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AMERICAN IMMIGRATION COUNCIL

UPDATED PRACTICE ADVISORY[1]

SPECIAL IMMIGRANT RELIGIOUS WORKERS: HOW TO DEMONSTRATE THAT AN IMMIGRANT SEEKS EMPLOYMENT IN A "RELIGIOUS OCCUPATION."

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The Immigration and Nationality Act (INA) authorizes visas for the following three categories of religious workers to immigrate to the United States to work for a qualifying religious organization: (1) ministers; (2) professionals working in a religious vocation or occupation; and (3) other individuals working in a religious vocation or occupation. 8 U.S.C. §§ 1101(a)(27)(C); 1153(b)(4). This practice advisory will address the term "religious occupation" as it is used in the second and third category of religious workers. *See* 8 U.S.C. §§ 1101(a)(27)(C)(ii)(II) and (III).

In deciding whether a position constitutes a "religious occupation" for religious workers, U.S. Citizenship and Immigration Services (USCIS) and the Administrative Appeals Office (AAO) frequently impose requirements in excess of those required by statute and regulation. This practice advisory will explain why federal courts have overturned AAO decisions that erroneously imposed three types of heightened requirements for the term "religious occupation": (1) religious training requirements; (2) distinctions between secular and non-secular duties; and (3) salary and hour requirements.

This practice advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

 This practice advisory was originally published on June 22, 2004. It has been updated to incorporate discussion of the recent decision *Camphill Soltane v. US Dep't of Justice*, No. 03-1626, 2004 U.S. App. LEXIS 18147 (3d Cir. Aug. 26, 2004).

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What are the requirements for a Special Immigrant Religious Worker visa?

An immigrant will qualify as a special immigrant religious worker by demonstrating that he or she:

1) has, for at least two years before applying for admission, been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;
2) seeks to enter the U. S. to work:
    i. as a minister for this religious denomination
    ii. as a professional in a religious occupation or vocation for this organization, or
    iii. in a religious occupation or vocation for this organization or an affiliated bona fide tax exempt organization; and
3) has been carrying on such vocation, professional work or other work continuously for at least two years before applying for admission.

8 U.S.C. § 1101(a)(27)(C). Either the immigrant or a person on his or her behalf may file a form I-360 petition for classification as a special immigrant religious worker. 8 U.S.C. § 1154(a)(1)(G); 8 C.F.R. § 204.5(m)(1). In most cases, the sponsoring religious organization will file the application for the immigrant religious worker. *See, e.g., Perez v. Ashcroft*, 236 F. Supp. 2d 899, 902 (N.D. Ill. 2002).

Each year, no more than 5,000 visas are made available for religious workers other than ministers – that is, for both professionals and non-professionals seeking admission to work in a religious occupation or vocation. 8 U.S.C. § 1153(b)(4). The visa provisions for these two categories of religious workers will sunset on September 30, 2008, unless extended by Congress.[3]

How is "religious occupation" defined?

For two of three categories of special immigrant religious workers, the INA requires that the intending immigrant work for the sponsoring organization in a "religious vocation or occupation." *See* 8 U.S.C. §§ 1101(a)(27)(C)(ii)(II) (professional capacity work); 1101(a)(27)(C)(ii)(III) (other [non-professional] work). The INA does not define a "religious occupation." The regulations define the term as follows:

[3] For more on the statutory and regulatory requirements and for practice pointers on how to develop and present an application, see Rodney M. Barker & Priscillia Suntoso, *Permanent Religious Workers Under the Immigration and Nationality Act, in* Immigration and Nationality Law Handbook, Vol. 2 (AILA 2004-05 ed.); Martina M. Keller, Christine H. Blum & Robert L. DeMoss II, *Preparing Special Immigrant Visa Petitions for Religious Workers: A Practical Guideline, in* Immigration and Nationality Law Handbook, Vol. 2 (AILA 2004-05 ed.).

> *Religious occupation means an activity which relates to a traditional religious function.* Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

8 C.F.R. § 204.5(m)(2) (emphasis added).

This definition does not require that the immigrant have any specific training or education. Rather, it defines "religious occupation" solely on the basis of "the nature of the work that a person performs." *Perez*, 236 F. Supp. 2d at 905; *see also Tenacre Foundation v. INS*, 78 F.3d 693, 697 (D.C. Cir. 1996) (interpreting the same definition in the non-immigrant religious worker regulations, the legacy INS conceded in litigation that no prior training or experience was necessary to function in a religious occupation).

This interpretation is underscored by a comparison of the regulatory requirements for "professional" and non-professional work in a religious occupation. To work in a professional capacity in a religious occupation, an immigrant must have the equivalent of a United States bachelor's degree. 8 C.F.R. § 204.5(m)(2) (defining "professional capacity"). In contrast, to demonstrate qualification for non-professional work in a religious occupation, the regulation simply requires "evidence establishing . . . that the type of work to be done relates to a traditional religious function." 8 C.F.R. § 204.5(m)(3)(ii)(D). In other words, an immigrant can demonstrate that he or she is qualified to work in a non-professional religious occupation simply by demonstrating that the work itself satisfies the definition of a religious occupation. The regulations require a specific educational background *only* to demonstrate that a person qualifies as a "professional;" this educational requirement has nothing to do with whether the work is a religious occupation.

I. Religious Training Requirements

Does USCIS erroneously impose specific training requirements for work to qualify as a "religious occupation"?

Yes. Despite the absence of any religious training requirement in the statute or regulations, the AAO and the regional service centers of the USCIS – the offices that adjudicate religious worker petitions – interpret the definition of a "religious occupation" as requiring specific religious training or theological education. Thus, these offices routinely deny religious worker petitions for religious occupations if either the position does not require formal religious training or education, or the immigrant applicant lacks such training. The AAO bases this requirement on its interpretation of the term "traditional religious function." The AAO claims that "*specific prescribed religious training or theological education is required*" to demonstrate that work constitutes a

traditional religious function. *See, e.g., Matter of [name not provided]*(AAO Sept. 30, 2003), *posted at* http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/sep3003_39c1203.pdf.

The AAO rationalizes this requirement using faulty and unsupported logic. The AAO claims, without citing any authority, that the positions listed in the regulation as examples of religious occupations – such as cantor, missionary or religious instructor – all require "prescribed courses of training established by the governing body of the denomination." The AAO then states that the regulatory examples that do not qualify as religious occupations – such as janitor and fund raiser – do not require specific religious training or education. From this, the AAO concludes that specific religious training or education is required for religious occupations. *See, e.g., id.* As a consequence, the AAO and the service centers routinely deny visa petitions for work in religious occupations where there is no evidence that the duties of the job require specific religious training or that the individual seeking the visa has specific religious training.

Why did a federal court reject the AAO's requirement of specific religious training?

A federal court rejected the agency's imposition of a religious training requirement on the term "religious occupation," and overruled the AAO's denial of a religious worker visa on this basis because the requirements were in excess of the statute and the regulations. *See Perez v. Ashcroft*, 236 F. Supp. 2d 899, 906 (N.D. Ill. 2002). In *Perez*, a church filed a special immigrant religious worker visa petition on behalf of the church's full-time, paid music director. In the position of music director, Perez ran the church's music program by organizing and directing several choirs; directing youth music activities; purchasing and maintaining instruments; coordinating the music for religious services; teaching the Bible to the church's youth group; and providing spiritual leadership and guidance to the congregation. *Id.* at 901-902.

Both the Nebraska Service Center and the AAO denied the petition on the ground that the position of music director did not clearly qualify as a religious occupation. The AAO stated that the church failed to show that the position of music director was a religious occupation because Perez had no formal religious training. *Id.* at 903.

The church and Perez filed suit in federal district court, challenging the AAO's decision under the Administrative Procedures Act (APA). In their suit, they made two claims that are relevant here: first, they argued that the AAO's requirement of formal religious training was invalid because it was contrary to the agency's own regulation defining a religious occupation; second, they also argued that this requirement of formal religious training could not be enforced as an agency rule because it was never adopted as a formal regulation. *Id.*

The district court agreed with the plaintiffs on both claims. First, the court concluded that nothing in the existing regulation even remotely suggests that the background or qualifications possessed by an applicant might play any part in determining whether that person qualifies for a visa. Rather, the court held that the regulation defines a religious

occupation solely on the basis of the nature of the work a person performs and its relationship to a religious function. *Id.* at 906; *see also Kent First Korean Church v. USCIS*, 2002 U.S. Dist. LEXIS 27081 (W.D. Wash. 2002) (unpublished) (adopting the reasoning of *Perez* in a non-immigrant religious worker context). In Perez's case, the court found uncontroverted evidence that his work played an integral role in the church's worship service, and thus concluded that it was "beyond dispute" that his work qualified as a religious occupation. *Perez*, 236 F. Supp. 2d at 904.

The *Perez* court next rejected the AAO's argument that the formal training requirement was simply an agency interpretation of its own regulation and therefore entitled to deference. Because the formal training requirement was unrelated to the regulation, the court determined that it could not reasonably be considered an interpretation of the existing regulation. *Id.* at 906. Instead, the court found that the formal training requirement was an independent rule setting forth substantive requirements. As a substantive rule, the agency was required to adopt it formally, as it would any regulation – that is, by means of publication in the Federal Register, with an opportunity for the public to comment prior to adoption of a final regulation. The court concluded that because INS had failed to adopt the rule in compliance with the Administrative Procedures Act, 5 U.S.C. § 553, it was invalid. *Id.* Additionally, the court also held that the AAO's denial of the petition based upon this invalid rule was also invalid. *Id.*

II. Distinction between Secular and Non-Secular Duties

Does USCIS erroneously impose restrictions on the types of tasks permissible for a "religious occupation"?

Yes. The regulations define a religious occupation as one "which relates to a traditional religious function." 8 C.F.R. § 204.5(m)(2). However, the AAO has narrowly interpreted this to mean that religious occupations must involve *only* religious functions, to the exclusion of secular functions, even when the secular functions are performed in furtherance of a religious mission. *See, e.g.*, *Perez*, 236 F. Supp. 2d at 904 (AAO erroneously found that the position of church music director is not a "religious occupation" because it includes administrative duties such as service rehearsals). Moreover, the AAO has also made erroneous factual determinations as to what duties are included in a particular job, omitting all references to the religious functions of the job. *See e.g., Camphill Soltane*, No. 03-1626, 2004 U.S. App. LEXIS 18147, at *15 (3rd Cir. Aug. 26, 2004). The AAO's attempts to define occupations in such a way as to exclude any religious import, and then to use that definition to determine that the occupation is secular is inconsistent with the intent of the regulation.

Why have federal courts rejected the AAO's restrictions?

The Third Circuit rejected the AAO's interpretation of the term "religious occupation" because of its circular reasoning. *See Camphill Soltane v. US Dep't of Justice*, No. 03-1626, 2004 U.S. App. LEXIS 18147, at *15 (3d Cir. Aug. 26, 2004). In *Camphill Soltane*, a non-profit dedicated to "Christianizing the ordinary aspects of life for the

mentally handicapped" sought a religious worker visa for the position of house-parent, music instructor, and religious instructor. *Id.* at *2. The AAO found that the caretaker duties of house-parent were purely secular and the position did not qualify as a religious occupation. *Id.* at *13-14. The court noted that, under AAO reasoning, many of the occupations specifically listed in the regulations are secular (for example, a religious translator performs the function of translation, a secular occupation). *Id.* at *15. The court interpreted the regulation to mean that a qualifying job must have "*some* religious significance," and rejected the AAO interpretation that the job must involve *only* religious functions. *Id.* at *16. The court held that there was no support in the record for the AAO claim that the job was "wholly secular" since the tasks of the house-parent included a number of "clearly religious responsibilities." *Id.* at *16-17.

The *Perez* court also rejected an argument by the government that, because Perez's church music director position included certain administrative duties such as sound system setting, it was not a religious occupation. The court stated that it was "difficult to imagine" any position with a religious organization that would not include some administrative duties, and concluded that the regulations "impose no requirement that for someone to qualify as a religious worker, he or she must never engage in any secular or administrative duties." *Perez*, 236 F. Supp. 2d at 904; *see also Kent*, 2002 U.S. Dist. LEXIS 27081, at *17 (favorably comparing the position of church music director to a cantor – a job which the regulations specifically recognized as a religious occupation – and distinguishing it from the positions cited in the regulations as not constituting religious occupations).

As these cases demonstrate, and despite AAO's insistence to the contrary, a religious occupation does *not* have to exclude all secular functions in order to fall within the scope of the regulatory definition. Although the job must have some religious significance, it can – and frequently will – also include some secular duties.

III. Salary and Hour Requirements

A sponsoring organization must submit to USCIS a letter from an authorized official of the religious organization that states "how the alien will be paid or remunerated" and which "clearly indicate[s] that the alien will not be solely dependent on supplemental income or solicitation of funds for support." 8 C.F.R. § 204.5(m)(4). The AAO has interpreted this to mean that the religious occupation must be a "traditionally full-time salaried position." *See, e.g., Camphill Soltane*, 2004 U.S. App. LEXIS 18147, at *17. The Third Circuit questioned this interpretation. The court noted that many of the occupations listed in the regulations, such as missionary, do not always receive salaries, and that the final rules explicitly included "uncompensated volunteers, whose services are engaged but who are not technically employees." *Id.* at *18 (quoting 56 Fed. Reg. 66,965 (Dec. 27, 1991)). Thus, the court invalidated an interpretation of the regulations that requires monetary compensation in order for a position to be considered a qualifying "religious occupation."

No regulation appears to address the number of work-hours required for a person engaged in a "religious occupation." However, the AAO has required that the position must be full-time. *See Camphill Soltane,* 2004 U.S. App. LEXIS 18147, at *19. The court questioned whether the regulations support this requirement, but did not reach the issue because the case involved an applicant who was working full time without additional supplemental employment. *Id.* Thus, the question of whether a part-time position (paid or volunteer) would qualify under the regulations as a "religious occupation" remains unresolved.

How has the AAO responded to *Perez* and *Camphill Soltane*?

The AAO has made it very clear that it does not consider *Perez* to be binding in districts outside of the Northern District of Illinois. *See Matter of [name not provided]*(AAO Sept. 30, 2003), *posted at* http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/sep3003_33c1203.pdf. Moreover, the AAO has raised the question of whether it will even follow *Perez* in cases arising within the Northern District of Illinois. *Id.* As a result, the AAO and the service centers have refused to apply *Perez,* and instead continue to require proof of religious training or education for work in religious occupations. It is too soon to see how the AAO will respond to *Camphill Soltane*.

What steps can be taken to overcome the AAO's erroneous interpretations of the term "religious occupation?"

Attorneys can rely on *Perez* to argue before the service centers and the AAO that a formal religious training requirement is invalid under the statute and regulations. Unfortunately, it is unlikely that the AAO will change its position on this issue without further litigation. Raising the issue before the agency will nevertheless ensure that the religious worker and/or religious organization have exhausted all administrative remedies prior to any subsequent federal court action and will preserve the issue for a federal court appeal.[4] Moreover, with a well-documented record, it is more likely that the agency may back down in a federal court challenge under *Perez.*

[4] It is wise to exhaust administrative remedies prior to federal court action. In some situations, a federal court will not have jurisdiction if the plaintiff/petitioner has not exhausted administrative remedies. *See, e.g., McCarthy v. Madison*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."). Even where it is not a jurisdictional issue, a court may nevertheless retain discretion to dismiss a case in which administrative remedies were not exhausted. *See id.* ("where Congress has not clearly required exhaustion, sound judicial discretion governs") (internal citations omitted). Thus, the safer practice is to exhaust all administrative remedies where possible. Note, however, that in some federal court cases brought under the Administrative Procedures Act, a court may not have the authority to impose an exhaustion requirement if one was not mandated by Congress. *See Darby v. Cisneros*, 509 U.S. 137 (1993). For more on this argument, see the AILF Practice Advisory "Failure to Appeal to the AAO: Does it Bar all Federal Court Review of the Case?" *at* http://www.ailf.org/lac/lac_pa_072704.asp.

Where an immigrant has actually had formal religious training or education, evidence of that training and education can be submitted to the AAO. When submitting this evidence, the attorney should make clear that the immigrant does not concede that training or education is required under the statute or regulations. It is particularly important to preserve this legal point because the AAO does not appear to have set a standard as to what constitutes sufficient training or education under its interpretation of the regulations. Thus, even where an individual has had some formal training, the AAO might still deny the case on the basis of insufficient training.

For example, the AAO has rejected on-the-job training as insufficient to qualify a position as a religious occupation. Similarly, the AAO has rejected religious study as insufficient, without actually explaining what training would have been sufficient in the case. *See, e.g., Matter of [Name not provided]* (April 17, 2003), *posted at* http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/apr1703_01c1203.pdf (rejecting religious study by characterizing it as merely taking "requisite steps to be indoctrinated into the precepts of the religion"). The AAO also has rejected cases where it found that the position consists of activities "normally expected of an active, studied member of the particular religion" rather than being career religious work. *See, e.g., Matter of [Name not provided]* (Mar. 27, 2003), *posted at* http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/MAR2703_01C1203.pdf.

The more detailed and complete the evidence is regarding the nature and extent of training or education, the stronger the case will be. In general in the employment-based cases, the best evidence is letters from current or former employers/trainers that describe the employment or training. *See* 8 C.F.R. § 204.5(g)(1). The AAO has rejected cases on the ground that assertions as to training were not supported with a letter from the employer or trainer. *See, e.g., Matter of [Name not provided]*(Sept. 30, 2003), *posted at* http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/sep3003_01c1203.pdf (simply going on record without supporting documentation is insufficient to meet applicant's burden of proof); *Matter of [Name not provided]*(Oct. 8, 2003), *posted at* http://uscis.gov/graphics/lawsregs/admindec3/c1/2003/OCT0803_03C1203.pdf (assertions of counsel are not evidence). However, the court in *Camphill Soltane* admonished INS for denying a petition without providing an explanation for why it was rejecting uncontradicted documentary evidence and without requesting additional evidence. *See Camphill Soltane*, 2004 U.S. App. LEXIS 18147, at *21-22. Thus, while the burden of proof remains with the applicant, USCIS should not simply deny a petition without explaining why the evidence is not credible or without providing an opportunity to supplement.

It is critical in all cases to submit evidence that demonstrates that the position consists of work that relates to a traditional religious function. *See* 8 C.F.R. §§ 204.5(m)(2); (3)(ii)(D). By submitting this evidence, you will be building a record for a federal court challenge should the service center and/or the AAO deny the case on the ground that the immigrant does not have sufficient formal training or education. This evidence will demonstrate that the position sought by your client satisfies the regulatory definition of a

"religious occupation," regardless of the presence or absence of any religious training or education on the part of the immigrant. 8 C.F.R. § 204.5(m)(2).

While there is no definition of "traditional religious function," the term is generally considered in the context of the specific religious denomination for which the immigrant will be working. Thus, to constitute a traditional religious function, the work should relate to the particular doctrines or practices of the sponsoring religious organization. Moreover, while it is the applicant's burden to demonstrate that work does relate to a traditional religious function of the particular organization, the legacy INS conceded in litigation that it must accept the good faith explanation of a religious organization as to what it means to be functioning within a religious occupation for that organization. *Tenacre Foundation*, 78 F.3d at 697.

In *Perez*, the record contained detailed evidence of the many ways in which Perez, as the musical director for the church, performed religious functions related to the church's practices and doctrines. Based upon this evidence, the court found that the position of music director was a religious occupation due to the "integral role that so many of Perez' musically oriented activities play in the worship services" of the church. *Perez*, 236 F. Supp. 2d at 904; *see also Kent*, 2002 U.S. Dist. LEXIS 27081 at *16-17 (finding the petitioner engaged in traditional religious functions by incorporating music into the church's religious programs). In *Camphill Soltane*, the record indicated how the house-parent was responsible for religious tasks such as prayer, festival celebrations, and Bible readings, as well as how the task of caring for the mentally-handicapped residents involved religious aspects. *Camphill Soltane*, 2004 U.S. App. LEXIS 18147, at *16-17. The court concluded that such evidence contradicted AAO's findings that the job was "wholly secular." *Id.* at *17.

Conclusion

As the above discussion indicates, without further litigation the service centers and the AAO are unlikely to admit that neither the statute nor the regulations require a showing of specific religious training or education for a position to constitute a "religious occupation." Nevertheless, there are some steps that you can take to strengthen your client's case before the agency. Additionally, in these cases, it is important to build a record for possible federal court review. As *Perez*, *Kent*, and *Camphill Soltane* illustrate, the federal court system often is the best forum for fairly adjudicating religious worker petitions.