



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

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

MATTER OF B-F-J-S-D-A-M-C-

DATE: JAN. 13, 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 classify the Beneficiary as a special immigrant religious worker to perform services as a religious bible worker. *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 dismissed.

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, 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 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).

II. PERTINENT FACTS AND PROCEDURAL HISTORY

On September 25, 2013, the Petitioner filed a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. 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 issued a notice of intent to deny (NOID) the petition and ultimately concluded there were several discrepancies associated with the petition and denied the petition accordingly. On appeal, the Petitioner submits a statement.

III. ANALYSIS

A. Attestation on the Originally Filed Petition

The Employer's Attestation portion of the original Form I-360 was signed by the Petitioner, but was not dated. The Director served a NOID noting this as one of several deficiencies. After the Petitioner supplied a new form with the attestation dated, the Director denied in part determining that this new submission was a material change to the petition without providing a discussion of how the inclusion of the date was material to the Petitioner's eligibility. We do not agree with the Director that supplying a missing date constitutes a material change as described in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Therefore, the Petitioner's new attestation accompanying the NOID response is recognized as valid under the present fact pattern, and the Director's finding to the contrary is withdrawn.

B. Qualifying Organization

1. Authority

The regulation at 8 C.F.R. § 204.5(m)(3) states that, in order to be eligible for classification as a special immigrant religious worker, a beneficiary must 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. The regulation at 8 C.F.R. § 204.5(m)(5) provides the following definitions:

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the

Matter of B-F-J-S-D-A-M-C-

Internal Revenue Code and possessing a currently valid determination letter from the [Internal Revenue Service (IRS)] confirming such exemption.

Tax-exempt organization means an organization that has received a determination letter from the IRS establishing that it, or a group that it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the Internal Revenue Code . . .

Regarding evidence of the Petitioner's tax-exempt status, the regulation at 8 C.F.R. § 204.5(m)(8) requires the following:

Evidence relating to the petitioning organization. A petition shall include the following initial evidence relating to the petitioning organization:

- (i) A currently valid determination letter from the Internal Revenue Service (IRS) establishing that the organization is a tax-exempt organization; or
- (ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt

2. Analysis

The Petitioner initially provided a June 26, 2000, IRS letter stating the [redacted] was included in the group ruling under the [redacted] tax exempt status. The Petitioner also submitted an October 18, 2005, letter from the [redacted] indicating the [redacted] was covered by the group exemption. The Petitioner also offered the January 10, 2011, letter from the [redacted]. Although the Director did not discuss this letter, it supports the Petitioner's assertion that it is considered as part of a subordinate group under the [redacted] tax exempt status. As such, the Director's adverse determination on this issue is hereby withdrawn.

C. Experience Gained While in a Lawful Immigration Status

1. Authority

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 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 be in lawful immigration status.

2. Analysis

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.

D. Qualifying Experience

1. Authority

The regulation at 8 C.F.R. § 204.5(m)(11) provides the following requirements if the Beneficiary was employed in the United States during the two years immediately preceding the filing of the application:

- (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.

2. Analysis

The Petitioner asserts that the Beneficiary had worked for its church for the past two years when it filed the petition. The Director's NOID indicated the initially submitted material was not sufficient and provided a quote of the regulation at 8 C.F.R. § 204.5(m)(11). In response, the Petitioner offered the Beneficiary's amended tax forms, but did not comply with the regulation that requires the

submission of “IRS Form W-2 or certified copies of income tax returns” relating to foreign nationals that receive salaried compensation. The Beneficiary’s 2012 tax forms are not certified copies in accordance with the regulation. As such, the remaining evidence in the record are not sufficient to meet the Petitioner’s burden to establish the Beneficiary possessed the qualifying prior experience during the two years immediately preceding the petition. *See* 8 C.F.R. § 204.5(m)(11).

E. Compensation

1. Authority

The regulation at 8 C.F.R. § 204.5(m)(10) provides the initial requirements relating to how the Petitioner intends to compensate the Beneficiary stating:

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. If IRS documentation, such as IRS Form W-2 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.

2. Analysis

The Petitioner provided the Beneficiary’s 2012 Form 1040X, Amended U.S. Individual Income Tax Return, 2012 Schedule C, Profit or Loss From Business, other tax forms, its own bank statements covering the period of July 2013 and August 2013, receipts of biweekly cash payments of \$950 to the Beneficiary, and its annual budget for the 2014 fiscal year. The Petitioner’s bank statements do not reflect biweekly checks in amounts equal to the cash payments of \$950 and the Petitioner did not include the pages listing the fees and other withdrawals, although those only totaled \$335 in August 2013. While the Petitioner submitted several items, the regulation at 8 C.F.R. § 204.5(m)(10) requires IRS documentation showing the Beneficiary received a salary, “such as IRS Form W-2 or certified tax returns” or if such evidence “is not available, an explanation for its absence must be provided, along with comparable, verifiable documentation.” Although the Petitioner indicated that it did not issue the Beneficiary a Form W-2, Wage and Tax Statement, the Beneficiary’s Form 1040X is not a certified copy from the IRS. The Petitioner also did not offer the Beneficiary’s Form 1099-MISC, Miscellaneous Income, for the record. As the regulation requires IRS materials or comparable and verifiable exhibits, the Petitioner’s has not satisfied the regulation.

Even if the regulation did not require IRS documentation as defined above, the Petitioner’s budget on record is not verifiable. First, not all of the budget numbers are internally consistent. The items under the Building Fund Income heading properly add up to the total of \$18,000. Likewise, the

individual Administrative Expenses add up to the listed total of \$2,660. That is not the case, however, for other categories. Specifically, Basic Giving Offering/Tithes, Gifts Income, and Church Sabbath School Offering total \$87,500 rather than the \$113,500 Operating Fund Income. Similarly, the budget lists \$2,000 for a part-time religious Bible worker and \$100 for a part-time organist/musician, but \$4,800 as the total expenses for part time employees. Similarly, the budget lists annual rent expenses of \$40,012, but the sole item in that category, rent payments, are only \$3,376. Even if the rent payments represent a monthly payment, which is not the case with other items on the budget, 12 payments of \$3,376 would equal \$40,512. As a final example, the items under General Ministry Expenses total \$6,625, but the budget totals those expenses as \$7,125. An internally inconsistent budget does not satisfy 8 C.F.R. § 204.5(m)(10). Moreover, The Petitioner submitted bank statements for two months. Statements covering such a short period cannot verify the reasonableness of the Petitioner's annual budget. In light of the above, the Petitioner has not shown how it intends to compensate the Beneficiary in accordance with the regulation at 8 C.F.R. § 204.5(m)(10).

IV. CONCLUSION

For the reasons discussed above, the Beneficiary's lawful status when she gained her experience is no longer a relevant issue as it relates to this petition. Further, the Petitioner overcame the Director's adverse determination as it relates to the lack of a date accompanying the signature on the attestation, and that it is a qualifying organization pursuant to 8 C.F.R. § 204.5(m)(5). However, the Petitioner has not established how it intends to compensate the Beneficiary, or that it has submitted evidence sufficient to satisfy the qualifying experience regulation at 8 C.F.R. § 204.5(m)(11).

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, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of B-F-J-S-D-A-M-C-*, ID# 15093 (AAO Jan. 13, 2016)