



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

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

MATTER OF I-B-D-E-M-D-V

DATE: JAN. 4, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a church, seeks to employ 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, finding that the Petitioner 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 September 30, 2016, 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, 2016, 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;

....

(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

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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,¹ 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. 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 employ the Beneficiary as a pastor. It indicated that the Beneficiary would work at its church in [REDACTED] New Jersey, as well as at another location in [REDACTED] New Jersey. In response to a question regarding the proposed salary and/or non-salaried compensation, the petitioning organization stated, "Beneficiary is paid \$300 weekly and receives the value of \$1,000 per month in housing allowance; Mission church in [REDACTED] pays an additional \$312.50 weekly." The Director issued a request for evidence (RFE), requesting, among other things, verifiable documentation of how the Petitioner intends to compensate the Beneficiary and the Beneficiary's lawful immigration status. In response to the RFE, the Petitioner submitted a brief and additional evidence, including, but not limited to: evidence of the Beneficiary's status as an R-1 nonimmigrant; a letter from the church's Treasurer; a letter from the [REDACTED] church's Treasurer; a letter from the Beneficiary's brother; and copies of tax documents.

The Director found that the Beneficiary's R-1 nonimmigrant status expired on July 31, 2012. The Director further found that the Beneficiary did not have authorization to work when he changed his status to that of a B-2 nonimmigrant. Therefore, the Director concluded that the Beneficiary did not have the requisite two years of continuous religious work experience in lawful immigration status. The Director denied the petition accordingly and 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 July 29, 2015, we issued an RFE, providing the Petitioner with an opportunity to address unexplained inconsistencies in the record regarding the Petitioner's intent and ability to compensate the Beneficiary as claimed. We also noted that the regulation at 8 C.F.R. § 204.5(m)(7)(xii) requires that the prospective employer has the intention and ability to compensate the Beneficiary at a level at which he and his accompanying family members will not become public charges. The Petitioner responded to our RFE with new evidence.

¹ 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).

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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). As explained below, although the Petitioner has overcome the Director's reason for denial, the Petitioner has not established its ability and intent to compensate the Beneficiary as claimed.

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. As the Director found, the record indicates that the Beneficiary has been employed at the Petitioner's church in [REDACTED] since February of 2011, as well as at the church in [REDACTED] since August of 2007. The record includes, but is not limited to, tax records, numerous letters from co-workers and other church members, and the Beneficiary's R-1 visa, all showing that the Beneficiary worked as a pastor for at least two years until the date the Form I-360 was filed on January 28, 2013.

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 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 compensates the Beneficiary a total of \$612.50 per week (\$300 per week from the church in [REDACTED] and \$312.50 per week from the church in [REDACTED]), plus \$1,000 per month in a housing allowance. However, in response to the Director's RFE, a letter from [REDACTED], the church's Treasurer, stated that the Beneficiary receives a salary of \$600 per month, which is inconsistent with the Form I-360 which indicated \$300 per week. Similarly, with respect to the church in [REDACTED] a letter from the Treasurer of that location, [REDACTED] stated that the Beneficiary was compensated \$15,000 in 2012. However, according to the Beneficiary's 2012 IRS Form 1099-MISC, Miscellaneous Income, the church in [REDACTED] paid him \$14,375. Both of these figures are inconsistent with the Form I-360 which indicated the [REDACTED] church pays the Beneficiary \$312.50 per week (the equivalent of \$16,250). There is no corroborating evidence to support the Petitioner's contention that the church in [REDACTED] paid the Beneficiary \$312.50 per week in 2012.

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as claimed. Furthermore, with respect to a \$1,000 per month housing allowance, the record contained only a letter from the Beneficiary's brother indicating that he provides housing for the Beneficiary and his wife.

In response to our RFE, the Petitioner submits, among other things, a letter from [REDACTED] which states that the Beneficiary's current gross monthly salary is \$900. This letter continues to contradict the Form I-360's statement of \$300 per week of compensation and provides no explanation for the discrepancy. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Also in response to our RFE, the Petitioner asserts that the Beneficiary and his wife will not become public charges and submits the couple's amended tax returns for 2012, 2013, and 2014. For 2012, the Beneficiary had previously reported an adjusted gross income of \$9,126 which was amended to \$21,213. For 2013, the Beneficiary's previously adjusted gross income of \$10,553 was increased to \$16,817. Similarly, for 2014, the Beneficiary's previously adjusted gross income of \$5,640 was changed to \$24,663. Although these amended tax returns show that the Beneficiary and his wife earned more income than they had previously claimed, they do not show that the increase in income was paid by the petitioning organization. Moreover, we note that all three of the amended tax returns were filed with the IRS on August 17, 2015, after we issued our RFE. The Beneficiary's only explanation of the changes was that the amended returns were "submitted to report additional income not included on [the] original return[s]." Considering the amended tax returns appear to have been filed in response to our RFE for the sole purpose of establishing that the Beneficiary and his wife will not become public charges, we afford them limited probative value. *Cf. Baldwin Dairy, Inc. v. United States*, 2015 WL 4742586, at *6 (W.D. Wis., Aug. 11, 2015) ("the AAO was justifiably skeptical about [the Petitioner's] motives and whether the company simply 'amend[ed] its tax return for the sole purpose of establishing its ability to pay the proffered wage.'").

Regarding the housing allowance, in response to our RFE, the Petitioner contends that the Beneficiary's brother provides housing as a contribution to the church for which he is given credit as a charitable contribution. According to the Petitioner, the amount of \$1,000 per month is "based on the average rentals in New Jersey for a one bedroom apartment." However, there is no evidence to support these contentions and, in any event, the regulation at 8 C.F.R. § 204.5(m)(7)(xi) requires that any compensation must be paid "by the attesting employer." Considering the record in its totality, the Petitioner has not met its burden of meeting the regulatory requirements relating to compensation.

IV. CONCLUSION

The Petitioner has not established its ability and intent to compensate the Beneficiary as claimed in the petition.

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, that burden has not been met.

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ORDER: The appeal is dismissed.

Cite as *Matter of I-B-D-E-M-D-V-*, ID# 12443 (AAO Jan. 4, 2016)