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## Immigration Reform

Carlos Ortiz Miranda

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# IMMIGRATION REFORM

CARLOS ORTIZ MIRANDA\*

## INTRODUCTION

This paper addresses the processing of religious workers' visas under the Immigration Act of 1990<sup>1</sup> ("The Act") which contains special provisions covering religious workers.<sup>2</sup> Prior to the passage of the Act, there were no statutory immigration provisions applicable to religious workers other than ministers.<sup>3</sup> Thus, the Act was a very important step in expanding the Church's ability to process and admit foreign-born religious workers into the United States. The religious workers provisions took effect on October 1, 1991,<sup>4</sup> and the Immigration and Naturalization Service ("INS") finalized the official rules interpreting the Act in November and December of 1991. The United States Department of State ("State Department") is also involved in enforcing the Act through its visa-issuing function.<sup>5</sup> The State Department issued detailed cables regarding the new provisions to United States consular posts throughout the world in 1991 and 1992.

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\* Carlos Ortiz Miranda serves as Assistant General Counsel to the United States Catholic Conference (USCC), specializing in immigration and international law. He also serves as Adjunct Professor at the Catholic University of America Law School, where he teaches immigration and nationality law. Mr. Ortiz received his undergraduate degree from the University of Puerto Rico, his law degree from the Antioch School of Law, and his LL.M. in International and Comparative Law from the Georgetown University Law Center. He is the author of several articles on immigration and international law, and was directly involved in the drafting of the religious worker provisions of the Immigration Act of 1990. Prior to joining the staff at USCC, he was a law professor at the Antioch School of Law and spent several years in private practice. Mr. Ortiz is a member of the American Bar Association (International Division), the American Immigration Lawyers Association, and the New York Bar.

<sup>1</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1101 et. seq.).

<sup>2</sup> See 8 U.S.C. § 1101(a)(15)(R), (27)(C). The 1990 Act dramatically increased the number of immigrants allowed entry based on employment categories. It reorganizes and redistributes these numbers among five employment-based groups, one of which is the "special immigrant" group that includes religious workers. *Id.* § 1153(b).

<sup>3</sup> See 8 U.S.C. § 1101(a)(27)(D) (1952) (repealed).

<sup>4</sup> See 8 U.S.C.A. § 1101 at 18 (1993 Supp.).

<sup>5</sup> 8 U.S.C. §§ 1201-1202. See THOMAS A. ALIENIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS & POLICY, 115-117 (2d ed. 1991).

## I. TERMS APPLICABLE TO CERTAIN CATEGORIES OF VISAS

There are three general visa categories for religious workers under the Act, each of which is defined by the INS rules. A visa applicant must be a qualified member of one of these groups<sup>6</sup> for the two years immediately preceding application in order to qualify under the Act.<sup>7</sup> Each term and their implications will be discussed fully below.

### A. *Ministers*

The first category consists of "ministers," which the INS defines as those duly authorized by a religious denomination to conduct worship and engage in services usually performed by a member of its clergy.<sup>8</sup> For the Catholic Church, this encompasses both ordained priests and deacons.

### B. *Professionals*

The second category covers those individuals working "in a professional capacity" for a religious organization.<sup>9</sup> The term "professional capacity" describes an activity requiring a baccalaureate degree or its equivalent.<sup>10</sup> As a result of this requirement, it is suspected that this category will be of limited use. When legislative changes were sought in this area, many expected that this category would be referred to as "professed religious." Unfortunately, the Senate chose to retain the term "professionals" under the Act.

### C. *Other Workers*

The third category covers other workers hired by a religious organization to work "in a religious vocation or occupation."<sup>11</sup> Inclusion in this category thus turns on the definitions of religious "vocation" and "occupation."

#### 1. Religious Vocation

According to the INS, a "religious vocation" is "a calling to religious life evidenced by the demonstration of a commitment practiced in the religious denomination, such as the taking of vows."<sup>12</sup> The proposed rule had narrowly defined a "religious vocation" to apply to only those people

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<sup>6</sup> 8 U.S.C. § 1101(a)(27)(C)(ii).

<sup>7</sup> *Id.* § 1101(a)(27)(C)(ii).

<sup>8</sup> Aliens and Nationality Regulations, 8 C.F.R. § 214.2(r)(2) (1993).

<sup>9</sup> 8 U.S.C. § 1101(a)(27)(C)(ii)(II).

<sup>10</sup> *Id.* § 1153(b)(3)(ii); 8 C.F.R. § 214.2(r)(2).

<sup>11</sup> 8 U.S.C. § 1101(a)(27)(C)(ii)(III).

<sup>12</sup> 8 C.F.R. § 214.2(r)(2).

who had already taken vows.<sup>13</sup> This proposed definition was problematic because the religious formation experiences would not help to satisfy the two year requirement mentioned earlier.<sup>14</sup> In some cases, the formation period could be as long as eight years. Fortunately, the INS responded favorably to the Church's comments and expanded its definition of religious "vocation."

The State Department has taken an interesting position concerning this issue. In its cable of March 1992, the Department stated that the nature of the activities performed by the applicant is irrelevant in determining whether a "religious vocation" exists. In other words, a person could qualify if he or she has simply made a lifelong commitment to a religion. Therefore, if this commitment exists, the person will be presumed to be engaged in activities which relate to a traditional religious function.<sup>15</sup>

## 2. Religious Occupation

The definition of religious "occupation" is more limiting. The INS defines this as "an activity which relates to a traditional religious function."<sup>16</sup> Since this definition is not very useful, the INS has provided examples of religious "occupations." These include workers in religious hospitals or health-care facilities, missionaries, catechists, religious translators, and even religious broadcasters.<sup>17</sup> Specifically excluded are clerks, janitors, and those exclusively involved in soliciting funds.<sup>18</sup>

In addition, it will be difficult for a lay person to qualify under the religious "occupation" definition. Both the INS and the State Department have stated that a lay person must perform activities which embody the tenets of the religion *and* which have a religious significance in order to qualify. Consequently, merely working within a religious facility would not necessarily qualify a lay person under the Act. Rather, foreign workers must also establish that the prospective activities are primarily, if not exclusively, religiously significant.

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<sup>13</sup> 56 Fed. Reg. 33,887 (proposed July 24, 1991).

<sup>14</sup> See *infra* note 8 and accompanying text.

<sup>15</sup> Contrast, however, the INS regulations. After defining "religious vocation," they provide: "Examples of persons with a religious vocation include, but are not limited to, nuns, monks and religious brothers and sisters." 8 C.F.R. § 214.2(r)(2).

<sup>16</sup> 8 C.F.R. § 214.2(r)(2).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

## II. ELIGIBILITY REQUIREMENTS

Although the main purpose of this article is to guide interested persons through the processing of the two types of visas, temporary and permanent visas, the eligibility criteria must be examined first.

### A. "Special Immigrants"

Those applying for visas as members of religious organizations, under the provisions described above, are classified as "special immigrants" under the Act.<sup>19</sup> To qualify, applicants must be members of a religious denomination (e.g., the Catholic Church) for at least two years.<sup>20</sup> In the case of professionals or other workers, they must have worked in an approved religious function for that two year period.<sup>21</sup> Since formation experiences may not satisfy this second requirement, some religious workers may not be brought into the country unless they have already taken ministerial vows. All aliens successfully applying under these provisions may be granted five year religious worker visas.<sup>22</sup>

### B. "Special Immigrant" with Permanent Residency

For a special immigrant with permanent residency, it must be determined whether the person is "outside" or "inside" the United States because each requires a different process. If one is considered "outside" the United States, then an appearance before a United States overseas consulate for "Consular Processing" is required. Moreover, the visa application should be made to the appropriate United States consulate which has jurisdiction over that person's residence.

If the person is "inside" the United States, the process is called an "adjustment of status." That is, an alien in the U.S. with a lawful temporary status "adjusts" his status to permanent residence.

## III. DOCUMENTS REQUIRED

### A. *The Petition*

The basic form for special immigrants is the INS Form I-360.<sup>23</sup> This is a brand new form and is very easy to complete. It requires a cover letter which accompanies a visa packet. The first part of the petition must include information about the religious applicant, such as his/her Order. The second part determines the classification requested. There are seven different classification options, one of which is the "Special Im-

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<sup>19</sup> 8 U.S.C. § 1101(a)(27)(1993 Supp.).

<sup>20</sup> *Id.* § 1101(a)(27)(C)(i).

<sup>21</sup> *Id.* § 1101(a)(27)(C)(iii).

<sup>22</sup> 8 C.F.R. § 214.2(r)(1)(1993).

<sup>23</sup> *Immigr. L. & Proc. Rep. B4-12.1 (MB, 1993).*

migrant Religious Worker.”<sup>24</sup> The third part of the petition requires additional individual information on the petitioner. It should be noted that most of the petition’s questions are not applicable to the religious worker. The final portion of the petition is basically an attestation whereby the applicant, his lawyer or anyone helping the applicant prepare the form must sign. The required accompanying documentation is extremely crucial so as to ensure that the visa petition will be approved.

Also included in the petition is the “qualifying letter” for the special immigrant visa. The letter must be obtained from an authorized official of the religious organization and must come from the “organizational unit” where the Form I-9<sup>25</sup> is to be maintained.<sup>26</sup> The letter must support the applicant’s qualifications for one of the statutory categories, and generally must state that this person is being *assigned* to the United States.<sup>27</sup> The second to fourth paragraphs of this letter should cover the proposed services of the person. The last five to nine paragraphs of that letter should point out the alien’s qualifications to perform the services.

#### *B. Affidavit of Membership*

The second important document that must be included in this packet is “The Affidavit of Membership.” It should be reiterated that the applicant needs at least two years of membership in the religious denomination to qualify.<sup>28</sup> The Affidavit of Membership supports this claim. For example, an Affidavit of Membership might state that a particular person was a lifelong Roman Catholic when she entered her particular order, that she took initial and permanent vows within the order, and that she fulfilled the two years experience required by both law and regulation. The Affidavit of Membership should conclude with a paragraph reiterating the proposed employment for the particular person.

#### *C. Evidence of a Bona Fide Organization*

The next document that should be included in the visa petition is evidence that the organization sponsoring the alien is a “bona fide nonprofit religious organization.”<sup>29</sup> This requirement caused some controversy when first proposed because of questions over the definition of a bona fide religious organization. Accordingly, in order to prove that it is

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<sup>24</sup> *Id.*

<sup>25</sup> Immigr. L. & Proc. Rep. B4-36.22(D) (MB, 1993).

<sup>26</sup> 8 C.F.R. § 214.2(r)(3)(ii).

<sup>27</sup> *Id.*

<sup>28</sup> 8 U.S.C. § 1101(a)(27)(C)(i).

<sup>29</sup> *Id.* The regulations define a “bona fide nonprofit religious organization” as one that is exempt from taxation under I.R.C. § 501(c)(3), or would qualify for such an exemption if it applied for one. 8 C.F.R. § 214.2(r)(2).

a bona fide religious organization, a Catholic Order should submit a Statement of the Order, stipulating when the Order was founded, briefly describing the activities of the Order, and stating how many branches and convents it has throughout the world and which of these are located in the United States. If possible, the appropriate Archbishop should send a letter to the INS and, when the visa is being processed overseas, to the State Department, stating that he has full knowledge of this particular Order and welcomes its activities in his diocese.

#### *D. Group Ruling Document*

Next, a copy of the United States Catholic Conference (USCC) Group Ruling letter should be provided. This should be attached to the front page of the most recent Official Catholic Directory (OCD), along with a photocopy of the page describing the particular religious organization. These documents are very important in establishing the organization's religious tax exemption under § 501(c)(3) of the Internal Revenue Code. If the organization does not have 501(c)(3) status, which is possible but not probable for most Catholic organizations, it can still qualify under the INS regulations if it *would* qualify for the 501(c)(3) exemption.<sup>30</sup>

#### *E. Affidavit of Support*

The last document that should be included in a visa application packet is the "Affidavit of Support." This document serves to satisfy the federal government's interest in preventing visa applicants from becoming public charges after they enter the United States by requiring certain financial information to be provided. In the past, there have been problems because some religious orders do not wish to disclose detailed financial information. Therefore, orders may sometimes comply with this requirement by sending a very general letter to the INS which states that it has an account with an investment broker and providing a general account balance. Although this method has been successful in the past, there is no guarantee of future success.

When the State Department is involved, applicants are typically dealing with their consular officers. These officers have the primary responsibility of approving or denying the visa petition. Some consular officers request more detailed information than others. An applicants' attorney should try to reason with the officer and the applicant should be as flexible as possible because there is absolutely *no formal review* from visa denials by consular officers.

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<sup>30</sup> See *supra* note 32; 8 U.S.C. 1101(a)(27)(C)(ii)(III).

## IV. TEMPORARY WORKERS

The visa provisions for workers are different and should be reviewed separately. The "R" visas<sup>31</sup> are temporary in nature due to the fact that there has been a lot of Congressional anxiety to limit religious workers' visas because of possible abuse. In this vein, it should be noted that Congress has included a termination date (October 1, 1994) in all of the permanent visa provisions detailed above, except for those covering ministers.<sup>32</sup>

There are significant variations among consulates in the types of information required to issue "R" visas. It is advisable to contact the Consulate responsible for processing applications from the particular geographic area to determine what type of materials they would feel comfortable with during their evaluation. Consular officials should be treated deferentially because they have the power to deny or approve petitions and their decisions are absolute and unreviewable as mentioned earlier. In one case, the Consular people in Argentina had no idea what the "R" visas were all about until they were given, by a lawyer for the Church, a copy of an internal State Department cable explaining the provisions.

The two year membership qualification is basically the same for temporary and permanent workers alike.<sup>33</sup> However, temporary workers *do not* need the two-year religious work experience required for permanent visas.<sup>34</sup> Also, "R" visa applicants are not required to maintain a foreign residency, called an "unabandoned" foreign residency, that is required of many other applicants for temporary employment-related visas.<sup>35</sup> Generally, maintenance of such a residence serves to ensure that applicants will return to their country when their visas expire. This foreign residency requirement is called the "Doctrine of Dual Intent"; it is controversial both in the administrative arena and in the courts. Although the person on the "R" visa does not need to maintain a foreign residence, he/she *does* need at least two years membership in the religious denomination.<sup>36</sup>

To review the temporary visa process: applicants must file a qualifying letter, an affidavit certifying that the sponsoring organization is a bona fide religious organization, a Statement of the Order, a letter from the bishop, an Affidavit of Membership and an Affidavit of Tax Exempt

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<sup>31</sup> 8 U.S.C. § 1101(a)(15)(R).

<sup>32</sup> *Id.* § 1101(a)(27)(C)(ii).

<sup>33</sup> *Id.* § 1101(a)(15)(R)(i).

<sup>34</sup> *See id.* § 1101(a)(27)(C)(iii).

<sup>35</sup> *See id.* § 1101(a)(15)(H) (nurse visa), and § 1101(a)(15)(L) (manager, executive, or employee with special knowledge visa).

<sup>36</sup> *Id.* § 1101(a)(15)(R)(i).

Status. In some cases outdated petitions have been used, and although this has not always prevented the petition from being approved, it is advisable to use the most updated affidavits, particularly in the case of the USCC Group Ruling letter. Immigration processing or consular officers, prefer to see documents issued within the previous year if possible. Finally, the affidavit of support from the Order's bank should also be included. One may also include such things as the Order's Articles of Incorporation which, although not necessary, are helpful to provide.

#### V. CHANGE OF CLASSIFICATION

Once a person enters the country as a nonimmigrant (a temporary visitor), the regulations permit that person to change both his or her employer<sup>37</sup> and visa classification.<sup>38</sup> The change of employer and change of visa classification is accomplished by means of Form I-129.<sup>39</sup> The most likely scenario in change of visa classification situations involves applicants in the United States missionaries.<sup>40</sup> A B-1 missionary is an administrative, not statutory category. B-1 visas are only good for short periods of time, such as three or six months.<sup>41</sup> Applicants must then return to the INS to apply for extensions.<sup>42</sup> Again, Immigration officials are free to summarily deny such applications. Therefore, religious workers on B-1 visas are advised to change to the "R" visa<sup>43</sup> because the "R" visa does not have the unabandoned foreign residence requirement,<sup>44</sup> mentioned earlier, and is valid for a full five years.

Another change of classification situation arises with the "F" visa.<sup>45</sup> These are student visas which are typically held by foreign seminarians. "F" visa holders who wish to remain in the United States should do a practicum of one year at the end of the regular course of study. The regulations allow for the practical training in order for the person to gain experience in his or her field of specialization.<sup>46</sup> Seminarians should use this period to enter the diaconate, so that after the one year practicum the applicant can change to the "R" visa.<sup>47</sup> If the applicant is not an

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<sup>37</sup> 8 C.F.R. § 214.2(r)(6).

<sup>38</sup> *See id.* § 214.2(r)(5).

<sup>39</sup> UNITED STATES DEP'T. OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, FORM I-129, *Petition to Change Classification*, No. 1115-0053. *See* 8 C.F.R. § 214.2(r)(5), (r)(6).

<sup>40</sup> 8 C.F.R. § 214.2(b)(1). *See* 8 U.S.C. § 1101(a)(15)(B).

<sup>41</sup> 8 C.F.R. § 214.2(b)(1). A B-1 visa is primarily for visitors and can be extended for up to six months. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 8 U.S.C. 1101(a)(15)(R).

<sup>44</sup> *See supra* note 38 and accompanying text.

<sup>45</sup> *Id.* § 1101(a)(15)(F) (student visa).

<sup>46</sup> 8 C.F.R. § 214.2(f)(10) ("practical training").

<sup>47</sup> 8 U.S.C. § 1101(a)(15)(R).

ordained deacon or priest by that time, the "minister" category<sup>48</sup> cannot be used. Instead, because the person has already graduated with a baccalaureate, the "professional" category<sup>49</sup> can be used. This is one of the limited uses of the "professional" category for Church purposes. Once the seminarian is on a "R" visa,<sup>50</sup> it is important for diocesan officials to move toward ordination, so that the applicant can start accumulating the two years experience necessary for permanent residency status.<sup>51</sup> If the applicant is being ordained, he or she could change from "R" visa status immediately if he or she already has three or four years of experience. It is not necessary to wait the full five years granted by the "R" visa if the diocese or Order wants to sponsor the applicant.

## VI. COMMON ISSUES RAISED

There are two types of situations that have concerned Church immigration attorneys under the new Act and visa regulations: hospital workers and parochial school teachers.

### A. "What About Hospital Workers?"

Can Catholic hospitals sponsor Catholic lay nurses using the "R" visas? Both the State Department and the INS would probably deny such petitions.

As stated earlier, the proposed job must relate to a "traditional religious function."<sup>52</sup> Thus, if the job has no *religious* significance, and is performed by a lay person, the mere fact that the person is a member of the religious denomination which operates the hospital would not, in and of itself, make the person a "religious worker." On the other hand, if a religious order has traditionally worked in the area of health care, then it is unlikely that there would be a problem with sponsoring a lay nurse, so long as the "religious vocation" category is used.<sup>53</sup> Of course, an Order could simply sponsor the person as a worker and then assign him to work in the hospital.

### B. "What About Parochial School Teachers?"

Would a lay Catholic qualify as a religious worker if he or she comes to teach in a parochial school? The answer is probably no, because the prospective activities must have some sort of religious significance. It is unlikely that the State Department or the INS would believe that teach-

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<sup>48</sup> *Id.* § 1101(a)(27)(C)(ii)(I).

<sup>49</sup> *Id.* § 1101(a)(27)(C)(ii)(II).

<sup>50</sup> *Id.* § 1101(a)(15)(R).

<sup>51</sup> *Id.* § 1101(a)(27)(C)(iii).

<sup>52</sup> 8 C.F.R. § 214.2(r)(2) (definition of "religious occupation").

<sup>53</sup> *See supra* notes 12-17 and accompanying text.

ing science or math is an innately religious activity. However, if the applicant teaches religion or is a religious counselor, the possibility of approval is much greater.

#### VII. EMPLOYMENT VERIFICATION FORMS

Let us review Employment Verification Forms - Forms I-9.<sup>54</sup> The regulations state that the Form I-9 should be kept at the "organizational unit" that will engage the services of the religious worker or the actual place of employment.<sup>55</sup> It is presumed that the term "organizational unit," refers to a particular convent, or particular house or Order that sponsors the applicant.

#### CONCLUDING OBSERVATIONS

Every month the Visa Consular Section of the State Department publishes a visa bulletin. It seems that all visa numbers for special immigrants are current. Therefore, there should be absolutely no problem in getting visas in a short period of time. Since there are numerical limits on special immigrant visas,<sup>56</sup> it is strongly suggested that applicants and their potential sponsors act promptly so as to avoid being closed out of filled categories.

Next, it is important to take advantage of the non-minister special immigrant categories now, because they will not exist after October 1994.<sup>57</sup> In the past, the absence of the categories has affected many nuns who did not have higher education degrees. When these categories expire, such applicants will be forced to use employment-based visa categories with limited quotas and application backlogs of several years. Because of this problem, the Church will certainly lobby Congress to keep these categories open. Since Catholics are probably one of the largest denominations sponsoring religious workers, there is a good chance that it will be successful if it can show that these visas have not been abused. Yet until that time, the termination provisions should influence decision making.

The temporary "R" visas, on the other hand, will continue to be part of the legal immigration system. There was some confusion about that initially, because the statute contained substantial cross-reference between the two provisions,<sup>58</sup> this has since been clarified. In addition, the State Department has stated categorically that there will be no termination of temporary religious visas.

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<sup>54</sup> Immigr. L. & Proc. Rep. B4-36.22(D) (MB, 1993).

<sup>55</sup> 8 C.F.R. § 214.2(r)(3)(ii).

<sup>56</sup> See ALIENIKOFF & MARTIN, *supra* note 5, at 125-126.

<sup>57</sup> 8 U.S.C. § 1101(a)(27)(C)(ii).

<sup>58</sup> *Id.* § 1101(a)(15)(R), (a)(27)(c).

Also, it is important that applicants who have begun processing in United States consulates abroad bring all of the qualifying documents with them, as they will be double-checked within the country. If a visa has been approved by a consular officer, the applicant will still be inspected by an immigration officer at the port of entry. These officers are empowered to initiate exclusion proceedings for entrants who do not have proper documentation.

Needless to say, the new visa categories have been used successfully thus far. Simply stated, they work.

