consider whether the Petitioner has submitted an hourly breakdown for the duties of the position to demonstrate that the proposed position will be full time.

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4. Qualifying Position

The regulation at 8 C.F.R. § 204.5(m)(5) provides the definition of a minister, a religious occupation, and a religious vocation. For example, if an evangelist for the Petitioner meets the regulatory definition of a minister, it should submit evidence that the Beneficiary:

- 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;
- Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;
- Performs activities with a rational relationship to the religious calling of the minister; and
- Works solely as a minister in the United States, which may include administrative duties incidental to the duties of a minister.

The Director may wish to consider whether the Petitioner has demonstrated that the proposed position meets the requirements of a minister, religious occupation, or religious vocation.

5. Denominational Membership

The Beneficiary attained his two-year membership at more than one institution. The regulation at 8 C.F.R. § 204.5(m)(5) provides that denominational membership in a religious denomination "means a religious group or community of believers that is governed or administered under a common type of ecclesiastical government." The Director may wish to consider whether the record contains evidence demonstrating the commonalities between the governing structure of [REDACTED] and the Petitioner's own governing structure.

IV. CONCLUSION

As discussed above, the Petitioner has overcome the stated basis for the denial decision, but the petition is being remanded for the Director to consider whether the Petitioner has established that the Beneficiary has the necessary two years of experience, the level at which the Beneficiary will be compensated, if the proposed position will be full time, and that the proposed position is a qualifying one in accordance with the regulation.

The matter will be remanded for a new decision. The Director may request any additional information deemed warranted and should allow the Petitioner to submit additional evidence in support of its position within a reasonable period of time. 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).

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ORDER: The matter is remanded to the Director for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of F-B-C-*, ID# 13936 (AAO Oct. 13, 2015)