Business Immigration, Workforce and Compliance Law

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Supplemental Materials

Class #8

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U.S. Citizenship and Immigration Services

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Policy Memorandum

SUBJECT: Procedures for Calculating the Maximum Period of Stay for R-1 Nonimmigrants (AFM Update AD12-03)

Purpose

This memorandum provides instruction to Immigration Service Officers who adjudicate R-1 nonimmigrant petitions for aliens who are coming to the United States temporarily to perform religious work, and their dependents. This memorandum outlines the procedure to be used for recapturing time spent outside the United States by R-1 nonimmigrants when seeking an extension of their R nonimmigrant status.[1] This guidance applies to all R-1 petitions seeking to recapture time that are currently pending with USCIS or to new petitions filed on or after the date of this memorandum.

Background

The Religious Worker (R-1) nonimmigrant classification is for aliens seeking to enter the United States for a period not to exceed 5 years solely to work as a minister or in a qualifying religious occupation or vocation.[2] In calculating the 5-year maximum period of stay, USCIS has not subtracted time in which the R-1 religious worker was traveling or residing outside of the United States following his or her initial admission in R-1 status.

Rationale for Updated Field Guidance

Certain nonimmigrants who have spent the maximum period of stay authorized by their nonimmigrant classification are, by statute, prohibited from having a new petition in the same status filed on their behalf until they have remained outside of the United States for a specific period of time (also known as a "limitation on admission" or "limitation on total stay").[3]

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[1] The term recapture in this memo is used as a short-hand for the period of time spent outside the United States that an alien seeks to have subtracted from their maximum period of stay in R-1 status, as governed by INA 101(a)(15)(R)(ii), in order to have that period of time added back (i.e., "recaptured") when the alien requests an extension of their R-1 status.

[2] *See* INA 101(a)(15)(R)(ii) (referring to religious work described in INA 101(a)(27)(C)(ii)). The beneficiary of an R-1 petition must have been a member of a religious denomination having a bona fide nonprofit religious organization in the United States for at least 2 years immediately preceding the filing of the I-129 petition. *See id.*

[3] *See, e.g.,* H-1B limitation on admission (1 year), *see* 8 CFR 214.2(h)(13)(iii); L-1 limitation on period of stay (1 year), *see* 8 CFR 214.2(l)(12); R-1 limitation on total stay (1 year), *see* 8 CFR 214.2(r)(6).

Currently, USCIS policy guidance provides that H-1B and L-1 nonimmigrant aliens, and their dependents, may recapture time spent outside of the United States when calculating their maximum period of authorized stay.[4] The policy of allowing recapture is designed to permit a qualifying nonimmigrant to spend the maximum permitted period of time allowed by his or her classification in the United States before he or she is required to spend a specific period outside of the United States in order to file a new petition for the same status.

USCIS has determined that extending the recapture policy to the R-1 nonimmigrant classification is appropriate, and that such a policy is consistent with R-1 statutory and regulatory language and the purpose and intent of the R-1 visa classification, as explained below. USCIS has further determined that the spouse and minor child of a principal alien who recaptures periods of time spent outside of the United States towards an extension of R-1 status may receive periods of R-2 stay coextensive with that of the principal alien.[5]

A. Recapture is Consistent with R-1 Statute and Regulations Describing Limitation on Stay.

Section 101(a)(15)(R) of the Immigration and Nationality Act (INA) states that a religious worker may "enter the United States for a period not to exceed 5 years."[6] The regulations provide that a religious worker "may be admitted as an R-1 alien or changed to R-1 status for an initial period of up to 30 months from date of initial admission."[7] The terms "admission" and "admitted" are statutorily defined as the "lawful entry of an alien into the United States after inspection and authorization by an immigration officer."[8] The R-1 status may then be extended for an additional 30 months "provided the total period of time spent in R-1 status" does not exceed the maximum 5 years.[9] Furthermore, "an alien who has spent five years in the United States in R-1 status may not be readmitted to or receive an extension of stay in the United States under the R visa classification unless the alien has resided abroad and has been physically present outside the United States for the immediate prior year."[10] USCIS has determined that the R-1 regulations permit an interpretation that only time actually spent in the United States in R-1 status to be counted towards the maximum 5 years of authorized stay.[11]

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[4] *See* Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants (AFM Update AD 05-21), Interoffice Memorandum from Michael Aytes, USCIS Acting Associate Director of Domestic Operations (Oct 21, 2005).
[5] *See* 8 CFR 214.2(r)(4)(ii).
[6] *See also* 8 CFR 214.2(r)(1).
[7] *See* 8 CFR 214.2(r)(4)(i).
[8] *See* INA 101(a)(13)(A).
[9] *See* 8 CFR 214.2(r)(5) (extension of stay or readmission).
[10] *See* 8 CFR 214.2(r)(6) (limitation on total stay).
[11] An individual may be permitted to recapture time spent outside of the United States regardless of whether they are currently in the United States or abroad and regardless of whether they currently hold R-1 status. An individual who has remained outside of the United States for at least one year immediately prior to the filing an R-1 petition is eligible to seek a new 5 year period of stay as an R-1.

B. Recapture is Consistent with the Purpose and Intent of the R-1 Classification.

An alien may be admitted as an R-1 nonimmigrant "for the purpose of conducting the activities of a religious worker for a period not to exceed five years."[12] An R-1 nonimmigrant may enter the United States after the date reflected on the approved petition. He or she, however, may have to leave the United States during the period of stay reflected on the approved petition for personal or professional purposes. It is not always the case that the petitioning organization will cease to need the religious worker at exactly the same date as the expiration of the period of stay that was initially requested on the petition. For this reason, it would benefit both the petitioning religious organization and the R-1 beneficiary if the petitioner is able to request that the alien beneficiary's stay be extended to "recapture" any time the alien spent outside of the United States during the approved period of stay.[13]

Field Guidance
USCIS officers who adjudicate R-1 nonimmigrant petitions are directed to follow the guidance provided in this memorandum which states that any days spent outside of the United States during the validity period of an R-1 petition will not be counted toward the maximum period of stay in the United States in R-1 status, provided that the alien remains eligible for the classification and is able to submit independent documentary evidence establishing that he or she was in fact physically outside of the United States during the day(s) for which the alien is seeking recapture.[14] The burden of proof rests with the petitioner, who files a petition with USCIS on behalf of the R-1 alien, to establish the alien's eligibility for any recapture benefits. This memorandum supersedes any previous guidance on requests pertaining to "recapturing" time for nonimmigrant workers admitted pursuant to INA § 101(a)(15)(R).

AFM Update
The Adjudicator's Field Manual is revised as follows:

1. Chapter 34.5(m) of the AFM is revised to read as follows:

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(m) Limitation on total stay.

An alien who has spent 5 years in the United States in R-1 nonimmigrant status may not be readmitted to or receive an extension of stay in the United States under the R nonimmigrant

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[12] *See* 8 CFR 214.2(r)(1).
[13] By contrast, the extension of a recapture policy to certain other nonimmigrant visa classifications would frustrate the intent and purpose of the classification, such as visa classifications which require a fixed schedule or evidence of a program itinerary.
[14] A "day" is construed to mean a full 24 hour calendar day. Partial days spent outside of the United States (e.g., an afternoon trip to Canada) will not be recaptured and added back to the total maximum period of stay.

classification unless the alien has resided abroad and has been physically present outside the United States for the immediate prior year, except for an R-1 nonimmigrant who:

(1) Is Eligible to Recapture Time Spent Outside the United States During the R-1 Validity Period. A religious worker "may be approved for temporary admission to the United States" for a period not to exceed 5 years. 8 CFR 214.2(r)(1); *see also* INA 101(a)(15)(R). A religious worker "may be admitted as an R-1 alien or changed to R-1 status for an initial period of up to 30 months from date of initial admission." 8 CFR 214.2(r)(4). The terms "admission" and "admitted" are defined as the "lawful entry of an alien into the United States after inspection and authorization by an immigration officer." INA 101(a)(13)(A). The authorized period of stay may be extended for an additional 30 months "provided the total period of time spent in R-1 status" does not exceed the maximum 5 years. 8 CFR 214.2(r)(5). Moreover, "an alien who has spent five years in the United States" in R-1 status may not be readmitted to or receive an extension of stay in the United States under the R visa classification unless the alien has resided abroad and has been physically present outside the United States for the immediate prior year. 8 CFR 214.2(r)(6). As a matter of policy, USCIS will count *only time spent physically in the United States* in valid R-1 status toward the 5-year maximum period of stay. When requesting an extension, the petitioner, on behalf of the R-1 nonimmigrant, may request that full calendar days spent outside the United States during the period of petition validity be recaptured and added back to his or her total maximum period of stay, regardless of whether they are currently in the United States or abroad and regardless of whether they currently hold R-1 status.

It is the burden of the petitioner, on behalf of the alien, to demonstrate continuing eligibility for the classification and that the alien is entitled to recapture time with appropriate evidence. The reason for the absence is not relevant to whether the time may be recaptured. Any trip of at least one 24-hour calendar day outside the United States for any purpose, personal or professional, can be recaptured.

(A) Evidence. The burden of proof remains with the R-1 petitioner, on behalf of the R-1 beneficiary, to submit evidence documenting periods of physical presence outside the United States when seeking an extension of petition validity and extension of stay as an R-1 nonimmigrant. The R-1 nonimmigrant is in the best position to organize and submit evidence of his or her departures from and readmissions to the United States. While a summary and/or charts of travel are often submitted to facilitate review of the accompanying documentation, independent documentary evidence (e.g., photocopies of passport stamps, I-94 arrival/departure cards, and/or plane tickets) establishing that the alien was outside the United States during all of the days, weeks, or months that he or she seeks to recapture is always required.

The fact that the burden may not be met for some claimed periods generally has no bearing on other claimed periods for which the burden has been met. Any periods for which the burden has been met may be added to the eligible period of admission upon approval of the application for extension of status. An alien may not be granted an extension of stay for periods that are not supported by independent documentary evidence. It is not necessary to issue a Request for Evidence (RFE) for any claimed periods unsupported by independent documentary evidence.

(B) Applicability to R-2 Dependents. The status of an R-2 dependent of a principal R-1 nonimmigrant is subject to the same period of admission and limitations as the principal alien. For example, if an R-1 nonimmigrant is able to recapture a two-week missionary trip abroad, then his or her R-2 dependents, if seeking an extension of stay, should be given an extension of stay up to the new expiration of the R-1 alien's period of stay.

(2) Is Eligible for a Seasonal or Intermittent Employment Exception.

(A) An R-1 nonimmigrant is eligible for this exception by demonstrating that he or she:

- Did not reside continually in the United States and that his or her employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year.

- Resides abroad and regularly commutes to the United States to engage in part-time employment.

(B) Evidence. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as: I-94 arrival/departure records, transcripts of processed income tax returns, and records of employment abroad.

2. The AFM Transmittal Memoranda button is revised by adding in numerical order a new entry to read:

AD 12-03 [INSERT DATE]	Chapter 34.5(m)	Provides guidance on recapturing time spent outside the United States during the 5-year period of authorized stay.

U.S. Department of Homeland Security

U.S. Citizenship and Immigration Services
Office of Public Engagement
Washington, DC 20529

U.S. Citizenship and Immigration Services

Questions & Answers

Religious Worker National Stakeholder Engagement

July 14, 2011 & July 28, 2011

Overview

On July 14, 2011 and July 28, 2011, the USCIS Service Center Operations Directorate in conjunction with the California Service Center hosted an engagement with the religious worker stakeholders. USCIS discussed issues related to the religious worker program including but not limited to RFEs, processing times, and on-site inspections. The information below provides a review of the questions discussed and the responses provided by USCIS.

Questions and Answers

Question 1: Despite the new regulations which codified that a foreign national may only be admitted in R-1 classification for the validity of the R-1 petition, up to a maximum of 30 months from the date of admission, U.S. Customs and Border Protection (CBP) sometimes admits R-1 nonimmigrants for 36 months, in accordance with the policy under the prior regulations. In such instances, what should the R-1 principal and their R-2 dependents do to correct the erroneously issued Form I-94?

> **Response:** The validity date errors on the I-94 should be corrected by bringing it to the attention of the port of entry that issued the I-94 or with the Deferred Inspection Office of CBP. You may wish to visit CBP's website at www.cbp.gov. 8 CFR 214.2(r)(4) only allows the initial period of admission in R-1 status up to 30 months from the date of the initial admission and that R-2 status is granted for the same period of time and subject to the same limits as the principal. 8 CFR 214.2(r)(5) further indicates that an R-1 alien who is maintaining status or is seeking readmission and who satisfies the eligibility requirements of this section may be granted an extension of R-1 stay or readmission in R-1 status for the validity period of the petition, up to 30 months, provided the total period of time spent in R-1 status does not exceed a maximum of five years. If the I-94 for R-1 status was issued beyond the initial maximum period of 30 months as stipulated in the regulations, it may have been issued in error by the CBP and should not be relied upon. Although neither the petitioner nor the beneficiary will be penalized for the error caused by the CBP officers, such error may affect the beneficiary's future immigration benefits if the beneficiary's stay exceeds the statutory maximum. Please note that Form I-102, Application for Replacement /Initial Nonimmigrant Arrival-Departure Document, should not be used to request USCIS to correct an error on Form I-94 issued by CBP, as USCIS cannot correct such errors.

Question 2: If an individual in an R-1 status travels outside of the U.S. during his or her authorized period of R-1 stay, can the period spent abroad be recaptured?

Response: No. There is no provision in the statute or the regulations for recapturing of time spent abroad in R status. However, as per 8 CFR 214.2(r)(6) the five-year limitation on the statutory maximum total period of stay does not apply to R-1 nonimmigrants who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year. Furthermore, the limitations do not apply to R-1 nonimmigrants who reside abroad and regularly commute to the United States to engage in part-time employment.

Question 3: Is an employer required to file a new petition for change of employment location of a beneficiary in an R-1 status under the new rule? For example, the petitioner filed the R petition which was approved for work at the location A listed on the Form I-129. If the petitioner would like to reassign the R-1 beneficiary to another location B within the same denomination, does the petitioner need to file a new petition? If so, which box must be marked on the Form I-129?

Response: The petitioner may be required to file an amended petition and receive an approval prior to the beneficiary's commencement of employment at the location different from that listed on the original approved R-1 petition if there is a material change in the terms or conditions of employment or the beneficiary's eligibility as specified in the original approved petition. The Employer Attestation which is part of the R-1 Classification Supplement to Form I-129 contains items such as the number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees; and the specific location(s) of the proposed employment. Changes in location of employment may constitute material changes to the terms and conditions of employment as specified in the original approved petition. An amended petition can be filed, with fee, by checking the box "f" under item 2 in Part 2 of the Form I-129.

Question 4: The new rule indicates that the petitioner (employer) must be a tax-exempt organization under section 501(c)(3) of the IRC. Therefore, does the beneficiary's work location have to be tax exempt under section 501(c)(3) of the Internal Revenue Code (IRC) or one having a group tax exemption?

Response: The petitioner should establish that the location where the beneficiary will work is covered by the group ruling issued to the petitioning central organization. This may be accomplished through the submission of a valid determination letter from the IRS issued to the petitioning central organization along with evidence such as an official directory listing the location of the beneficiary's employment reflecting that the intended location is part of that group ruling. With regard to the statement that the new rule only requires the petitioning employer be tax-exempt under section 501(c)(3) of the IRC, it should be noted that a job offer is required for the R-1 classification. According to 8 CFR 214.2(r)(1)(iv), an R-1 nonimmigrant must be coming to or remaining in the United States at the request of the petitioner to work for the petitioner. Furthermore, 8 CFR 214.2(r)(13) states:

An R-1 alien may not be compensated for work for any religious organization other than the one for which a petition has been approved or the alien will be out of status. A different or additional employer seeking to employ the alien may obtain prior approval of such employment through the filing of a separate petition and appropriate supplement, supporting documents, and fee prescribed in 8 CFR 103.7(b)(1).

Therefore, it is important to establish the nexus between the petitioner and the beneficiary's employment location to ensure that the location where the beneficiary will work is part of the petitioning organization. Tax-exempt status of the petitioning organization and the beneficiary's employment location is one of the indications to establish such connection.

Question 5: When one petitioner submits multiple petitions for multiple beneficiaries, can all the petitions submitted by the same petitioner be adjudicated by the same adjudicators?

> **Response:** CSC has sole jurisdiction over religious worker petitions and there is a dedicated team of adjudicators assigned specifically to adjudicate religious worker petitions.

Question 6: What is the current status of the Ruiz Diaz litigation?

> **Response:** On May 5, 2011, the U.S. District Court for the Western District of Washington, granted USCIS' motion for summary judgment dismissing the litigation. This decision is currently on appeal to the Ninth Circuit. As of November 8, 2010, USCIS no longer accepts forms I-485, I-765, or I-131filed concurrently with or based on a pending I-360. To date, an I-485, I-765, or I-131 application filed where the underlying petition is an I-360 petition for a religious worker must be based on an *approved Form* I-360.

Question 7: The new religious worker regulations changed the definition of "religious denomination" slightly from the old regulations. Retained in the new definition, found at 8 CFR 204.5(m)(5) and 8 CFR 214.2(r)(3), is the requirement of some form of "ecclesiastical government" used to govern a religious group. The comments on this definition in the preamble to the new regulations interpret the phrase quite broadly. The preamble states, "... the definition of 'religious denomination' does not require a hierarchical governing structure.... USCIS is aware that some denominations officially shun such structures. The focus of the regulation is, instead, on the commonality of the faith and internal organization of the denomination." Moreover, the regulation states: "thus, an individual church that shares a common creed with other churches, but which does not share a common organizational structure or governing hierarchy with other churches, can satisfy the 'ecclesiastical government' requirement of the 'religious denomination' definition by submitting a description of its own internal governing or organizational structure."

The new regulations seem to introduce some flexibility into the denominational membership requirement by defining "denominational membership" as "membership during at least the two-year period immediately preceding the filing date of the petition, IN THE SAME TYPE of religious denominational as the United States religious organization where the alien will work." The "same type" language appears to be an attempt to introduce such flexibility, particularly given the comments in the preamble mentioned above.

Can you comment on how CSC views the "same denomination" requirement as applied to Christians who maintained membership in a non-denominational church outside the U.S. and who seek to enter the U.S. to work in a religious worker capacity at another non-denominational church which does not share a common ecclesiastical governing structure with the entity abroad?

> **Response:** A religious denomination is defined in 8 C.F.R. §204.5(m)(5) and 214.2(r)(3) as "a religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:
>
> (A) A recognized common creed or statement of faith shared among the denomination's members;
> (B) A common form of worship;
> (C) A common formal code of doctrine and discipline;
> (D) Common religious services and ceremonies;
> (E) Common established places of religious worship or religious congregations; or
> (F) Comparable indicia of a bona fide religious denomination"
>
> Thus, although the definition of "religious denomination" does not require a hierarchical governing structure, the foreign and U.S. non-denominational churches must be governed by a common ecclesiastical government and meet one or more of the requirements reflected in

A through F above.

Question 8: USCIS supplemental guidance dated January 5, 2009 stated that the final religious rule, which changed the legal requirements for I-360 religious worker petitions effective November 2008, does not apply retroactively to I-360 petitions filed prior to November 2008. Accordingly, the beneficiary would not need 2 years of authorized religious work prior to filing an I-360 petition if the I-360 petition was filed before November 2008. Can you please confirm that USCIS continues to apply this guidance and does not retroactively apply the final religious worker rule?

Response: The Supplemental Questions and Answers dated January 5, 2009 does not state that the religious worker final rule, which became effective on November 26, 2008, does not apply retroactively to I-360 petitions filed prior to the effective date of the final rule. Rather, it indicates that the final rule is not retroactive in the context of questions that ask about R-1 visas issued under the previous regulations without a petition approval by USCIS as well as R-1 visas issued based on an I-129 R petition approved under the previous regulations, as long as the prior approval has not been revoked under the new regulations. The preamble to the final rule states that all cases pending on the rule's effective date and all new filings will be adjudicated under the standards of the new rule. It further states that if documentation is required under the new rule that was not required before, the petition will not be denied. Instead, the petitioner will be allowed a reasonable period of time to provide the required evidence or information. Accordingly, if the I-360 petition was filed prior to but was pending on the final rule's effective date, it would be adjudicated under the new regulations, which require that the requisite two years of continuous religious work be authorized if the employment was in the U.S.

Question 9: What is suggested for a religious organization that claims it never has had the requirement to obtain a 501 (c)(3) letter because it can show it is a house of worship and a non-profit organization. Such organizations also do not file taxes, all because these are costly to small organizations. How can such an organization still sponsor a religious worker visa or permanent worker application?

Response: A religious organization must apply for and receive an IRC § 501(c)(3) determination letter to demonstrate non-profit status if it wishes to utilize the R-1 nonimmigrant or the special immigrant religious worker program. The requirement to submit the IRC § 501(c)(3) letter is clearly stated in 8 C.F.R. §§ 214.2(r) (9) and 204.5(m)(8). Failure to comply with this requirement will result in an unfavorable decision of the filed petition.

To further clarify, the following is excerpted from the *Special Immigrant and Nonimmigrant Religious Workers; Special Immigrant Nonminister Religious Worker Program Act,* 73 Fed. Reg 72276. at 72280 (Nov. 26, 2008):

USCIS recognizes that the IRS does not require all churches to apply for a tax-exempt status determination letter, but has nevertheless retained that requirement in this final rule. *See* Internal Revenue Service, *Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities under the Federal Tax Law* (IRS pub. no. 1828, Rev. Sept. 2006). A requirement that petitioning churches submit a tax determination letter is a valuable fraud deterrent. An IRS determination letter represents verifiable documentation that the petitioner is a bona fide tax-exempt organization or part of a group exemption. Whether an organization qualifies for exemption from federal income taxation provides a simplified test of that organization's non-profit status.

Question 10: Can more than 2 years of part time work of under 35 hours per week for the same religious organization qualify for filing an I-360 for purposes of showing the beneficiary worked at least 2 years prior to filing for at least 35 hours per week?

Response: No. The qualifying position must be a full-time position.

According to 8 CFR 204.5(m)(4), religious workers must:

(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 ...

Therefore, we need to look to 8 CFR 204.5(m)(2) which states that religious workers must:

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

As 8 CFR 204.5(m)(2) specifically states that the position must have been full-time, and 8 CFR 204.5(m)(4) requires that the religious worker have worked continuously for two years in one of the positions described in (m)(2), the qualifying position must have been full-time (at least 35 hours).

Question 11: Please address the continuing problem that originates at the Phoenix Lockbox which rejects or "does not recognize" a properly filed G-28 Notice of Appearance on behalf of a religious organization petitioner using the I-360 form.

Response: USCIS is aware of the issues with Lockbox's system not being able to match the petitioning organization listed on the Form I-360 with the accompanying G-28 and is working on the system fix which is scheduled to be completed by September of 2011. In the interim, Lockbox is conducting a manual workaround to ensure that a receipt notice will be sent to the accredited representative or attorney of record if a properly executed Form G-28 has been submitted with the I-360 petition. However, if a representative of record did not receive a receipt notice despite the fact that a properly executed Form G-28 has been submitted with the petition, he or she may contact the CSC I-360 Attorney Inquiry e-mailbox at CSC I-360 Attorney Inquiry@dhs.gov to request a duplicate receipt notice.

Question 12: Why are I-360 and I-485's being transferred to NSC?

Response: I-360 petitions for the religious worker category should not be transferred to NSC or TSC as the CSC has sole jurisdiction over the religious worker petitions as these petitions are adjudicated at CSC. Once the I-360 petition is approved by CSC, applicants may file their I-485 applications based on the approved I-360 petitions with either NSC or TSC depending on the jurisdiction.

Question 13: Can an application be amended after it's submission but before its adjudication?

Response: A petitioner should follow the standard process of contacting the National Customer Service Center (NCSC) at 1-800-375-5283 with a request to submit documentation or amend a petition. Depending on the requested changes, the petitioner may need to file an amended/ new petition.

Question 14: If an RFE seems overly burdensome, what can be done to alleviate that burden? For instance, a Roman Catholic Diocese which was visited earlier and which filed previously approved petitions was asked for lease agreements, rental agreements and/or mortgage payments for every parish

where the priest might be assigned (there are more than 100 parishes), copies of city or fire department occupancy permits, 3 months of utility bills and photographs of each church, inside and outside.

Response: Each petition is fact dependent and is adjudicated on its own merit. There may be circumstances in which it is necessary to request additional evidence to help establish the petitioner's qualification. The decision to generate an RFE is made on a case-by-case basis. If the petitioners feel that the RFE was inappropriately issued, they may contact the USCIS National Customer Service Center (NCSC) at 1-800-375-5283, or in a case of premium processing filing, the CSC premium processing hotline at the number reflected on the RFE coversheet.

Question 15: Does a Supervisor review RFEs before issuance so as to appropriately limit the scope of the request?

Response: Not all RFEs are reviewed by supervisors prior to issuance. However, supervisors have roundtable discussions with the adjudicators on a regular basis about various issues pertaining to religious worker petitions and are making every effort to avoid unnecessary RFE issuance.

Question 16: What is USCIS doing to ensure that filed materials are not requested again in an RFE (e.g. tax-exempt status)?

Response: Every effort is being made to avoid generating an RFE for evidence already submitted. However, the submitted evidence must meet the standards for approval and must not, for instance, be outdated or illegible and must contain an appropriate certificate of foreign language translation. As mentioned above in response to question 15, supervisors have roundtable discussions with the adjudicators on a regular basis about various issues pertaining to religious worker petitions and are making every effort to avoid unnecessary RFE issuance.

Question 17: Where a sponsor of more than one worker is asked for the same supporting documentation, is there a way to show a prior approval, similar to the ability to avoid more than one site inspection once a successful inspection has been conducted. Perhaps we can reference prior approvals to show the legitimacy of the petitioner and avoid unnecessary duplication of documents.

Response: USCIS' regulations and form instructions state that each petition must be filed with the required initial evidence as each petition is adjudicated on its own merit. Nevertheless, the petitioner may submit supplemental information (including approval notices for other cases from the same petitioner) if the petitioner believes that it helps bolster its case. However, the information submitted would only be supplemental; a petitioner must still submit the required initial evidence.

Question 18: Without preferring one religious group over another, does the fact that for instance a 60 year old Roman Catholic Diocese is widely known and is listed in The Official Catholic Directory, and that the Petition is signed by the Bishop, who also is listed in the Directory, have any evidentiary weight which might, in the exercise of discretion, limit the need for or at least, the scope of an RFE?

Response: Each petition is adjudicated on its own merit and must satisfy the burden of proof by a preponderance of the evidence. The lengthy history and ecclesiastical hierarchy of a religious entity may be relied upon by the adjudicating officer in the exercise of discretion. However, if certain evidence, as required by the regulations, is not submitted with the petition, an RFE may be issued.

Question 19: What suggestions do you have for supporting evidence which might make your work easier, speed up the process and mitigate against the likelihood of the issuance of an RFE?

Response: The requirements are clearly defined in 8 C.F.R. §§ 214.2(r)(9), (r)(10) and (r)(11), as well as 204.5(m)(8), (m)(9), (m)(10), (m)(11), and the Form I-129 and Form I-360 instructions. USCIS suggests that the petitioner provide sufficient evidence as described in the regulations listed above and the form instructions with the filing of the petition to minimize the likelihood of receiving an RFE and to increase adjudicative processing time. There are also optional checklists available to assist the petitioners in submitting the required supporting documentary evidence. Form M-736, Checklist for Religious Workers for Form I-129, and Form M-737, Optional Checklist for Special Immigrant Religious Workers Filing Form I-360, are available on the form's entry page for Form I-129 and Form I-360, respectively, on the USCIS website. The petitioners may find these resources helpful in completing the nonimmigrant and special immigrant religious worker petitions.

Question 20: What is being done to speed up I-129 processing so the adjudication time is between 2 weeks and 2 months like the other I-129 petitions.

Response: USCIS has made many successful efforts in recent months to reduce the processing time and pending backlog for I-129 R petitions. However, the frequent need to request initial or additional evidence, as well as the need for on-site inspections prevents comparing the time needed to process I-129 R petitions with those of other employment-based nonimmigrant visa classifications.

Question 21: To avoid a repeat situation that caused the Ruiz-Diaz case to be filed, what is being done to speed up the adjudication of I-360 petitions based on special immigrant religious worker status. The current processing time posted says 5 months, but the actual time is minimally 7 months and longer.

Response: Efforts are continually being made to complete adjudications as timely as possible, although there are other factors such as site checks and RFEs that affect the timeliness of a final decision.

Question 22: Why not allow Premium Processing for I-360s based on religious worker status for those who have already had a site inspection? Why has this not been considered, when it would follow the same rules as the I-129 which has been being executed successfully for religious workers?

Response: USCIS appreciates this suggestion and will take it into consideration.

Question 23: What is the best way to request an expedite when premium processing is not possible on an I-129.

Response: As indicated at the USCIS website, all expedite requests are reviewed on a case-by-case basis, and are granted at the discretion of the Director if certain criteria are met by the petitioner. The petitioner can make an expedite request by contacting the National Customer Service Center (NCSC) at 1-800-375-5283. The NCSC will take a "service request" and forward your expedite request to the office with jurisdiction over the application or petition. The petitioner also has the option of writing a letter to the service center. Please refer to www.uscis.gov for further information regarding request for expedited processing.

Question 24: There was a memo that permits Premium Processing for Churches or Organizations that have passed the site visits. How do we determine this fact, since no certificates or notice is given that state this fact?

Response: There is no memo, but USCIS posted on its website an announcement of resumption of premium processing service for the R-1 nonimmigrant religious worker visa classification along with questions and answers. As mentioned in the press materials, prior to accepting Form

I-907, Request for Premium Processing Service, USCIS will conduct a system search to verify whether or not a successful site inspection was completed at the location where the beneficiary will work. The petitioner may choose to submit a copy of the Form I-797 approval notice for the previously approved R petition to facilitate USCIS in locating the petitioner's site inspection record.

Question 25: Is there a method for the headquarter temple in a district to request on-site inspection of its smaller branches in the area if the headquarter owns all the temples in the district?

Response: No, USCIS does not accept requests for on-site inspections. If and when USCIS conducts an on-site inspection of the petitioning organization, the inspections may include the organization headquarters, or satellite locations, or the work locations planned for the applicable employee. See 8 CFR 204.5(m)(12) and 8 CFR 214.2(r)(16).

Question 26: Can a temple request an on-site inspection to be done in advance of a petition?

Response: No. On-site inspections cannot be requested in advance of or subsequent to a religious worker petition being submitted and received by USCIS. A petition, signed by the intending petitioner acknowledging his/her responsibilities, must be received in order for USCIS to conduct an on-site inspection.

Question 27: Why are certain organizations getting numerous on-site inspections when already having had one within the last 4 years?

Response: There is no set validity for site visits. Site inspections are conducted at the petitioner's location. Therefore, if the petitioning entity has multiple locations, it is possible that petitions are being filed that reflect the addresses of each organizational location instead of a central headquarters organization or main office. It is also possible that the petitioner's address has changed. Site inspections may also be requested at the discretion of an adjudicator if he or she identified an area of concern.

Question 28: Is the Service still doing site inspections? If so, what effect does a favorable report have on the filing of subsequent R-1 or Special Immigrant Petitions by the same religious organization and for how long?

Response: Pre-approval on-site inspections are still being conducted on any religious organization that has not already satisfactorily completed a site inspection. However, even after a petitioner satisfactorily completes a pre-approval site inspection, a post-adjudication site inspection may be conducted. USCIS may also elect to conduct a pre or post-adjudication site inspection in any case where derogatory information indicates fraud or in cases where the record indicates substantial changes in the petitioning organization.

Question 29: Might the Petitioner receive a copy of the report which could be included in subsequent filings?

Response: No, USCIS does not release the compliance review report. An approval notice is evidence of a petitioner's satisfactory completion of an on-site inspection and can be submitted with subsequent filings.

Question 30: For how long are site visits valid?

Response: There is no set validity for site visits. Please see the response to question 27 above.

Question 31: What is the current time it takes to complete a site inspection for a religious organization that has not had one to date? What is being done to speed up the wait time?

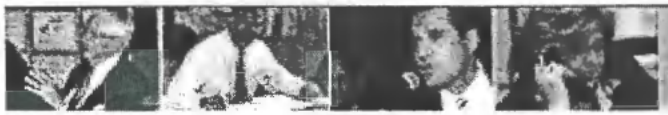
Response: It is anticipated that religious worker site visits will be done within 90 days of referral to the Center Fraud Detection Operation from an adjudicator after an adjudicator reviews the religious worker petition. The petitioners may request expedited processing if they meet the criteria listed on the USCIS website. Please refer to www.uscis.gov for further information.

Demonstrating the scope and effect of the site inspections, in FY 2010, USCIS performed 742 site inspections. Due to work carried over from FY 2009 (the first year of the Administrative Site Visit and Verification Program), FDNS reviewed 974 site visit reports. Of these 974, only 57 (6%) resulted in a "not verified" result (meaning that the information in the petition could not be immediately verified and that further review or action was warranted). Ultimately, 32 (3%) of the 974 petitions were denied or revoked. Looking at the scope of the fraud problem in 2005, when a Benefit Fraud Assessment revealed a 33% fraud rate in the religious worker program, these results are encouraging. It is important to note that not all of the 32 denials and revocations were necessarily based on fraud. Thus the actual fraud rate within the religious worker program is likely very much reduced from the 2005 rate.

While FDNS does not believe that performance of site inspections unreasonably delays processing of religious worker petitions, it is interested in knowing of any cases where processing times seem to be unusually long.

R-1: Nonimmigrant Religious Workers

- Sponsoring organization must be certified as tax-exempt by IRS (501(c)(3)
- Individual must have been a member of the denomination for the past two years
- Work must be in a religious vocation, religious profession or traditional religious occupation
- Can be part-time (minimum 20 hours per week) or concurrent (two part-time employers)
- Site visit by an agent or representative of USCIS is mandatory
- Maximum of five years (in 2½ year increments)



Special Immigrant Religious Workers

- Sponsoring organization must be certified as tax-exempt by IRS (501(c)(3)
- Individual must demonstrate two years of paid, full-time experience in the religious occupation
- Employment must be full-time (minimum of 35 hours per week)
- Site visit by an agent or representative of USCIS is mandatory
- Separated in minister and non-minister categories. The non-minister category must be renewed by Congress on a regular basis. Recently extended for three years.
- Can file permanent residence paperwork concurrently.

U.S. Department of Homeland Sec
U.S. Citizenship and Immigration Se
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

November 9, 2010 **PM-602-0010**

Policy Memorandum

SUBJECT: Ninth Circuit Court of Appeals Overturns the Permanent Injunction Issued by the District Court in *Ruiz-Diaz v. United States,* No. 09-35734 (9th Cir. Aug. 20, 2010); Revisions to the *Adjudicator's Field Manual (AFM)* Chapter 22.3(b)(1), AFM Update AD 11-01

Purpose

This Policy Memorandum (PM) implements the mandate of the Ninth Circuit Court of Appeals overturning the permanent injunction issued by the U.S. District Court for the Western District of Washington in *Ruiz-Diaz v. United States*, No. 09-35734.

Scope

Unless specifically exempted herein, this PM applies to all USCIS employees and contractors who handle Form I-360, Petition for Amerasian, Widower, or Special Immigrant, seeking the classification of special immigrant religious worker and Form I-485, Application to Register Permanent Residence or Adjust Status, where the underlying basis is an I-360 petition seeking the classification of special immigrant religious worker. Furthermore, this PM supplements the guidance issued in the August 5, 2009 Memorandum HQDOMO AD09-45, "Clarifying Guidance on the Implementation of the District Court's Order in Ruiz-Diaz v. United States, No C07-1881RSL (W.D. Wash. June 11, 2009) by adding an editor's note to Appendix 22-04 of the AFM.

Authority

8 CFR 245.2(a)(2)(B); *Ruiz-Diaz v. United States*, No. 09-35734.

Background

Since June 11, 2009, USCIS has accepted concurrently and properly filed I-360 petitions seeking the classification of special immigrant religious worker and I-485 applications pursuant to the order of the U.S. District Court for the Western District of Washington in the *Ruiz-Diaz v. United States* litigation (2009 WL 799683). This order was recently reversed by the Ninth Circuit, vacating the injunction, and became effective on October 13, 2010. To comply with the District Court's injunction, USCIS had to revise its procedures. USCIS is now modifying these procedures again to be consistent with the Ninth Circuit's decision and mandate. These operational changes took place on November 9, 2010.

Policy

As of November 9, 2010, any I-485 application where the underlying basis is an I-360 petition seeking the classification of special immigrant religious worker must be filed based on an approved I-360 petition. On or after November 9, 2010, USCIS service centers and offices (including the lockboxes) must reject any Form I-485, Form I-765 (Application for Employmer Authorization), or Form I-131 (Application for Travel Document) filed concurrently with or based on a pending I-360 petition seeking the classification of special immigrant religious worker.

Any Form I-485 based on a Form I-360 religious worker petition filed prior to November 9, 2010 shall be accepted and adjudicated pursuant to the guidelines established in the August 5, 2009 Memorandum HQDOMWD AD-09-45, "Clarifying Guidance on the Implementation of the District Court's Order in Ruiz-Diaz v. United States, No C07-1881RSL (W.D. Wash. June 11, 2009).

Implementation

The *AFM* is revised as follows:

1. Paragraph (b)(1) of Chapter 22.3 is revised to read:

(b) Special Immigrant Ministers of Religion & Other Religious Worker Cases.

(1) General. A U.S. employer or an individual alien may file an I-360 petition for special immigrant religious worker classification. In either case, a U.S. employer must submit certain evidence and an attestation which is now a part of Form I-360 and is required by the final rule in support of the petition. If applicable, the U.S. employer must submit a Religious Denomination Certification which is also now a part of Form I-360. For at least two years preceding the filing of the petition, the beneficiary must have been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States. The beneficiary must be coming to the United States to work:

- Solely as a minister of the U.S. employer's denomination;
- In a religious vocation either in a professional or nonprofessional capacity; or
- In a religious occupation either in a professional or nonprofessional capacity.

The beneficiary must have been carrying on such work continuously for at least tw years preceding the filing of the petition. Additionally, see Appendix 22-3 and the final religious worker rule at 73 FR 72275 (Nov. 26, 2008) http://edocket.access.gpo.gov/2008/pdf/E8-28225.pdf for a general and detaile explanation pertaining to adjudication of special immigrant ministers of religion and other religious worker petitions.

Note

As of November 9, 2010, Form I-360 for the special immigrant religious worker classification, Form I-485, Form I-765, and/or Form I-131 may no longer be filed concurrently pursuant to the order of the Ninth Circuit Court of Appeals in Ruiz-Diaz v. United States, No. 09-35734 (9th Cir. Aug. 20, 2010). The Ninth Circuit's decision vacated the District Court's permanent injunction allowing for concurrent filing for special immigrant religious workers. Any I-485 application where the underlying basis is an I-360 petition seeking the classification of special immigrant religious worker must be filed based on an **approved** I-360 petition. See **Appendix 22-05** and the legal settlement notice on the USCIS Internet site at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8fd36a3817d12210VgnVCM1000004718190aRCRD&vgnextchannel=2492db65022ee010VgnVCM1000000ecd190aRCRD.
Those I-485 applications based on I-360 religious worker petitions filed prior to November 9, 2010 shall be accepted and adjudicated pursuant to the guideline established in the August 5, 2009 Memorandum HQDOMO AD09-45, "Clarifying Guidance on the Implementation of the District Court's Order in Ruiz-Diaz v. United States, No C07-1881RSL (W.D. Wash. June 11, 2009). See **Appendix 22-04**. [Note updated 11-9-2010, AD11-01]

Note

All religious workers, other than ministers, immigrating to the United States as special immigrant religious workers must enter the United States with a valid immigrant visa or adjust to permanent resident status (have an approved Form I-485) before September 30, 2012. Statutory amendments may extend this date. USCIS will provide information and further guidance if the date is extended. [Note updated 11-9-2010, AD11-01]

2. Appendix 22-4 is revised by adding an editor's note to read:

Appendix 22-4 Implementation of the District Court's Order in *Ruiz-Diaz v. United States,* No. C07-1881RSL (W.D. Wash. June 11, 2009); August 14, 2009 Fact Sheet and Press Release [Added 06-25-2009, AD09-45]

Editor's Note: The Ninth Circuit reversed the District Court's order and vacated the injunction described in this Appendix, effective October 13, 2010. Accordingly, the guidance herein applies only to Forms I-485 filed prior to November 9, 2010 and in conjunction with Forms I-360 seeking special immigrant religious worker classification. See also **Appendix 22-05**.

June 25, 2009 memo and August 14, 2009 Fact Sheet and Press Release here:

3. Appendix 22-05 is added to read:

Appendix 22-5 Order of the Ninth Circuit Court of Appeals in *Ruiz-Diaz v. United States*, No. 09-35734 (9th Cir. Aug. 20, 2010) Vacating the District Court's Permanent Injunction

[INSERT 9TH CIRCUIT COURT'S ORDER HERE]

4. The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, the following entry:

AD11-01 11-9-2010	Chapter 22.3(b)(1) Appendix 22-04; Appendix 22-05	Provides guidance for processing Form I-360, Petition for Amerasian, Widower, or Special Immigrant, filed on behalf of special immigrant religious workers in light of the Ninth Circuit Court of Appeals' mandate overturning the permanent injunction issued in the U.S. District Court order in *Ruiz-Diaz v. United States*. It also supplements the guidance issued in AD09-45 by adding an editor's note.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Business Employment Services Team of the Service Center Operations Directorate.

Office of Inspector General

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 11, 2009

MEMORANDUM FOR: Michael Aytes
Acting Deputy Director
United States Citizenship and Immigration Services

FROM: Richard L. Skinner
Inspector General

SUBJECT: *Letter Report: The Special Immigrant Nonminister Religious Worker Program (OIG-09-79)*

As mandated in the *Special Immigrant Nonminister Religious Worker Program Act,* we examined United States Citizenship and Immigration Services (USCIS) regulations, published in November 2008, designed to decrease benefit fraud. We concluded that USCIS has taken steps that can reasonably be expected to reduce fraud in special immigrant nonminister petitions, but that it is not possible to determine the exact amount of fraud reduction attributable to the new regulations.

Adjudicators find nonminister petitions challenging, but the regulation has provided important tools, like an attestation requirement for petitioning organizations, to help identify fraudulent cases. Adjudicators said that the new process provides effective fraud deterrence.

USCIS managers said that more subtle fraud is expected to persist. We are making 5 recommendations to facilitate enhancements to the existing regulatory scheme. Should you have any questions, please call me, or your staff may contact Carlton I. Mann, Assistant Inspector General for Inspections, at (202) 254-4100.

Background

Congress amended the *Immigration and Nationality Act* in 1990, to create a special immigrant status for ministers and nonministers in religious vocations and occupations.[1] Special immigrant nonminister religious workers must have been members of the denomination, and have worked in the capacity for which they are applying for at least the two years immediately preceding the petition. Individuals who become special immigrants are lawful permanent residents and will be eligible to apply for naturalization. To qualify as a special immigrant, a petition (Form I-360) must be approved by USCIS.

Reducing benefit fraud, which is considered the willful misrepresentation of material fact, has been a longstanding priority. In 2005, the USCIS Office of Fraud Detection and National Security (FDNS) conducted a Benefit Fraud Assessment (BFA) of religious worker immigrant petitions. After examining pending and completed special immigrant religious worker cases, FDNS determined a 33% fraud rate existed. Nonexistent organizations had filed a large number of petitions, and material misrepresentations were common in documents submitted to establish eligibility.[2]

Following the BFA, FDNS instituted policy changes to enhance the integrity of the religious worker program. Site visits to verify the existence of petitioning organizations were implemented. USCIS also centralized adjudication of religious worker petitions at the California Service Center (CSC) to ensure more consistent adjudications and increased information sharing.

In April 2007, USCIS issued a proposed rule on Special Immigrant and Nonimmigrant Religious Workers. After public comment, USCIS issued final regulations on November 26, 2008. The regulation:

- Expanded the definitions of terms specific to the program;
- Required petitioners to attest to a number of facts related to the organization and the work that the beneficiary would perform;
- Created greater evidentiary requirements, including an IRS tax-exempt letter;
- Mandated proof of qualifying work experience; and
- Continued the use of site visits as a verification tool.

On October 10, 2008, Congress passed the *Special Immigrant Nonminister Religious Worker Program Act,* which extended the nonminister program to March 6, 2009.[3] The extension was contingent on issuance of final regulations to reduce benefit fraud. The Act mandated that we report on the effectiveness of the new regulations.

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[1] Immigration Act of 1990; Public Law 101-649 (Nov. 29, 1990).
[2] "Special Immigrant and Nonimmigrant Religious Workers (Proposed Rule)." Federal Register 72:79 (April 25, 2007) p. 20442.
[3] Public Law 10-391.

Our fieldwork included interviews and file review at the CSC. We discussed religious worker procedures with the six adjudicators who process I-360 petitions, supervisors, and FDNS staff. We also examined 70 petition files and supporting documentation.

Fraud Reductions are Difficult to Quantify

Although prior to publication of the final regulations, data gathered in June 2008 for an internal USCIS report concluded that site visits and centralized petition processing contributed to a reduction in fraudulent religious worker petitions. This report noted that special immigrant religious worker approval rates decreased from 67% in FY 2006 to 33% in FY 2007. Additionally, denial rates almost doubled, from 31% in FY 2006 to 60% in FY 2007. When considering voluntary petition withdrawals, non-approvals rose from 32% in FY 2006 to 66% in FY 2007. USCIS also noted a 16% reduction in received petitions during the time period. Petitions may be denied or withdrawn for reasons other than fraud, but more stringent USCIS oversight is a major deterrent to organizations intending to commit benefit fraud.

USCIS concluded, however, that it is difficult to quantify fraud reductions. Existing data makes "no claim of direct causality" between reduced petition approvals and decreased fraud. Rather, it is "possible that cyclical trends alone or in some combination of other factors account for the changes observed." While the data is strongly suggestive of fraud reduction, further research is required to determine the effect of anti-fraud measures.

Although data used in the June 2008 report is consistent with other figures that USCIS has reported, there were discrepancies between the figures and data that we requested. The discrepant data also included FY 2008 and partial FY 2009 figures for petition approval and denial rates. Given these discrepancies, we were hindered in our analysis of fraud trends in the program. Because resolution of data issues would not change the difficulty of quantifying exact fraud reductions, we did not pursue a complete USCIS explanation of the data inconsistencies we discovered.

Although USCIS does track I-360 approvals as separate categories, I-360 denials are not tracked as separate minister and nonminister totals in USCIS data systems. Given the differential treatment of ministers and nonministers in the statute, and Congressional concern regarding nonminister fraud, a method for tracking denials for both categories is needed. CSC staff suggested this change to us.

Policy Changes can Enhance Anti-Fraud Efforts

USCIS has developed a credible process to deter and detect nonminister petition fraud. All of the persons we interviewed praised the new process because it ensures more legitimate petitions. Adjudicators and their supervisors noted that consolidation of I-360 petition review at the CSC, and improvements to the I-360 form, have created a more efficient process to detect and deter fraud. The new I-360 attestation ensures that petitions meet regulatory requirements. Petitioners must attest to 12 specific facts about the organization and the work the beneficiary is to perform. Adjudicators said that the

attestation easily presents key facts, supported through evidence, which expedites review and allows for identification of missing information. We reviewed several files that demonstrated how adjudicators used authorities in the regulations to request additional information when petitions are incomplete. With petition processing in one location, consultations between adjudicators improve the consistency and accuracy of decisions.

Inherent Difficulties with Nonminister Petitions

Adjudicators noted difficulties with special immigrant nonminister petitions. The program requires full-time work for all religious workers, but some organizations have difficulty documenting the full-time status of a beneficiary's work. Other petitions did not have evidence that demonstrated the religious nature of a nonminister's work. Even complete petitions can be difficult to evaluate. For example, religious painters and sculptors are central to the faith of some denominations, while artists in other faiths are secular workers. Adjudicators said that understanding such differences was an intricate part of nonminister adjudications, especially because a denomination defines its own acceptable religious occupations. This standard could become a means for organizations to deem generally secular work as religious, or grant some faiths an advantage because of different views of religious occupations.

In the proposed regulations, USCIS listed examples of nonminister occupations. During the public comment period, concerns were expressed that the list favored Judeo-Christian petitioners. In the final regulations USCIS removed the examples. As the agency gains more experience dealing with petitions from various faiths, a list of occupations that are traditionally religious should be developed, and updated as necessary. Such examples are important for anti-fraud efforts because an FDNS manager said that religious worker fraud is more subtle now compared to the years before site visits and the attestation requirement. Future illegitimate activities are projected to include petitions for people who do not do religious work, workers not performing stated duties, or organizations that do not need full-time workers. Further guidance on regulatory definitions of religious work would inform the public and ensure more complete petitions.

Differences Exist between Religious Occupations and Vocations

The regulation includes distinctions between religious vocations and occupations. Workers in a religious vocation, such as nuns and monks, must have "a formal lifetime commitment" through vows or similar means that demonstrate devotion to a religious way of life distinct from the activities of "the secular members of the religion."[4] Individuals in an occupation must meet all of the following requirements:

1. The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination;
2. The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination;

[4] 8 C.F.R. § 204.5(m)(5).

3. The duties are not in primarily administrative or support positions; and
4. Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.[5]

Individuals in a vocation, who are not required to meet these four standards, may do work that is not traditionally religious. There were cases in our file review where a position could not meet the entire religious occupation definition. These included musicians, secretaries, administrative officers, and others engaged in generally secular activities. However, a nun could work as the Hospitality and Home Economics Manager because of the regulation's definition of a vocation. Another petition was for a nun to engage in cooking, cleaning, laundry, and shopping. Under the regulation, if the employment is full-time, a religious worker with a vocation can get a petition approved for such a job.

Files we reviewed contained pending petitions for occupations that did not meet the full-time and definitional tests. Examples included musicians with no other defined role, a Sunday school director with primarily administrative duties, and petitions with a significant amount of time for study or training. Instructions for the I-360 form and the regulation list all definitional requirements of an occupation. Other documents explaining the regulations simply state that the work must primarily relate to a traditional religious function, just one of four parts of a permissible occupation. Revised fact sheets or other materials, would provide more complete information to the public. This should decrease the number of petitions received from organizations that will not be able to provide beneficiaries employment that meets the requirements of a religious occupation.

Steps can be Taken to Ensure Religious Organizations' Tax Exempt Status

Petitioning religious organizations must be "exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986."[6] Petitions must include a "currently valid" IRS exemption determination letter. However, USCIS has issued potentially confusing statements about what constitutes a valid letter. Because the letters do not expire, USCIS will accept determination letters regardless of date. However, while the agency correctly notes that a letter revoked by the IRS cannot be used to meet the regulatory requirement, any properly issued letter will always appear to be valid, even in the few cases where IRS subsequently revokes the organization's tax-exempt status. Of 45 new petition files we reviewed that had IRS letters, the average letter was twenty years old, including five letters from the 1960s. An IRS expert we interviewed said that organizations with letters that old could still be tax exempt. However, USCIS can issue policy to ensure that all determination letters are currently valid.

Religious organizations rarely lose tax exempt status. The IRS neither re-evaluates organizations after a letter is issued nor updates letters with the organization's continued tax exempt status. However, IRS Publication 78, *Cumulative List of Organizations,* is

[5] Ibid.
[6] Ibid.

available on-line. This tool, rather than 45-year old letters, is the best way to determine the current tax exempt status of religious organizations. The IRS also produces a list of organizations that have recently lost tax exempt status. USCIS stated that the agency *may* consult Publication 78, but the current Adjudicator's Field Manual does not require use of updated IRS information to ensure an organization's current status. This would be useful, especially when a petitioner's IRS letter had not been recently issued.

USCIS did not Adopt a Requirement that Petitioners Demonstrate a Need for Workers

USCIS originally proposed that petitioners be required to demonstrate that the worker would "fulfill a reasonable need of the organization." This language was not retained in the final regulations. A USCIS expert informed us that the standard was vague, with an implication that the government would become involved in the strategic employment decisions of religious organizations. This is a legitimate concern. Additionally, the regulations include compensation requirements and information in the attestation that minimize the chance that an organization will petition for unneeded workers.

Our file review included petitions from organizations that seemed primarily concerned with keeping beneficiaries in the United States, rather than documenting why the worker was needed. An organization submitted one petition so that an individual "may be eligible to permanently reside in the United States," while another stressed the desire to keep the worker in the United States without much detail about the work requirement. Such cases can meet definitional requirements and be from legitimate organizations. Nonetheless, the regulation is not currently able to identify organizations that establish sinecure positions to gain permanent residency for unneeded staff. For marginal cases, adjudicators could use a need requirement to gain further information about the proposed work. USCIS should use ongoing data review to study the utility of a need-based standard, but the legitimate concerns regarding inclusion of such a requirement in the final regulation led us to not recommend a policy change in this area.

The Level of Interaction between Adjudicators and FDNS Can be Expanded

In addition to the regulatory process improvements described above, USCIS can make procedural changes to the religious worker program. Interaction between adjudicators and FDNS personnel primarily results from adjudicator requests for FDNS to conduct site visits. Adjudicators said that such contact is generally limited to e-mail. FDNS staff we interviewed reported limited interaction with adjudicators.

Results from site visits are an important component in adjudicators' approval and denial decisions. Given that the adjudicator relationship with most FDNS staff is remote, adjudicators have felt too removed from the site visit process. Adjudicators do annotate specific issues for FDNS to explore during site visits, but it is unclear whether FDNS district office personnel receive the annotations. Increased communication would ensure that adjudicator concerns about specific petitions are adequately conveyed to the field.

Adjudicators would like to learn more about FDNS' work process. Such knowledge would give adjudicators greater understanding of petitioners and beneficiaries. Several adjudicators suggested that they be allowed to periodically observe site visits. Additionally, adjudicators signaled a desire for more dialogue with FDNS staff. Existing roundtable discussions are a valuable tool for adjudicators and FDNS staff to share best practices and exchange information. Both parties supported these discussions, but lamented the infrequent nature of the roundtables.

Beneficiaries Warrant More Scrutiny in the Compliance Review Process

Because site visits were developed in response to concerns about petitioner fraud, the process focuses on ensuring the credibility of the petitioning organization. April 2007 USCIS guidelines established that "[t]he primary focus of the site visit is on the petitioner." Although a focus on petitioner fraud is effective and laudable, site visits also present opportunities to further scrutinize beneficiaries who are in the United States.

The BFA concluded that beneficiaries present a credible fraud risk. Although 44% of cases demonstrated that an organization was illegitimate, 42% of cases included misrepresentations of beneficiary qualifications. Given that the fraud of nonexistent organizations has largely been addressed, a renewed focus on willful beneficiary misrepresentation is warranted. We reviewed a site visit report suggesting revocation of a worker's status because secular administrative services were being performed under the guise of a religious occupation. The organization argued that the individual did such tasks because religious work did not require enough of the beneficiary's time, a violation of the regulatory language.

Expansion of beneficiary compliance does not discredit existing site visits. The regulations do not limit site visits to the time before a beneficiary gains special immigrant status. Ongoing monitoring can be a credible anti-fraud tool to ensure beneficiaries are engaged in acceptable work described in the I-360. Current regulatory language focuses the site visit process on the petitioner, but a beneficiary's work is central to program integrity. Given the imminent implementation of the Administrative Site Visit and Verification Program, which will use contractors for initial site visits in 44 urban areas, additional resources may be available to conduct post-status site visits.

Recommendations

We recommend that the Director of U.S. Citizenship and Immigration Services:

Recommendation #1: Develop a mechanism for separately tracking I-360 special immigrant minister and nonminister petition denials.

Recommendation #2: Create or revise, and disseminate to the public, examples of legitimate religious work and specific religious occupations that meet regulatory definitions.

Recommendation #3: Require adjudicators to consult the Internet version of Internal Revenue Service Publication 78 and other IRS data on organizations that have lost tax exempt status.

Recommendation #4: Expand the use of roundtables and other communication between adjudicators and FDNS service center and district office personnel.

Recommendation #5: Expand site visit policies to verify beneficiaries' regulatory compliance after benefit issuance.

OIG Analysis of Management Comments

In its comments to our report, USCIS concurred with recommendations 1, 3, 4 and 5. It provided specific plans to implement recommendations 1 and 3, which are therefore resolved-open.

- Compliance with recommendation 1 will have been accomplished once both the Form I-360 petition and the CLAIMS data system have been modified to facilitate separate tracking of minister and nonminister petition denials. We request that USCIS provide us with progress reports every 90 days.

- Compliance with recommendation 3 will have been accomplished once appropriate revisions have been made to the National Standard Operating Procedures to suggest to adjudicators that they consult the online version of Internal Revenue Service Publication 78. We request that USCIS provide us with progress reports every 90 days.

Recommendation 4 suggested that the current communication between adjudicators and FDNS personnel be expanded. While USCIS concurs, most of the information in its response describes the status quo. Until we have a USCIS action plan, we cannot consider recommendation 4 to be resolved. We request that USCIS provide us information about specific service center and FDNS initiatives to expand formal and informal communication.

Recommendation 5 suggested expansion of site visit policies to verify beneficiary compliance after the religious worker status was granted to the beneficiary. Again, while USCIS concurs with the recommendation, most of the information in its response describes the status quo, and about the new Administrative Site Visit and Verification Program (ASVVP). While there are indeed contractual considerations to using ASVVP visits as a broader anti-fraud tool, the new program will free some or all of the FDNS resources currently devoted to routine site visits. Until USCIS provides an action plan, we cannot resolve recommendation 5. We request that USCIS provide us information about specific plans to broaden petitioner site visits to include some beneficiary verification.

USCIS did not concur with recommendation 2, and pointed out that the proposed list of examples was omitted from the final rule due to public comments USCIS received during the proposed rulemaking process. USCIS said in its comments to our draft report that such a list can create confusion about the scope of the definition of "religious occupation," and that examples of religious occupations would not serve any anti-fraud efforts as the denomination must still define its own acceptable religious occupations. The burden of proof rests with the petitioner to establish that the occupation relates primarily to a traditional religious occupation within the denomination. We are persuaded by the USCIS explanation. Recommendation 2 is closed and no further action is required.

Appendix A
Purpose, Scope, and Methodology

Our review was undertaken to comply with Public Law 110-391, Section 2, paragraph (c), which mandated that we report on the effectiveness of measures recently implemented by USCIS to eliminate or reduce fraud in the special immigrant nonminister religious worker visa category. The new measures were published on November 26, 2008 (Federal Register 73:229, p. 72276).

We interviewed managers at USCIS headquarters responsible for overseeing religious worker petition verification and adjudication; managers and adjudicators at the USCIS California Service Center, which processes religious worker petitions; and immigration officers that conduct on-site inspections to obtain their professional assessment of the impact the regulations have had on eliminating or reducing fraud. We discussed rules for tax-exempt religious organizations with a subject matter expert at the Internal Revenue Service. We also reviewed USCIS data and case records. Our fieldwork took between March – May, 2009. We conducted our inspection under the authority of the Inspector General Act of 1978, as amended, and according to the inspection standards of the Council of Inspectors General on Integrity and Efficiency.

Department of Homeland Security
U.S. Citizenship and Immigration Services

I–797E, Notice of Action

A #	Application/Petition
Receipt #	Application for Amerasian, Widow(er), or Special Immigrant
Notice Date	Page 1 of 3

January 31, 2012

WILDES, LEON
515 MADISON AVE
NEW YORK, NY 10022

Request for Evidence

Notice also sent to:

RETURN THIS NOTICE ON TOP OF THE REQUESTED INFORMATION LISTED ON THE ATTACHED SHEET.

Note: You are given until _____ in which to submit the requested information to the address at the bottom of this notice.

Please note the required deadline for providing a response to this Request for Evidence. The deadline reflects the maximum period for responding to this RFE. However, since many immigration benefits are time sensitive, you are encouraged to respond to this request as early as possible but no later than the date provided on the request.

Pursuant to 8 C.F.R. 103.2(b)(11) failure to submit ALL evidence requested at one time may result in the denial of your application.

For more information, visit our website at www.uscis.gov
Or call us at 1-800-375-5283

Telephone service for the hearing impaired: 1-800-767-1833

CSC4611 WS22222 DIV VI NT

You will be notified separately about any other applications or petitions you filed. Save this notice. Please enclose a copy of it if you write to us about this case, or if you file another application based on this decision. Our address is:

USCIS - CALIFORNIA SERVICE CENTER
P.O. BOX 10590
LAGUNA NIGUEL, CA 92607-0590
800-375-5283

WAC1290110939

Please see additional information on the reverse side.

Form I–797E (Rev. 05/05/06)

Additional Information for Applicants and Petitioners

General

The filing of an application or petition does not in itself allow a person to enter or remain in the United States and does not confer any other right or benefit.

Inquiries

If you do not hear from us within the processing time given on this notice and you want to know the status of this case, use InfoPass at **www.uscis.gov** to contact your local USCIS office or call our National Customer Service Center at **1-800-375-5283.**

You should follow the same procedures before contacting your local USCIS office if you have questions about this notice.

Please have this form with you whenever you contact a local office about this case.

Requests for Evidence

If this notice asks for more evidence, you can submit it or you can ask for a decision based on what you have already filed. When you reply, please include a copy of the other side of this notice and also include any papers attached to this notice.

Reply Period

If this notice indicates that you must reply by a certain date, and you do not reply by that date, we will issue a decision based on the evidence on file. No extension of time will be granted. After we issue a decision, any new evidence must be submitted with a new application or petition, motion or appeal, as discussed under **"Denials"**

Approval for a Petition

Approval of an immigrant or nonimmigrant petition means that the beneficiary, the person for whom it was filed, has been found eligible for the requested classification. However, approval of a petition does not give any status or right. Actual status is given when the beneficiary is given the proper visa and uses it to enter the United States. Please contact the appropriate U.S. consulate directly if you have any questions about visa issuance.

For nonimmigrant petitions, the beneficiary should contact the consulate after receiving our approval notice. For approved immigrant petitions, the beneficiary should wait to be contacted by consulate.

If the beneficiary is now in the United States and believes he or she may be eligible for the new status without going abroad for a visa, he or she should use InfoPass to contact a local USCIS office about applying here.

Denials

A denial means that after every consideration, USCIS concluded that the evidence submitted did not establish eligibility for the requested benefit.

If you believe there is more evidence that will establish eligibility, you can file a new application or petition, or you can file a motion to reopen this case. If you believe the denial is inconsistent with precedent decisions or regulations, you can file a motion for reconsideration.

If the front of this notice states that this denial can be appealed and you believe the decision is in error, you can file an appeal. You can obtain more information about these processes by either using InfoPass to contact your local USCIS office, or by calling the National Customer Service Center.

If the petitioner is requesting consulate/embassy notification, provide the following evidence in duplicate. Submit the following information to the United States Citizenship and Immigration Services ("USCIS"). The response must be from an authorized official of the religious organization. Documentation containing a language other than English must be submitted with a full English translation. The translator must certify that the translation is complete and accurate and that he or she is competent to translate. The actual foreign language document must be submitted with the English translation.

Nature and Purpose of the Organization: Submit a copy of the organizing instrument of the organization that specifies the purposes of the organization; and

Submit organizational literature, such as books, articles, brochures, calendars, flyers and other literature describing the religious purpose and nature of the activities of the organization.

EVIDENCE PERTAINING TO COMPENSATION

Compensation: Submit 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 comparable evidence. 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.

Additionally, 8 C.F.R. 204.5(m)(11) states:

> 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. If the alien was employed outside the United States during such two years, the petitioner must submit comparable evidence of the religious work.

The petition was filed on 12/8/2011. Hence, the petitioner must submit evidence to establish that the beneficiary has been employed and receiving compensation for said employment during the two year period immediately preceding the filing of the petition (12/8/2009 – 12/8/2011). If there was a break in the continuity of the work during the preceding two years explain the reason for the break.

Moreover, the petitioner states: "Please note a change of status application from R1/R2 to B-2 classification has been filed and is currently pending with the immigration service on behalf of Rabbi and his accompanying family members. He continues to have full responsibility of the mazta making bakery." Please explain.

Petitioner Location: Submit documentary evidence to prove religious activity at the petitioner's stated address: submit evidence such as the petitioner's lease agreements, rental agreements, and/or mortgage payments; a copy of the city or county fire department occupancy permit for the petitioner's location; copies of utility bills and telephone bills; brochures, advertising; color photographs of the petitioner's location, both inside and outside the building.

Beneficiary's Services: Submit documentary evidence to show that the beneficiary's services are needed. Please ensure that the evidence addresses the following factors:

- Number of volunteer and paid ministers and staff serving the petitioner's organization;
- Size of the congregation, submit a current membership directory verifying the total number of actual congregants.
- Specific duties which the beneficiary will be undertaking vs. specific duties of other staff

Proffered Position: Provide a **detailed description** of the work to be done, including specific job duties, level of responsibility/supervision, and number of hours per week to be spent performing each duty. Include a daily and weekly schedule for the proffered position. List the minimum education, training, and experience necessary to do the job and submit documentary evidence to show that the beneficiary has met such requirements. Further, explain how the duties of the position relate to a traditional religious function.

Traditional Religious Occupation: Provide evidence that the duties primarily relate to a traditional religious function and the position is recognized as a religious occupation within the denomination. Provide evidence that the duties are primarily related to, and clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination.

Religious Worker

According to INA Section 101(a)(27)(C)(ii)(II) and (III), aliens classified as special immigrant religious workers are eligible for admission to the United States as permanent residents. However, to immigrate under the special immigrant religious worker category, aliens must have a petition approved on their behalf and either enter the United States as an immigrant or adjust their status to permanent residence while in the United States.

INA § 101(a) states in relevant parts:

(27) The term "special immigrant" means -

(A) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(B) an immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship;

(C) an immigrant, and the immigrant's spouse and children if accompanying or following to join the 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, 2012, 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 20, 2012, 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 title 26) 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).