



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

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

MATTER OF S-R-S-O-A-

DATE: OCT. 26, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a Sikh temple, seeks to classify the Beneficiary as a special immigrant religious worker to perform services as a Priest. *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. We will remand the appeal.

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 attained his experience for the position while in the United States, in a lawful immigration status. On appeal, the Petitioner submits a brief with additional documentary evidence.¹

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;

¹ The Petitioner filed the Form I-290B, Notice of Appeal or Motion, without a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative and an official of the Petitioner signed the form. Subsequently, an attorney filed a Freedom of Information Act request on behalf of the Beneficiary, accompanied by a Form G-28 that the Beneficiary signed but the attorney did not. We notified counsel that the Form G-28 was not properly filed, but counsel did not submit a properly filed Form G-28 in response. Regardless, that Form G-28 pertained to representation of the Beneficiary. The Petitioner is not considered to be represented by counsel relating to this Form I-290B.

(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;² 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.

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.

(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 April 2, 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 evidence (RFE), requesting, among other things, additional documentation addressing the Beneficiary's work history and confirmation that the Beneficiary was employed while in lawful immigration status. In response to the RFE, the Petitioner submitted exhibits relating to the Beneficiary's R-1 status, in addition to material relating to other issues noted in the Director's RFE.

The Director found that the Petitioner did not provide 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.

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. 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, as requested in the RFE, an hourly breakdown for the duties of the position to demonstrate that the proposed position will be full time.

2. Qualifying Position

The regulation at 8 C.F.R. § 204.5(m)(5) provides the definition of a minister and the Petitioner indicated on the Form I-360 that the position is that of a minister. As the Petitioner asserted the position of a Priest 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, including whether the Petitioner documented the denomination's standards for training and whether the Beneficiary will work solely as a minister.

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 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).

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 S-R-S-O-A-*, ID# 12452 (AAO Oct. 26, 2015)