



July 5, 2015

PM-602-0119

## Policy Memorandum

SUBJECT: Qualifying U.S. Work Experience for Special Immigrant Religious Workers

### Purpose

On April 7, 2015, the U.S. Court of Appeals for the Third Circuit, in *Shalom Pentecostal Church v. Acting Secretary DHS*, 783 F.3d 156 (3d Cir. 2015), found the regulatory requirements that qualifying work experience gained in the United States must have been acquired in lawful status (herein “lawful status requirements”) in 8 CFR 204.5(m)(4) and (11) to be beyond the Department’s legal authority (*ultra vires*). The court found that the statute was clear and unambiguous and that the regulation was inconsistent with the statute. The Department of Homeland Security (DHS) did not seek further review of this decision.

As a result of this decision and a growing number of Federal courts reaching the same conclusion, U.S. Citizenship and Immigration Services (USCIS) has decided to acquiesce to the *Shalom Pentecostal* decision nationally and will no longer deny special immigrant religious worker petitions based on the lawful status requirements at 8 CFR 204.5(m)(4) and (11).<sup>1</sup> To promote a uniform immigration policy and consistent adjudications, this policy memorandum (PM) instructs USCIS employees to apply the *Shalom Pentecostal* decision nationwide until such time as DHS amends the regulations at 8 CFR 204.5(m)(4) and (11) to remove the lawful status requirements. This PM updates chapter 22.3(b) of the Adjudicator’s Field Manual (AFM); AFM Update PM-602-0119. The guidance contained in this PM is controlling and supersedes any prior guidance on the lawful status requirements for special immigrant religious workers.

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<sup>1</sup> *Congregation of the Passion v. Johnson*, No. 13 C 02275, 2015 WL 518284 (N.D. Ill. Feb. 6, 2015); *Shia Ass’n of Bay Area v. United States*, 849 F. Supp. 2d 916 (N.D. Cal. 2012); *Shalom Pentecostal Church v. Beers*, No. 11-4491 (D.N.J. Sept. 16, 2013), *affirmed* 783 F.3d 156, 168 (3d Cir. 2015); *see also Madrasah Islamiah, Inc. v. U.S. Dep’t Homeland Sec.*, No. H-12-3492, 2015 WL 632090, at \*10 n.4 (S.D. Tex. Feb. 13, 2015) (acknowledging, without deciding, argument that the lawful status requirements in 8 CFR 204.5(m)(4) and (11) are *ultra vires*).

## **Scope**

This PM applies to and shall be used to guide determinations by all USCIS employees. This PM applies to all Form I-360 petitions for special immigrant religious worker status currently pending with USCIS and to new petitions filed on or after the date of this memorandum.

## **Authorities**

- Immigration and Nationality Act (INA) section 101(a)(27)(C), 8 U.S.C. 1101(a)(27)(C).
- INA section 103(a), 8 U.S.C 1103(a).
- Homeland Security Act of 2002 section 451, 6 U.S.C. 271.
- 8 CFR 204.5(m)(4); 8 CFR 204.5(m)(11).
- *Shalom Pentecostal Church v. Acting Secretary DHS*, 783 F.3d 156, 168 (3d Cir. 2015).

## **Background**

The regulations governing the special immigrant religious worker program at 8 CFR 204.5(m)(4) and (11) require that work experience acquired in the United States toward eligibility as a special immigrant religious worker be gained while in lawful immigration status.

The Third Circuit Court of Appeals in *Shalom Pentecostal* found that the lawful status requirements in 8 CFR 204.5(m)(4) and (11) are *ultra vires* in that the statute is clear and unambiguous and the regulation is inconsistent with the statute.<sup>2</sup> The court also found the lawful status requirements to impermissibly conflict with section 245(k) of the INA which states that certain aliens may work without authorization for up to 180 days and still remain eligible for an adjustment of status. Similarly, section 245(i) of the INA allows certain immigrants to adjust status despite having worked without authorized status. The Third Circuit found that the lawful status requirements impermissibly render special immigrant religious workers who may be otherwise eligible for adjustment of status under section 245 of the INA ineligible because such workers cannot obtain the approved Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, needed to qualify for an adjustment of status.

## **Policy**

The *Shalom Pentecostal* decision precludes USCIS from applying the lawful status requirements at 8 CFR 204.5(m)(4) and (11) to cases arising in the Third Circuit. To promote consistent adjudications and a nationally uniform immigration policy, USCIS acquiesces to the finding that those regulations are *ultra vires* nationwide, and will no longer apply the lawful status requirements. In addition, USCIS will amend the regulations at 8 CFR 204.5(m)(4) and (11) to reflect this finding by removing the lawful status requirements. This PM instructs USCIS employees to apply the *Shalom Pentecostal* decision nationwide pending a regulation change. Accordingly, USCIS will no longer require that the qualifying religious work experience for the

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<sup>2</sup> See *supra* note 1.

2-year period preceding submission of a Form I-360 special immigrant religious worker petition be acquired in lawful immigration status if gained in the United States.

Nevertheless, special immigrant religious workers whose qualifying work experience was not obtained in lawful immigration status may be ineligible to adjust status under the requirements set forth in section 245 of the INA. Such workers may also be subject to the 3- or 10-year bars to admission under section 212(a)(9)(B)(i) of the INA if they seek to reenter the United States after being unlawfully present for a period of more than 180 days.

USCIS is issuing this PM without a request for comments on the policy, because it is only announcing a change in its interpretation of the INA in nationwide acquiescence of the Third Circuit's decision in *Shalom Pentecostal*.

The AFM is revised accordingly.

### **Implementation**

The AFM is updated as follows:

1. In Chapter 22.3(b), the AFM is revised to read as follows:

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Note: As of July 8, 2015, all religious workers, including ministers, immigrating to the United States as special immigrant religious workers need not establish that the qualifying religious work experience gained in the United States for the 2-year period preceding a Form I-360 petition was employment authorized.

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#### **(7) Initial Evidence Related to the Religious Worker's Prior Employment.**

- The religious worker's qualifying experience during the 2 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.
- If the religious worker was employed in the United States during the 2 years immediately preceding the filing of the application and:
  - Received salaried compensation, the petitioner must submit Internal Revenue Service (IRS) documentation that the alien received a salary, such as an IRS Form W-2 or certified copies of income tax returns.
  - Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available.
  - 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 religious worker was employed in the United States and there was an unacceptable break during the 2 years immediately preceding the filing of the Form I-360 petition, the 2-year clock must restart. The subsequent 2-year period of qualifying employment may be completed in or outside the United States.

- If the religious worker was employed outside the United States during the 2 years immediately preceding the filing of the application, the petitioner must submit comparable evidence of the religious work.
- A break in the continuity of the work during the preceding 2 years will not affect eligibility so long as:
  - The beneficiary was still employed as a religious worker;
  - The break did not exceed 2 years; and
  - The nature of the break was for further religious training or for sabbatical. However, the beneficiary must have been a member of the petitioner’s denomination throughout the 2 years of qualifying employment.

Additionally, events such as sick leave, pregnancy leave, spousal care, and/or vacations are typical in the normal course of any employment and will not be seen as a break of the 2-year requirement as long as the beneficiary is still considered employed during that time.

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

AFM Update	Chapter 22.3(b)	To remove lawful status requirement for qualifying U.S. work experience
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**Use**

This PM is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. 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 Office of Policy and Strategy.