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Richard A. Sloan  
Director  
Regulatory Management Division  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
111 Massachusetts Avenue, NW, 3<sup>rd</sup> Floor  
Washington, DC 20529

**Re: DHS Docket No. USCIS-2005-0030  
Special Immigrant and Nonimmigrant Religious Workers  
72 Fed. Reg. 20442 (April 25, 2007)**

Dear Mr. Sloan:

The American Immigration Lawyers Association (AILA) submits the following comments to the U.S. Citizenship and Immigration Services (USCIS) on the proposed rule that would overhaul the Religious Worker Visa Program (RWVP). AILA is the voluntary bar association of over 10,000 attorneys and law professors who practice and teach in the field of immigration and nationality law. Founded in 1946, AILA is a non-partisan, non-profit organization affiliated with the American Bar Association and is dedicated to promoting justice, advocating for fair and reasonable immigration law and policy, and advancing the quality of immigration and nationality law and practice.

We appreciate the opportunity to comment on the proposed regulation and believe we are particularly well qualified to do so. AILA members regularly assist foreign nationals and their employers in the process of applying for immigration status and are familiar with the ever-changing complexities and subtleties of immigration law. AILA attorneys represent a wide variety of U.S. religious organizations in their immigration matters and include many attorneys who work on the staffs of major religious conferences and synods. AILA also has a standing Committee on Religious Workers, comprised of members with special expertise and interest in the Religious Worker Visa program. Thus, we have developed special expertise with respect to the RWVP and the problems religious institutions and their alien religious workers face in seeking visas and admission to the United States.

This small but essential program allows U.S. religious organizations to fill critical positions and increases the ability of faith-based organizations to serve their communities. If this program is unduly restricted through new regulations, religious organizations across the country will face a serious shortage of religious workers to perform essential services for their communities. As a result, the religious organizations and the communities they serve will suffer.

USCIS has clearly stated that its rationale for the proposed rule is to reduce or eliminate the opportunity for fraud in the RWVP. AILA wholeheartedly endorses agency efforts to identify and root out fraud so that only deserving and qualified religious organizations receive benefits in the program.

However, we are deeply concerned about several aspects of the proposed rule.

**USCIS Has Not Conducted Sufficient Data and Programmatic Analysis to Determine the Need for the Proposed Rule’s Significant Changes and to Craft Narrow and Effective Rules**

**Reliance on the 1999 GAO Report For Determining the Nature and Extent of Fraud is Misplaced.**

The central rationale advanced by USCIS in proposing such broad changes to the religious worker rules is its belief in the existence of widespread fraud. The agency’s belief relies heavily on the results of a GAO Report, *Issues Concerning the Religious Worker Visa Program*, NSIAD-99-67 (March 26, 1999) (*hereinafter GAO Report*).

However, such reliance is misplaced. The GAO did not investigate reported or suspected incidents of fraud. Instead, it repeated legacy INS’ own concerns about fraud in the religious worker program and noted INS’ acknowledgement of the difficulty of proving willful intent to commit fraud. Likewise, the GAO also did not conduct any data reviews or analysis into the extent of fraud. Rather, it reported that neither INS nor Department of State had “data or analysis to firmly establish the extent of the problem.” (*GAO Report*, p 4.) Similarly, the nature of the purported fraud was not studied. The report mentioned anecdotal legacy INS concerns that fraud involved applicants making false statements about their qualifications and conspiracy between applicants and sponsoring organizations to misrepresent material facts about applicants’ qualifications.

The GAO took INS and the Department of State to task for their failure to “routinely investigate questionable visa petitions and applications or report fraud information by type of visa.”

After the passage of eight years since the report was published, we still are not aware of any systematic efforts to understand the extent and nature of fraud in the RWVP. While fraudulent activity may well occur in the program, USCIS should have a better grasp of the problems so that proposed solutions have a greater likelihood of success while minimizing the burdens to stakeholders.

The Full Religious Worker Benefit Fraud Assessment (BFA) Has Not Been Provided; The BFA Summary Does Not Provide Sufficient Information Regarding the Nature and Extent of Fraud

The USCIS relies heavily on a Benefit Fraud Assessment (BFA) of the religious worker program conducted by USCIS' office of Fraud Detection and National Security.<sup>1</sup> 72 Fed. Reg, 20444.

According to the summary, the BFA entailed the review of 220 pending and completed I-360 Special Immigrant religious worker cases filed over a six month period. The stated purpose was to determine the extent of fraud occurring within the sample. The summary reports that the study concluded that there was a 32.73% rate of fraud in the religious worker program.

We agree that this level of fraud, if accurate, is cause for alarm. However, we have concerns about the methodology utilized and the conclusions drawn from this assessment, particularly since they form the theoretical underpinning for the sweeping changes contained in the proposed rule. Our concerns regarding the BFA include:

- ✓ Small sample. The BFA involved the review of 220 I-360 Special Immigrant petitions. Given the dearth of any data or qualitative analysis by USCIS in recent years regarding the RVWP, this sample size is too small. While such a size may be statistically sound (the Supplementary Information indicated a reliability factor of plus/minus of 5%), this is not large enough to provide researchers with the full range of incidents of fraud and effectiveness of current procedures in serving as a check on, or disincentive to, fraudulent behavior.
- ✓ Unclear criteria. The BFA assessment did not describe what criteria were utilized to determine whether fraud existed in a given reviewed application. Though it provided a definition of the word "fraud," this is not a description of the criteria used. For instance, fraud was defined as the "willful" misrepresentation or falsification of a material fact. But it is unclear how the investigators determined that a misrepresentation was willful. Were petitioners and/or sponsoring organizations interviewed in all cases? Were they under oath? Were prior applications reviewed to identify patterns?
- ✓ Flawed methodology. The methodology described in the BFA summary does not allow a conclusion that its statistics are relevant or correct: (a) it is unstated how the random sampling from receipts was made; (b) it is not clear whether the "assessment" was made for statistical accuracy or for enforcement purposes. If the assessors had a dual role which included law enforcement responsibilities it is difficult to separate whether their contributed data was impartial or skewed to a particular result; (c) it is unclear how many of the

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<sup>1</sup> The USCIS does not provide a citation for the BFA, but cites only to a summary. [http://www.uscis.gov/files/natedocuments/Relig\\_Worker\\_Fraud\\_Jul06.pdf](http://www.uscis.gov/files/natedocuments/Relig_Worker_Fraud_Jul06.pdf).

selected cases proceeded to adjudication, how many were denied on fraud grounds, and how many of these rejected cases went to an administrative or federal court review and with what result.

Of the examples provided to illustrate fraud, several of the fraud conclusions are questionable, particularly in light of the above. One must ask whether there was true fraud or simply failure on the part of the applicants to prove the elements of the application.

In addition, we are troubled that the Supplementary Information to the proposed rule contained statistical conclusions from the BFA that were not reported in the summary of the BFA made public by the USCIS. Specifically, it reported that the BFA determined that 44% of the fraudulent cases were petitions filed on behalf of religious workers by nonexistent organizations and an additional 54% contained material misrepresentations in the documentation submitted to establish eligibility. 72 Fed. Reg. 20444.

Moreover, we have no confidence that USCIS reviewed information in its own databases to help it assess the extent of the problem with fraud and to look at trends over time. It would be useful to know the number and percent of RWVP applications that are investigated due to suspicion of fraud, denied due to fraud, and ultimately approved on appeal or motion to reopen or reconsider after initial denial on alleged fraud grounds.

In short, it appears to us that USCIS has not adequately studied the RWVP to determine the true nature and extent of fraud in the religious workers program. Thorough analysis is crucial to the crafting of effective rules.

**USCIS Violates the Religious Freedom Restoration Act By Failing To Demonstrate a Compelling Interest**

The Supplementary Information to the proposed rule requests comments on the applicability of the Religious Freedom Restoration Act of 1993 (RFRA). 107 Stat. 1488, as amended, 42 U.S.C. §2000bb, *et. seq.* RFRA was enacted into law because Congress recognized that laws seemingly neutral toward religion may burden religious exercise in the same manner as laws intended to interfere with religious exercise. Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. The only exception to this general mandate under the statute requires the Government to satisfy the compelling interest test to demonstrate that application of the burden is (1) in furtherance of a compelling government interest, and (2) is the least restrictive means of furthering that compelling governmental interest.

The Supreme Court recently had the occasion to analyze the RFRA in *Gonzales v. O Centra Espirito Beneficiente Uniao Do Vegetal*, 456 U.S. 418 (2006) (UDV).<sup>2</sup> In UDV, the Court found that Congress established the compelling interest test in RFRA as a means to strike a sensible balance between religious liberty and competing governmental interests. The Court stated that religious exceptions to generally applicable rules depend on the particular circumstances at issue and require case-by-case analysis, and that RFRA mandates consideration of exceptions to a generally applicable law under the compelling interest test. While the RFRA may require exceptions to generally applicable laws, the burden is on the government to demonstrate compelling interest, and it is up to the federal judiciary to strike the proper balance between the Government's interest and the burden on the exercise of religious freedom an enactment imposes.

USCIS has made it clear that the Government's interest is to eradicate fraud in the RWVP. 72 Fed. Reg. 20445. However, as we note above, we urge that suspicions of the extent and severity of fraud and abuse alleged by the USCIS are not supported by the studies relied upon by the USCIS. Thus, the USCIS has not demonstrated a compelling interest in implementing the proposed changes. As will be discussed below, the steps the USCIS proposes to curb suspected fraud and abuse in the RWVP go far beyond the least restrictive means to further the government's interest. These proposed regulations, then, violate both prongs of the Religious Freedom Restoration Act.

### **Definitional and Evidentiary Changes Are Too Restrictive and Intrusive**

The proposed rule would create new definitions as well as amend existing definitions. Moreover, as a result of the proposed changes and revisions to definitions, new or revised evidentiary requirements are imposed. Several of these changes are too broad in reach, the need for the proposed changes is not supported by the studies, and several of the proposed changes violate RFRA.

#### **The IRS §501(C)(3) Tax Exempt Status and Determination Requirement Fails To Increase Protection Against Fraud and Abuse and Is Unduly Restrictive and Burdensome**

A significant proposed change is the requirement that a petitioning organization have obtained IRS §501(c)(3) tax exempt status as a "religious organization," and document that status with a current determination letter stating that the organization is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, as a "religious organization." See proposed 8 CFR §204.5(m)(4), 8 CFR §204.5(m)(7), and 8 CFR §214.2(r)(7). The requirement to document IRS §501(c)(3)

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<sup>2</sup> UDV is a small religious sect which uses an herbal tea known as *hoasca* in its religious ceremonies. One of the herbs in the tea contains a hallucinogen, the possession of which violates the Controlled Substance Act. Federal law enforcement agents seized a shipment of the tea and threatened prosecution. UDV successfully sought to enjoin the prosecution on RFRA grounds. Before the Court was the government's appeal of the order of the court below granting UDV's complaint.

status by a current determination letter extends to a bona fide nonprofit religious organization that is attesting to the affiliation of a petitioning organization seeking qualification as a bona fide organization which is affiliated with a religious denomination. See proposed 8 CFR §204.5(m)(4). Where the petitioner is a bona fide organization affiliated with a religious denomination, the religious denomination with which the petitioning organization is affiliated must submit a current IRS §501(c)(3) determination letter. See proposed 8 CFR § 204.5(m)(7)(iii)(E) and 8 CFR §214.5(r)(7)(iii)(D).

Under the current regulations, it is not necessary to show that the religious organization with which the religious worker will serve has obtained tax exempt status as a religious organization under section 501(c)(3) of the Internal Revenue Code of 1986. If an organization has never sought exemption, it is sufficient to “...establish to the satisfaction of the Service that it would be eligible for it if it had applied for tax exempt status.” See 8 CFR §204.5(m)(2) and 8 CFR §214.2(r)(2).

Imposing a requirement that the qualifying religious organization obtain a determination of IRS §501(c)(3) tax exempt status as a religious organization fails to increase protection against potential fraud and abuse, and is unduly burdensome on many religious organizations. Moreover, in practice, the USCIS petitioning process and the State Department’s visa application process at consulates typically require evidence to support the religious nature of the petitioning religious organization, whether or not the petitioning organization has obtained tax exempt status as a religious organization under IRS §501(c)(3).

The IRS determination that a petitioner is a qualifying religious organization is made on the basis of Attachment A to Form 1023, and the evidence submitted with it. The issues addressed in this attachment, such as doctrine and belief, religion’s history and government, place of worship, membership, commission of ministers and others, are, in practice, addressed in the USCIS religious worker petitioning process. The USCIS is equally, if not better, qualified to address the religious nature of the petitioner. In fact, the IRS determination may be several years old and a USCIS determination at the time of filing would go further to support the integrity of the program.

In a proposed rule published not long after the Immigration Act of 1990, the Immigration and Naturalization Service (INS) proposed that petitioning organizations receive IRS §501(c)(3) religious organization tax exempt status. See 56 Fed. Reg. 33886, 33887 (July 24, 1991). After reviewing comments, the INS revised the provision in the final rule, concluding that requiring a determination was unduly restrictive, and instead, promulgated regulations that permitted a petitioning organization to submit evidence to show that the organization would qualify for tax exempt status as a religious organization under IRS §501(c)(3). See 56 Fed. Reg. 66965 (December 27, 1991).

The same objection, that requiring a determination letter is unduly restrictive and burdensome, applies today. As a practical matter, the IRS is taking several months to

process these applications and, as noted in the Supplementary Information, there are fees associated with a request for an IRS §501(c)(3) determination letter, which cost up to \$750.00.

The proposed rule imposes a requirement that a “Bona Fide Nonprofit Religious Organization” possess a “currently valid” letter from the Internal Revenue Service confirming that the organization is a religious organization exempt from taxation section 501(c)(3) of the Internal Revenue Code of 1986. We note that the term “currently valid” needs to be defined. Presumably this means the most recent determination letter from the IRS, but this needs to be clarified.

We do not agree that nonprofit status as required by the INA is solely determined by a tax exempt designation. Such status may be established by the petitioner’s incorporating and governing legal documents, or other evidence of tax exempt status that is more readily available to petitioning religious organizations. States with a sales tax often grant exemption to churches and nonprofit organizations, and evidence of the requirements for such exemptions and the grant of a sales tax exemption should establish the nonprofit and religious nature of the petitioning organization. Many states and municipal governments tax owners of real estate and exempt nonprofits. Petitioners should be given the option to establish that their state or municipal government exempts nonprofits from real estate taxation and that the petitioning entity is so exempt. Even the United States Postal Service examines the supporting documentation to verify that an organization is organized and operated for a nonprofit purpose and qualifies for nonprofit mail rates. See USPS Publication 417.

The proposed rule discusses IRS group tax exemptions. The typical IRS §501(c)(3) group ruling letter establishes that (a) the central organization (the organization that holds the group ruling) is exempt under IRS §501(c)(3); and, (b) that the subordinates included in that group ruling are also exempt under IRS §501(c)(3). However, as with individual ruling letters, a group ruling letter does not classify the central organization or any subordinate covered under the group ruling as a “religious organization.”

Further, although the central organization holding an IRS §501(c)(3) group ruling may be classified as a “church” under IRC §§509(a)(1) and 170(b)(1)(A)(i), each subordinate covered under that group ruling is not also classified as a “church.” Even if each subordinate were so classified, it would not be the same thing as classification as a “religious organization.” “Church” is a subset of “religious organization.” Although all churches are religious organizations, all religious organizations are not churches. As with the requirement to submit an individual IRS §501(c)(3) ruling letter, a requirement to submit an IRS §501(c)(3) group ruling letter does little to advance the stated purposes of the proposed rule, while unduly burdening the religious organizations.

For all of these reasons, we urge USCIS to retain the current regulatory scheme that permits the submission of either an IRS §501(c)(3) determination letter or the qualifying evidence.

### The Definition of “Religious Denomination” Is Too Restrictive and Unclear

The proposed definition of “religious denomination” is too restrictive, given the realities of the organizational structure of many religions. For instance, while the Supplementary Information to the proposed rule states that the definition is intended to accommodate those legitimate religious denominations that “officially shun” structures such as hierarchical governing structures, we note that the actual definition undermines this goal. 72 Fed. Reg. 20445.

The current regulations define a “religious denomination” as having “some form of ecclesiastical government, a creed or statement of faith, some form of worship, a formal or informal code of doctrine and discipline, religious services and ceremonies, established places of religious worship, religious congregations, or comparable indicia of a bona fide religious denomination.” See 8 CFR 204.5(m)(2), 8 C.F.R. 214.2(r)(2). The proposed regulations, however, changes the definition in a key fashion. While the current regulations require “some form of ecclesiastical government,” the proposed regulations define the term “religious denomination” as “...a religious group or community of believers governed or administered under a common type of ecclesiastical government.” Proposed 8 C.F.R §204.5(m)(4), 72 Fed. Reg. 20452. Under this definition, only those communities of believers who have chosen to be “governed or administered” may be considered a denomination. This proposal requires evidence of some form of ecclesiastical government in addition to the other indicia of a bona fide religious denomination. Many denominations do not have ecclesiastical government and they would thus be excluded under the proposed rule.<sup>3</sup>

### The Definition of “Religious Occupation” Uses Imprecise Terminology, Is Too Restrictive, and Will Result in Erroneous Determinations and Substantial Burdens on Religious Exercise

We acknowledge that the current definition of “religious occupation” has led to some confusion because of its lack of detail. As a result, we welcome clarification, such as that the duties must “primarily” relate to a traditional religious function. Too often, religious employers are told that a position is not a “religious occupation” because the employee spends even a small amount of time on administrative tasks related to his or her religious employment. We hope that this change will eliminate this common problem.

We applaud additions to the proposed list, particularly those relating to youth ministers, religious choir directors or music ministers, and ritual slaughter supervisors. Their inclusion acknowledges that their activities often are primarily

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<sup>3</sup> For example, Rev. Swami Arumugam Katir, submitting a comment to the proposed rule on behalf of “Hindusim Today” magazine, provides testimony about the absence of ecclesiastical governmental structure in Hinduism. Similarly, Melanie Nezer, Migration Policy Counsel, Hebrew Immigrant Aid Society (HIAS), testifies that “...there is no single rabbi or group of rabbis or lay religious leaders that exerts centralized ecclesiastical authority over members of the Jewish faith.”

religious in nature despite the secular connotation of their titles. Nevertheless, even with expansion, given the very nature of religious belief and worship, any “list” is incomplete. We are concerned that the list appears to be Judeo-Christian-centric, excluding, for example, Hindu *silpis* and *sthapatis*, Hindu temple architects, Hindu religious dancers, and Hindu religious food preparers.

Given the immense array of religions and denominations operating legitimately in the U.S., it is critical to make clear that any “list” of religious occupations is intended to be illustrative only. Further, any final rules should emphasize that the exclusion of a particular occupation from the list is not intended to indicate that the activity is necessarily not a “religious occupation.” By stating that the specific positions on the list “can qualify” as religious occupations, it appears that USCIS is suggesting that, in some cases, these occupations may not qualify as religious occupations. This undermines the intent of the list, which should be to give guidance to religious organizations regarding which types of positions they can fill with foreign religious workers. We suggest keeping the language that precedes the list as it is in the current regulation, or else substituting “can qualify” with the phrase “will ordinarily qualify.”

However, we object to the removal of all “workers” in religious hospitals and religious health care facilities from the list. While many or most workers in such settings may well perform primarily secular functions, some fill roles that relate to traditional religious functions. Examples include hospital ministers and those providing spiritual guidance to ill and terminal patients and their families. Their exclusion from the proposed list will create a presumption against them that will be especially difficult to overcome.

In addition, we urge USCIS to be more cautious with its use of the term “secular” and the suggestion that the distinction between the secular and religious aspects of an occupation are always easy to discern. Justice Alito, when he sat on the Third Circuit, found that the label “secular” could be erroneously applied without careful consideration of an occupation’s religious significance. In this case, the court reversed the AAO’s determination that a person who cared for the mentally handicapped was secular in nature, writing: “We note that the regulation specifically excludes certain workers, such as “janitors” and “maintenance workers,” who perform wholly secular functions, but this does not mean that a person cannot qualify as having a “religious occupation” if the worker’s job includes both secular and religious aspects.” *Soltane v. U.S. Dep’t of Justice; Immigration and Naturalization Service*, 381 F.3d 143 (3d Cir. 2004).

The pre-determined nature of the occupations on the list of non-qualifying “secular” positions suggests a non-bending, one-size-fits-all approach that is not grounded in reality. AILA members have clients from religious denominations that ascribe traditional religious functions to traditional religious occupations which deserve a case-by-case adjudication rather than a simplistic occupational label. We also note the casual use of the adjectives “administrative” and “support,” similar to references to “secular,” to describe non-qualifying occupations, will result in gross unfairness to employees and religious organizations alike.

Aside from the unfairness that will result, such an approach substantially burdens religious exercise without compelling justification, and furthers no stated governmental interest. We urge the agency to emphasize the nuances that often accompany these questions and, again, to utilize caution in its choice of terminology.

We also recommend that “teachers in religious schools” be included in the examples of “religious occupations.” The teaching of children in a religious environment is a core religious function in a great many faiths.

In addition, AILA is concerned that in order for a position to be considered a “religious occupation,” the petitioner would be required to show that the occupation is “recognized as a compensated religious occupation within the denomination.” Proposed 8 CFR § 204.5(m)(4), 72 Fed. Reg 20452. This requirement is grounded in an unduly narrow perception of how religious organizations are organized and is an unrealistic and unfair expectation for some. In some faiths there may not be a designated religious official that can declare for the entire denomination which occupations are so recognized.

A religious employer’s ability to meet the requirement that the duties be “primarily, directly, and substantively related to, and must clearly involve inculcating or carrying out the religious creed and/or beliefs of the denomination” should be sufficient proof that the occupation is religious without this additional evidentiary burden.

We recommend that this provision requiring that the petitioner demonstrate that the position is one “recognized as a compensated religious occupation within the denomination” (which is included twice in the proposed definition) be deleted.

#### Requiring That a Religious Worker Be Compensated Is Beyond Statutory Authority

A consistent thread that runs through the proposed rule is the requirement that the prospective alien religious worker must receive compensation for service in the religious occupation during the qualifying prior period, and in the intended activity in the U.S. For example, proposed 8 CFR §204.5(m)(2) provides: “All three types of religious workers must have been performing, on a compensated, full-time but not necessarily exclusive basis, as a minister or in a religious vocation or occupation for at least the two-year period immediately preceding the filing of the petition.” And, the definition of the term “religious occupation” provides that the position must be “salaried, or otherwise compensated by room and board, or other support that is reflected in an alien’s W-2, wage transmittal statements, or income tax returns.” Proposed 8 CFR §204.5(m)(4).

The requirement that a religious worker receive a salary or other compensation as shown on a W-2 form would bar from admission individuals who have engaged in qualifying religious activities abroad and in the U.S. without compensation on a fully voluntary basis. For instance, missionaries seeking to enter the U.S. on behalf of the Church of Jesus Christ of Latter-day Saints (LDS) comprise a large percentage of

total religious worker visas issued annually. However, these individuals, pursuant to LDS doctrine, serve without any Church compensation.

Moreover, the compensation requirement is in conflict with the practices of many religions where those engaged in religious vocations undergo periods of formation after taking vows or otherwise pledging dedication to religious life. Typically, these persons are formally accepted into their orders for a period of uncompensated training and discernment during which they perform all of the responsibilities of a fully professed member of the order or congregation. Such persons' religious work is intrinsic in their being and they make a commitment to a way of life. They receive room and board, but no form of "compensation" that is reflected on a W-2 or other wage or tax statement.

It is hard to discern benefits that would accrue from the large restrictions on petitioners and sponsors that these provisions would impose. The Supplementary Information to the proposed rules explains that the mandate of compensation "provides an objective means of confirming the legitimacy of and commitment to the religious work, as opposed to lay work, and of the employment relationship." But it is clear from the examples discussed above that no nexus exists between compensation and the legitimately religious nature of the work performed.

While USCIS concedes this point, stating that it "recognizes that legitimate religious work is sometimes performed on a voluntary basis", it nevertheless clings to the mistaken belief that implementing a "bright lines" test will help to ensure the integrity of the program. All it would do, however, is discriminate against religious organizations that rely on volunteer workers to perform core work and those too small to provide salaries for some of its religious workers. This is unrelated to the agency's stated goal of reducing opportunities for fraud.

On the more practical level, room and board is often considered parsonage under the tax law and is not reflected in a W-2 or other tax document.

The requirement that the alien religious worker have received compensation during the qualifying period and that the prospective activities be compensated are *ultra vires*. Neither INA §101(a)(27)(C) nor INA §101(a)(15)(R) includes a requirement that the alien religious worker have received compensation as a religious worker in the qualifying period prior to application for admission or status as a religious worker.

We also are concerned about the constitutional implications of this proposed regulatory requirement of compensated employment. The reason for Congress' decision not to require such employment is simple: Congress was mindful of the First Amendment rights of the religious community and the wide variance in traditional religious practices from denomination to denomination. The proposed rule could well impinge on the free exercise of religion. The existing regulation is sensitive both to the constitution and to Congressional intent by not including such a requirement. The proposed rule demonstrates no such sensitivity.

The proposed exemption for aliens “who have taken a vow of poverty or similar formal lifetime commitment to a religious way of life” is not sufficiently responsive to the Constitutional rights of all denominations. If the USCIS regulation becomes final, it would represent a law which favors certain religions over others, and as such would violate the First Amendment. Congress can pass no such law, and certainly an agency cannot impose one by regulatory fiat.

The requirements that the alien religious worker must have been in a compensated position during the qualifying period and that the prospective position be a compensated one should be deleted.

#### Documentation of Employment Is Excessive

The proposed regulation requires that, in support of R visa classification extension applications, the petitioner include the religious worker’s W-2, the employer’s wage transmittal statements, and transcripts of the religious worker’s processed income tax returns for any preceding period spent in the United States in R nonimmigrant status. The requirement of all three forms of evidence is duplicative, and creates unnecessary burdens on the petitioner and beneficiary (particularly by requiring that they obtain IRS transcripts). Any one of these documents should be sufficient proof of the religious worker’s past employment. We propose that the requirement be that the evidence must include one of the following: “the alien’s W-2 wage statements for each year of employment, the employer’s wage transmittal statements for each year of employment, copies of the alien’s income tax returns for each year of employment, *or* transcripts of the religious worker’s processed income tax returns for any preceding period spent in the United States in R nonimmigrant status.” 8 CFR 214.2(r)(10).

#### The Definition of “Religious Vocation” is Unduly Restrictive

*“Vocation” Relates to a Person’s Status, Not “Activities”*

We have concerns with several aspects of the definition of “religious vocation” provided by the proposed rule. First, the definition’s focus on what the petitioner *does* is misplaced and inappropriately restrictive. Any discussion of religious vocation should be in the context of the well established principle that a religious vocation is a *status* in life and not work, which could be said of a religious occupation. It has been clear since the Immigration Act of 1990 and Supplementary Information published by legacy INS on the special immigrant religious worker category that “... religious workers in a religious vocation (including, but not limited to nuns, monks, or religious brothers and sisters who take vows) often engage in such occupations and could qualify for this classification not by virtue of their occupation, but by virtue of their vocation.” 56 Fed. Reg. at 30703, 307307 (July 5, 1990).

The term “religious practices and functions” in the proposed rule is of great concern to us. It is not compatible with the life and status of every person genuinely engaged in a religious vocation. For instance, a person engaged in a religious vocation for an

organization whose religious mission is service to the sick and needy is engaged in a “religious practice and function” when viewed as a status within an organization with that mission. The term “religious” may be too restrictive to include this type of religion-based activity and could also be interpreted to impose the requirements of a religious occupation on a religious vocation, looking at a petitioner’s “9-to-5” job duties. This requirement exceeds the thrust of the statute and creates erroneous results. Thus, a religious sister in an order dedicated to care of the sick and needy could be inappropriately subject to the test of whether her day-to-day activities meet the qualifications of traditional religious functions or other religious occupation requirements.

The Department of State’s Foreign Affairs Manual (FAM) also recognizes the important distinction between life status of those in a religious vocation and the job duties of others. In discussing the State Department’s definition of “religious vocation” in 22 CFR §41.58 (k), the FAM refers to the religious vocation as:

... a calling to religious life, evidenced by the demonstration of a “lifelong commitment as practiced in the religious denomination, such as the taking of vows.” . . . An alien who has taken vows or the equivalent and has made a lifelong commitment to a religion is presumed to be engaging in activities relating to a traditional religious function regardless of the nature of the activity. Persons with religious vocations may engage in any type of activity within their religious vocations, may engage in any type of activity within their denomination or its affiliate, and the absolute exclusion of janitors, maintenance workers, clerk, etc. from the definition of “religious occupation” does not apply to religious vocations. For vocation-based R-1 applicants, the emphasis is therefore on what the applicant’s status is within the religious organization, rather than on what the applicant will do in the United States. (See 9 FAM 41.58 N10.2-1.)

In distinguishing religious vocations from religious occupations, the next paragraph of the FAM states that for an occupation-based R-1 applicant the emphasis is on what the applicant will do in the United States rather than what the applicant’s status is. (See 9 FAM 41.58 N10.2-2.) The FAM is clear that the status of one with a religious vocation is not determined by the nature of daily activities within the vocation. AILA urges USCIS to accept the FAM’s perspectives on the characteristics of a religious vocation.

#### *A Vocation Does Not Require a “Lifetime” Commitment*

AILA also objects to the insertion of the word “lifetime” in the definition, requiring that those in a religious vocation demonstrate a “formal lifetime commitment to a religious way of life.” No rationale for this requirement is provided in the Supplementary Information. Presumably, it is based on an assumption that only a permanent commitment can demonstrate a true commitment to a religious vocation and ensure that legitimate religious work is being performed. However, this view ignores the reality of many legitimate religions. The annual renewal of vows in the

Catholic tradition for women entering the convent and the two-year commitment to missionary work made by most male LDS members are but two examples.

The AAO has understood this in its decisions under the statute. For instance, the AAO held that a Carmelite nun who is in the novice stage of her vocation and who was continuing to actively learn and participate in religious life qualified as a nun with a religious vocation. *In re: X*, 18 Immig. Rptr. B2-5 (AAO Sept. 18, 1997). More recently, the AAO referred to Catholic Church Canon Law and recognized that a nun who professed simple vows that were renewed annually qualified in a religious vocation. *In re: Catholic Solitudes, Petitioner*, File A97 634 008, (AAO April 7, 2004).

We urge that the requirement of a “lifetime” commitment be stricken.

#### *Study and Training Within a Vocation*

We are also concerned that the proposal does not recognize allowable study and training. The proposed rule states that, for R-1 purposes, one may pursue study or training incident to status, but that such “religious study or training for religious work does not constitute religious work.” This is simply wrong.

A person pursuing a religious vocation may engage in study and training in furtherance of the development of that vocation, as an incident to the vocation. Such study and training can include novitiate or it can include what might otherwise be considered secular study which is in furtherance of the religious organization’s religious mission. For example, for a religious organization of nuns whose religious ministry is care of the sick, it would be proper for a nun to study in a healthcare field. For a religious organization whose religious ministry is education, it would be proper for one in a religious vocation to pursue a degree in teaching.

The FAM recognizes that for one with the vocation of a minister, it is acceptable in fulfilling the two year experience requirement to include seminary study or teaching at a religious academy. See 9 FAM 42.32 (D)(1) N8. The FAM also recognizes that for R-1 purposes, an alien who has a religious vocation may qualify for R-1 status even if the person is engaged in training.

We also note that the latest version of the Adjudicators Field Manual (AFM) states that “continued study by an alien in a religious vocation will not be considered disqualifying if can be demonstrated that the study is consistent with the alien’s vocation.” The quoted language of the AFM is the correct statement of the law. See AFM § 22.3 (b)(4).

The statement that “religious study or training for religious work does not constitute religious work” for I-360 purposes is incorrect and will result in denial of status to many deserving persons in religious vocations. 72 Fed. Reg. 20453. The definitions and requirements for establishing qualification in a religious vocation should be consistent with good faith positions of religious organizations that have a recognized practice of identifying the vocation following the organization’s rules and traditions.

This category should not be subsumed into the different requirements for the religious occupation and should not be narrowed or streamlined to serve the purposes of administrative convenience.

## **Proposed Petitioning Requirements**

### **Petition Requirements for R Visa Status**

The proposed rule would alter the current ability of nonimmigrants to apply for the R visa status directly with a U.S. consulate abroad and specifies that only an employing nonprofit organization in the United States may petition on behalf of an alien minister.

This provision is *ultra vires*. A review of the INA makes clear that Congress consciously exempted non-immigrant religious visa applicants from the petitioning requirement that it imposed on immigrant religious workers. The statute imposes a petitioning requirement on immigrant religious workers in INA § 203(e), but singles out only four non-immigrant categories that must submit visa petitions. These four are (H), (L), (O), and (P)(1). INA § 214(c)(1). There is no mention of a petition requirement for a nonimmigrant under INA § 101(a)(15)(r).

In its supplemental information, USCIS acknowledges that “(T)here is a significant procedural difference between the filing processes for special immigrant religious workers and nonimmigrant religious workers.” 72 Fed. Reg. 20444. Nevertheless, it justifies this major – and legally impermissible -- departure from current processes by noting that the rule “addresses concerns about the integrity of the religious worker program by proposing a petition requirement for religious organizations seeking to classify an alien as an immigrant or nonimmigrant religious worker.” *Id.*

Setting aside arguments we have addressed earlier about the lack of a sufficient determination of fraud in the system, USCIS simply cannot supersede the will of Congress because of a perceived problem. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Supreme Court stated that, where a “statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” The Court, in clear terms, wrote that if “Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Id.* at 843 n.9 (emphasis added). Congress has clearly spoken on this matter; its intentions are clear. Consequently, USCIS has no authority to add this new requirement to non-immigrant religious workers.

Another concern is the administrative delay that this rule would cause. The greatest benefit to consular approval has been the relatively quick turn around on adjudication and issuance of visas for religious workers. This efficiency has been critically important to religious organizations. Without this option, many religious organizations will be unable to afford the expense or the time that will be required to

utilize the religious worker program. The imposition of a petition requirement will add substantial amounts of time to processing for R-1 classification in many cases.

Finally, imposing a petition requirement will impose an additional financial burden on religious organizations in the form of filing fees to the USCIS. The new “base” fee for an I-129 Petition for a Nonimmigrant Worker will soon be \$320.00. With processing targets for all petitions at six months, without premium processing, religious organizations will no longer be able to bring in their religious workers in the R classification quickly, but rather, will face a minimum delay of several months, in addition to having to suffer the burden of the additional filing fee.

#### Elimination of Self-Petition for Special Immigrant Ministers and Religious Workers Is Ultra Vires

The proposed rule seeks to impose a ban on self-petitioning by aliens seeking classification as special immigrant ministers of religion and religious workers under INA §101(a)(27)(C). This provision is contrary to INA §204(a)(1)(G)(i), which specifically permits an alien seeking special immigrant status to self-petition.

We reiterate here our comment that the bar on self-petitioning for special immigrants is *ultra vires*. The statute is clear that a special immigrant minister of religion or religious worker is able to self-petition. Congress was clear when it granted these aliens the right to self-petition. The USCIS has no authority to add this new requirement to non-immigrant religious workers.

In addition, by prohibiting self-petitioning by ministers and allowing only nonprofit religious organizations to petition for ministers, the proposed rule would prohibit many hospitals, medical facilities, prisons and similar organizations that regularly employ minister chaplains from petitioning under the program. Further, a minister of international reputation who has achieved world class recognition in his denomination would not be permitted to apply directly for non-immigrant or immigrant status. Such individuals with outstanding international reputations pose no threat to the integrity of the process and can be compared to aliens of extraordinary ability in employment based cases.

#### Break in Continuity of Previous Religious Work Requirements are Unduly Restrictive

The proposed rule would permit breaks in the continuity of the required religious work during the two years immediately preceding the filing of the petition as long as 1) the religious worker remained employed on a compensated, full time basis; 2) the break did not exceed two years; and 3) the nature of the break was for further religious training or sabbatical that did not involve unauthorized work in the United States. These proposed provisions are problematic on several fronts. First, the requirement that the religious worker has remained fully employed or compensated is completely unrealistic. A religious worker who engages in further religious training or sabbatical is typically not employed or, if at all, not on a full-time basis. Second,

this proposal would exclude religious workers who experience breaks in their employment because of maternity leave (which is often unpaid) or other absences due to serious health problems.

While we understand the need for USCIS to verify the bona fide nature of any break in full-time employment, this could easily be rectified. To do so, we suggest including a provision that would allow USCIS to consider, with all necessary documentation, whether a break in the continuity of previous religious work was for genuine (e.g., study or training) or unavoidable (e.g., maternity or health issues) so as to retain eligibility.

#### Expansion of the Number of Petitions Required Imposes an Undue Financial Burden on Religious Entities

We urge USCIS to reconsider the proposed time limits on duration of R-1 status. Currently, religious organizations are only required to file two petitions (or consular process, which can be much more streamlined) if they wish to employ a religious worker. Under the proposed rule, they would be required to file three petitions. This, in combination with the substantial fee increases about to take effect, would impose a financial hardship for many religious organizations. We propose an initial period of a maximum of 2 years, followed by an extension of 3 years. In the alternative, we propose that filing fees be reduced for the second and third R-1 petitions (the two extensions) filed by a single religious organization.

#### The Investigations Provisions Over-Reach

The proposed rule proposes a host of measures in order to monitor the integrity of the R visa process. These measures include on-site inspections of the petitioning organization as well as tours of its facilities, interview with officials, and review of organizational and other records. The Supplementary Information to the proposed rule claims that the two purposes of on-site inspections are to deter and detect fraud, and allow USCIS to monitor religious workers in order to ensure that they maintain lawful status while in the country. 72 Fed. Reg. at 20447.

The USCIS already has authority under INA §103 and 8 CFR §103 to conduct audits, on-site inspections, reviews or investigations. AILA supports reasonable processes that enable the agency to prevent and discover fraud. However, AILA is deeply troubled by several aspects of the investigations proposal which, taken in total, represents a huge expansion over current efforts, with substantial - and avoidable - problems.

An initial concern is the absence of any criteria for initiating inspections. For instance, there is no guidance as to the level of indicated or suspected fraud – if any – would be required in order to justify an investigation. Nor are there any reasonable limitations on the nature, scope, or duration of such investigations. The *carte blanche* authority that USCIS proposed to give to itself is too broad. Detailed and reasonable checks on the agency's investigatory powers will prevent abuse and harassment of

new or disfavored religions and also aid USCIS in focusing its limited resources and the public in providing necessary oversight.

A second, more problematic, issue is the absence of any maximum period of review in a given case. No definition of “satisfactory completion” is provided. Our concerns here relate not only to the potential hardship to employers impacted by these reviews, but also to the impact on the individual petitioners.

One area of grave concern to many petitioners is maintenance of authorization for their religion-based employment. Backlogs of continued cases could easily extend far beyond the 240 days of the automatic employment authorization rule under 8 CFR §274a.12(b)(20). Under the employers sanctions law the employer would be unable to verify continued employability after the 240 day and the religious employee would need to cease employment.

Many AILA practitioners report that clients on the R classification who have filed I-360 petitions and are waiting for the on-site visits will soon be nearing their 5-year limit under the current regulations. Even if they were to rely on INA §245(k), which ought to be an unusual remedy, they cannot consider filing for adjustment of status until the I-360 is approved. This is an untenable situation for the petitioning entities that are looking for an orderly and legal manner to maintain their needed religious workers

This current backlogged situation, when combined with the addition of thousands of new nonimmigrant petitions under the proposed rule and the possibility of numerous on-site inspections, could create a “perfect storm” of administrative chaos and gridlock.

The problem could be corrected by allowing the concurrent filing of I-360 petitions with I-485 adjustment of status applications. Most other employment-based immigrant visa petitions can now be filed concurrently with the I-485 application. We see no policy reason why religious workers could not also benefit from this option.

Finally, AILA is alarmed that the proposals do not provide a method to challenge the length or scope of investigations. While we appreciate that the agency cannot set a maximum time frame for on-site inspections, the proposal should contain a statement that both their scope and length will be as focused as possible, given the potential interruptions, intrusion into religious activities, and air of suspicion that these inspections will likely entail.

## **Conclusion**

The NPRM Supplementary Information concedes that the proposed rule would disqualify qualified religious workers, but that its fraud rationale justifies the failure to classify qualified religious workers:

USCIS recognizes that legitimate religious work is sometimes performed on a voluntary basis, but allowing such work to be the basis for an R-1 nonimmigrant visa or special immigrant religious worker classification opens the door to an unacceptable amount of fraud and increased risk to the integrity of the program.

72. Fed. Reg. 20446.

If the proposed rule disqualifies even one otherwise qualified religious worker from an extension of R-1 classification, it is *ultra vires*, a violation of the First Amendment and an intrusion sufficient to invoke the protection of the Religious Freedom Restoration Act of 1993.

AILA appreciates the agency's desire to prevent fraud in the R visa process. However, there are statutory and constitutional constraints that must be adhered to. The only permissible courses of action are either for USCIS to retain the existing regulatory extension evidentiary requirements or, in the alternative, craft narrowly-drawn rules that still allow the agency to discourage fraudulent activity. The statute does not permit the scheme that this proposed rule represents since it would exclude religious workers who belong to denominations who do not fit the broad-brush model that the proposal contemplates.

The existing regulations read like they were written to facilitate the admission of religious workers seeking to enter the U.S. to work for religious institutions and organizations in the United States. They allow enough flexibility that a wide range of religious denominations, which operate in starkly different ways, can use the program in order to fulfill their diverse religious missions. The proposed regulations are so dense, complicated, and broadly drawn that they are likely to have the effect of limiting religious worker admissions. While we understand the need to combat fraud, these proposed regulations will impose tremendous new burdens—and cause tremendous confusion—for the many bona fide religious institutions who have relied on the religious worker visa program to staff critical functions in the United States.

Many prominent religious denominations in the United States, including the Catholic Church and Protestant churches, as well as Jewish, Muslim and Buddhist communities, rely heavily on the RWVP to maintain their religious traditions and serve their communities. We agree that the regulations require additional clarifications to avoid the kinds of controversies that currently exist in the RWVP practice area. We also agree that it is a vital goal for the USCIS to protect against fraud and deception. Yet, we urge the USCIS not to make changes that would seriously undermine the original purpose of the program.

The proposed rule would allow the USCIS to disqualify religious workers through such restrictions as unfettered and prolonged investigations and unreasonable financial requirements for the faith-based community, despite the existence of less intrusive alternatives. The proposals discussed above would severely hinder use of this program by religious institutions and could even have the effect of making the

program unusable. For some denominations that rely heavily on the program, cutting off their ability to bring religious workers to their communities affectively would amount to the interference with the free exercise of religion.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION