No. 13-4434

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SHALOM PENTECOSTAL CHURCH; and Carlos ALENCAR,
Appellees,

v.

Jeh JOHNSON, Secretary,
United States Department of Homeland Security, et al.,
Appellants.

On Appeal from a Final Order of the
United States District Court for the District of New Jersey
No. 1:11-CV-4491-RMB

AMICUS BRIEF OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

Amicus American Immigration Lawyers Association does not have any parent corporation, and there is no publicly held company that holds 10% or more of the American Immigration Lawyers Associationôs stock.

American Immigration Lawyers Association is unaware of any publicly held corporation other than the parties to this litigation that has a financial interest in the outcome of the proceeding.

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I. STATEMENT OF AMICUS CURIAE

Amicus Curiae, the American Immigration Lawyers Association (ñAILAò), as detailed in the Motion for Leave to File as Amicus, is a national organization comprised of more than thirteen thousand (13,000) immigration lawyers and law school professors who practice and teach in the field of immigration law. AILA members represent religious institutions and workers. AILA takes a particular interest in the intersection of immigration law and religious exercise, and it publishes a practitionerôs guide entitled ñImmigration Options for Religious Workersò that is in its second edition (2011). AILA seeks to file this brief in accordance with Federal Rule of Appellate Procedure 29. No party or other person, other than the *amicus curiae*, participated in the authorship of this brief either in whole or part, or contributed money in the preparation or submission of the brief.[1]

II. INTRODUCTION

When the Department of Homeland Security administers the Immigration and Nationality Act (INA), it must do so within the limits imposed by Congress. It is not free to impose requirements when the statute is unambiguous and Congress left no gap for the agency to fill. There are many instances where the agency must interpret the INA or apply it to situations that the INA itself did not contemplate or address. This, however, is not one of them. Congress spoke clearly when it set forth the requirements for religious workers seeking to immigrate to the United States in 8 U.S.C. § 1101(a)(27)(C). Congress carefully selected the conditions that the religious petitioners and beneficiaries must meet. And it did not include a requirement as to the location of the beneficiaryôs prior work experience or require that the experience be in an employment-authorized capacity. On its face, the statute is inclusive of all work, regardless of

[1] AILA takes no position on the merits of the specific case or the other issues raised in the appeal.

whether it occurred inside or outside of the United States and regardless of whether it was lawful or unlawful. The agencyôs argument, that the statute is ambiguous because it says it is, fails.

The governmentôs regulation[2] and interpretation of the statute defining who may immigrate as a religious worker is *ultra vires* and unduly restrictive. The burden it places on religious organizations is unreasonable and contrary to the congressional intent evidenced in the plain language of the statute and the overall statutory scheme. For no apparent reason and with no authorization from the applicable statute, USCIS has chosen to discriminate against religious workers and attach additional restrictions on their ability to adjust their status to lawful permanent residents that do not apply to any other types of employment-based immigrants. Although USCIS attempts to justify its action as a reasonable measure to prevent fraud, its interpretation of the statute forbidding religious workers from immigrating if they have ever worked without authorization in the past has little to no chance of preventing fraudulent religious worker petitions. Unauthorized employment is an entirely different immigration violation from filing fraudulent petitions. And making a blanket determination that anyone who has worked without authorization is filing a fraudulent petition makes little sense and is inconsistent with other aspects of the Immigration and Nationality Act.

Furthermore, visa petitioners and beneficiaries have standing to challenge visa petition denials and unlawful interpretations of the immigration law by the government. The government incorrectly argues that its denial of the visa petition in this case caused Shalom Pentecostal Church and Mr. Alencar no injury because Mr. Alencar would not be eligible to immigrate to the United States even if his I-360 had been approved. But visa petitioners and beneficiaries are

[2] 8 C.F.R.§§ 204.5(m)(4) and (11) require that prior work experience occurring in the United States must be authorized under the U.S. immigration laws. The statute, 8 U.S.C. § 1101(a)(27)(C)(iii), only requires that the beneficiary ñhas been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).ò

injured by the denial of a visa petition even if the beneficiary is ineligible to adjust status to that of a lawful permanent resident or is inadmissible. As discussed below, an approved visa petition provides multiple ways for a beneficiary to obtain lawful permanent resident status, and many grounds of inadmissibility can be waived. Inadmissibility and eligibility for adjustment of status are not relevant considerations at the visa petition stage.

III. ARGUMENT

A. Visa petitioners and beneficiaries have standing to challenge the agency's actions in this case.

Parties who are harmed by an administrative agencyôs action have standing to challenge that action under the Administrative Procedure Act. 5 U.S.C. § 702. Courts have held that aggrieved parties include both petitioners and beneficiaries of immigration petitions that might ultimately confer lawful status on the beneficiary. *See e.g. Patel v. USCIS,* 732 F.3d 633, 636 (6th Cir. 2013) (noting the Immigration and Nationality Actôs employment based visa categories provide visas to aliens, not employers, and finding that both have standing to challenge denials); *Construction and Design v. USCIS*, 563 F.3d 593, 597-98 (7th Cir. 2009); *Ghaly v. INS,* 48 F.3d 1426, 1434 n.6 (7th Cir. 1995); *Abboud v. INS,* .140 F.3d 843, 847 (9th Cir. 1998); *Taneja v. Smith*, 795 F.2d 355, 358 n.7 (4th Cir. 1986); *Oddo v. Reno*, 17 F. Supp. 2d 529, 531 (E.D.Va. 1998); *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992), (holding that a plaintiff has Article III standing if he has suffered an actual injury that is traceable to the challenged conduct and is likely to be redressed by a decision in his favor).

In this case, the agency argues that there is no standing for either plaintiff because, as a consequence of the plaintiffôs having fallen out of lawful status, he is allegedly ineligible for immigration benefits for a minimum of ten years. (Deftsô Br. at 17-19.) The agencyôs conclusion of ineligibility is overly simplistic, and their suggested outcome is far from certain at this point.

Since the I-360 petition approval is a necessary precondition to even applying for lawful status, it would be premature to reach the question of Mr. Alencarôs eligibility for that status. As discussed below, even if Mr. Alencar is ultimately inadmissible for ten years after a departure from the United States, a court order that USCIS approve his churchôs wrongfully denied I-360 petition will provide redress for the injury. Provisions of the Immigration and Nationality Act, the federal immigration regulations, and another Act of Congress, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1, *et seq.*, would likely provide eventual relief to both plaintiffs if the I-360 is approved.

The 6th Circuit Court of Appeals in *Patel* rejected the very same argument made by the agency:

> Even if the petition's denial is set aside, the government says, it still must approve Patel's application for an adjustment of status. The government suggests that might not happen, in which case this suit would not redress Patel's injury. But the government misunderstands what that injury is. Patel ñlost a significant opportunity to receive an immigrant visaò when the CIS denied Peshtal Inc.'s petition on grounds that Patel says were arbitrary. *Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998). That lost opportunity is itself a concrete injuryð and a favorable decision would redress it. Indeed, the record reflects that Peshtal Inc.'s offer of employment to Patel remains open, and the government (to its credit) conceded during oral argument that CIS could grant Peshtal Inc.'s petition if (as Patel contends) the petition's denial was arbitrary and capricious. Patel thus has constitutional standing.

Patel, 732 F.3d at 638.

As the Sixth Circuit pointed out, visa petitioners and beneficiaries have a due process interest in the granting of a visa petition such as an I-360:

> There is a decent amount of support for the proposition that § 1154(b) creates an interest to which procedural due process rights attach. Supreme Court precedent makes clear that non-discretionary statutes create property interests for the purpose of procedural due process. *Town of Castle Rock v. Gonzales*, 162 L. Ed. 2d 658, 125 S. Ct. 2796, 2803 (2005) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1997)). Section

> 1154(b) states that the Attorney General, ñ*shall* . . . approve the petition [for immediate relative visa].ò 8 U.S.C. § 1154(b) (emphasis added). The D.C. circuit explicitly held that this language created a right protected by procedural due process. *Escobar v. INS*, 896 F.2d 564 (D.C. Cir. 1990). Additionally, Fifth Circuit dicta implied that it would uphold a due process claim under § 1154(b). *Anetekhai v. INS*, 876 F.2d 1218, 1223 (5th Cir. 1989). In rejecting a substantive due process challenge to § 1154(h), the section at issue in *Almario*, the court stated, ñcertainly, if Congress had conditioned an alien's eligibility for a status adjustment on the existence of a bona fide marriage, **procedural due process would require that the couple be given an opportunity to establish that fact before an adjustment could be denied.**ò

Bangura v. Hansen, 434 F.3d 487, 496 n.2 (6th Cir. 2006) (emphasis added).

The agencyôs argument, at pages 20-21 of their brief, that the *Patel* Court mischaracterized the employment-based immigration benefits scheme, is unavailing, particularly where upholding the agencyôs regulations will block a religious minister from obtaining lawful status to engage in religious work in the United States. The agency claims that an opportunity to apply for an immigrant visa ñhardly matters when the alien is indisputably inadmissible to the United States.ò (DeftsôBr. at 21.) But this statement is inaccurate both as a general principle and in the specific ways that immigrant visas are processed. Many intending immigrants with approved visa petitions apply for an immigrant visa, which may be denied if they are subject to a procedural or substantive legal obstacle, such as a ten-year bar under 8 U.S.C. § 1182(a)(9)(B) or another ground of inadmissibility. But their approved petitions are not nullified as a matter of course in these situations. Rather they are held in abeyance until the beneficiary obtains a waiver of inadmissibility or is no longer subject to the bar. The approved visa petition generally remains valid indefinitely. [3]

[3] There are limited circumstances under which an approved religious worker petition may or must be revoked. But none relate to the ineligibility of the beneficiary to immigrate under the ten-year bar or any other ground of inadmissibility. An approved religious worker petition is revoked automatically if required filing fees are not paid, the beneficiary dies, or the petitioner chooses to withdraw the petition. 8 C.F.R. § 205.1(a). In addition, USCIS may revoke the approved petition after giving the petitioner notice and a chance to respond. *Id*. § 205.2. But such a revocation would have to be based on a finding that the beneficiary is ineligible to be classified as a religious worker under § 1101(a)(27)(C), not a finding that

So even if, for the sake of argument, a beneficiary is presently ineligible to apply for an immigrant visa, through either adjustment of status in the United States under 8 U.S.C. § 1255 or by way of consular visa processing outside the United States, an approved I-360 petition will provide him with the opportunity to pursue his application for an immigrant visa at some point in the future. Assuming he meets the criteria of a special immigrant religious worker as defined by 8 U.S.C. § 1101(a)(27)(C), he requires the petitionôs approval before he can pursue that opportunity. Further, as explained below, there are many plausible paths for an out-of-status beneficiary to pursue lawful permanent resident status.

Courts have repeatedly recognized the complexity of the immigration laws. *See e.g. Alanis-Bustamante v. Reno*, 201 F.3d 1303, 1308 (11th Cir. 2000) (ñIt would seem that should be a simple issue with a clear answer, but this is immigration law where the issues are seldom simple and the answers are far from clear.ò); *Drax v. Reno*, 338 F. 3d 98, 99-100 (2d Cir. 2003); *Montilla v. INS,* 926 F.2d 162 (2d Cir. 1991); *Castro-O'Ryan v. INS,* 847 F.2d 1307, 1312 (9th Cir. 1987); *Doug Sik Kwon v. INS,* 646 F.2d 909, 919 (5th Cir. 1981); *Lok v. INS*, 548 F.2d 37, 38 (2nd Cir. 1977). In the case of an inadmissible religious worker in the United States, there may be a number of legal strategies that would benefit him if he was the beneficiary of an approved I-360. We have already explained, in the worst case scenario, such a religious worker could simply depart the United States and wait until ten years passed if he or she has no way of returning sooner. But there are also several other strategies that may or may not apply to him or others. They include the following:

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the beneficiary is inadmissible to the United States. *See* 8 U.S.C. § 1154(b)(requiring approval of employment-based immigrant visa petitions if the beneficiary meets the statutory requirements for classification in the visa category sought).

1. Apply for adjustment of status.

It is not the case that all persons who have worked without authorization or who lack valid immigration status in the United States are ineligible to apply for adjustment of status. For example, 8 U.S.C. § 1255(k) excuses up to 180 days of unauthorized employment or time out of status for employment-based adjustment of status applicants. Furthermore, 8 U.S.C. § 1255(i) waives time out of status, unauthorized employment, and entries without inspection for adjustment of status applicants who are the direct or derivative beneficiary of labor certifications or immigrant visa petitions filed prior to May 1, 2001. In addition, Congress included in the adjustment of status statute an exception for persons who can show that their violation of status was through no fault of their own or due to technical violations. 8 U.S.C. § 1255(c)(2). While there is a regulation that interprets that exception, 8 C.F.R. § 245.1(d)(2), the exact parameters of the exception are not agreed upon as a universal principle. *See e.g. Alimoradi v. USCIS*, No. CV 08-02529, 2008 U.S. Dist. LEXIS 86820, at **12-14 (C.D. Cal. Aug. 29, 2008); *Mart v. Beebe*, No. 99-1391, 2001 U.S. Dist. LEXIS 182, at **4-6, 16 (D. Ore. Jan. 5, 2001). Thus, a religious worker would have an opportunity under the statute and regulations to argue an exception to the general rule of ineligibility for adjustment of status.

2. Assert a non-INA based exemption or waiver under the Religious Freedom Restoration Act in conjunction with an application for adjustment of status or for other immigration benefits.

If a religious worker visa petition beneficiary is deemed ineligible for adjustment of status under the INA, he and his church could still assert a good faith non-INA exemption to the limitations on adjustment of status in the INA and its implementing federal regulations. In particular, he could argue that the immigration lawôs restrictions should give way to constitutional religious freedom concerns as well as the statutory protections for religious

freedom in the Religious Freedom Restoration Act or RFRA, 42 U.S.C. § 2000bb-1, et seq., such that the agency should read a religion-based exemption into the INA or its regulations. USCIS recognizes this possibility:

> an organization or individual who believes that the RFRA may require specific relief from any provision of this regulation may assert such a claim at the time they petition for benefits under the regulation.

Special Immigrant and Nonimmigrant Religious Workers, 73 Fed. Reg. 72,276, 72,283 (Nov. 26, 2008).

Agency action that arguably fails to properly apply the RFRA can be challenged in federal court. Courts understand that the RFRA constitutes an amendment to all federal law: ñAny law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.ò *City of Boerne v. Flores,* 521 U.S. 507, 532 (1997); Religious Freedom Restoration Act § 6, 42 U.S.C. § 2000bb-3(a) (ñThis Act applies to all Federal law. . . whether statutory or otherwise, and whether adopted before or after November 16, 1993.ò). In cases where a substantial burden on religious exercise is found, the federal government must either demonstrate a compelling interest in imposing the federal law or recognize an exemption from it. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *see, generally,* Pollock, *Immigration Law vs. Religious Freedom: Using the Religious Freedom Restoration Act to Challenge Restrictive Immigration Laws and Practices,* 12 Rutgers J. Law and Religion 295 (2011).

Amicus recognizes that the district court granted the agencyôs motion to dismiss the plaintiffsô RFRA-based count of the Complaint on the pleadings, but nothing in that decision would preclude future religious freedom claims by the plaintiffs in different applications or related contexts, as they persist with the often long effort needed to successfully navigate the U.S. immigration system.

3. Depart the United States and apply for a nonimmigrant visa to return.

Beneficiaries who are out of status in the United States and unable to change their nonimmigrant status in the United States may nonetheless proceed abroad and seek to return on a nonimmigrant visa immediately or in the future, depending on their circumstances. Typical nonimmigrant statuses for religious workers can include the R-1 visa, defined at 8 U.S.C. § 1101(a)(15)(R), for ministers and other religious workers in a religious vocation or occupation; the H-1B visa, defined at 8 U.S.C. § 1101(a)(15)(H)(i)(B), for persons coming to work in the United States in a specialty occupation including professions in theology; and even the L-1A visa, defined at 8 U.S.C. § 1101(a)(15)(L) for intra-company transferees. *Matter of Church of Scientology*, 19 I & N Dec. 593 (Comm. 1988) (inferring that the Catholic Church, but not Scientologists, meet the parent/subsidiary model for intra-company transfers).

The INA provides for a waiver of inadmissibility for nonimmigrants. 8 U.S.C. § 1182(d)(3). This waives most of the various grounds of inadmissibility. Time spent in the United States after the religious worker's return on a nonimmigrant visa would then count toward satisfying a previously imposed unlawful presence bar, ultimately making the person eligible to adjust their status based on the approved I-360.

4. Apply to change to a nonimmigrant status.

While there is a general rule that someone who entered the United States must maintain his status in order to change to a different nonimmigrant status, this rule also is not absolute. 8 C.F.R. §§ 248.1(b)(1)-(4) allows the USCIS to grant a change of status request in its discretion where it finds that an untimely application was due to extraordinary circumstances beyond the control of the applicant or petitioner. Such circumstances are not defined and, in practice, the USCIS considers such requests on a discretionary, case by case basis, sometimes approving them

even when a person has been out of status for years. This grant of an untimely change of status will often remove any impediment to the beneficiary adjusting their status as it would place them back into a lawful nonimmigrant status as of the date their previous nonimmigrant status expired. If the beneficiary, in addition to falling out of lawful nonimmigrant status, has worked without authorization for more than 180 days, thus rendering him ineligible to adjust under § 1255(k), the grant of the untimely application for a change of status may enable him to cure this problem as well by allowing him to travel overseas and reenter. Since the 180 days of unauthorized employment are calculated from the date of the beneficiaryôs last entry, this departure and reentry as a nonimmigrant restores the beneficiaryôs ability to adjust status.

5. Consular process an immigrant visa based on the approved I-360 petition.

As already discussed, an inadmissible alien may depart the United States to apply for an immigrant visa. If the U.S. Consular Officer determines that the religious worker triggered a ten-year unlawful presence bar, the application would be held until ten years passed, but the religious worker could also seek any available waiver to return sooner, including a non-INA RFRA exemption as discussed above in point #2.

Not all status violations lead to unlawful presence for purposes of triggering the unlawful presence bar in 8 U.S.C. § 1182(a)(9)(B). For example, nonimmigrants whose period of stay indicated in their I-94 cards has not expired do not accrue unlawful presence even if they have violated their status.[4] Nor do F-1 nonimmigrant students or Canadians, who are admitted for ñduration of status.ò[5] Religious workers in these situations could depart from the United States

[4] Adjudicatorôs Field Manual, ch. 40.9.2(b)(1)(E)(i), available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF (last visited June 2, 2014) at page 25.
[5] Adjudicatorôs Field Manual, ch. 40.9.2(b)(1)(E)(ii) and (iii), *supra*.

and apply for an immigrant visa to return without needing a waiver of inadmissibility or having to wait ten years.

6. Utilize an approved I-360 petition as a favorable factor for prosecutorial discretion.

In recent years, the Department of Homeland Security has focused its limited resources on removing high priority aliens, such as those with serious records of criminal and immigration violations. *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement re: *Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 11, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (indicating factors, at p.4, including whether the alien has ties to and makes contributions to his community). In the absence of other options, an immigration practitioner could argue that an I-360 petition approval was prima facie evidence of a need for the alienôs religious services, and this could support such a request for prosecutorial discretion.

The agency in this case rejects the reasoning of the *Patel* court simply because, in its view, the opportunity to apply for an immigrant visa is unimportant where some identifiable characteristic of the applicant puts into question his or her ultimate success. But the *Patel* court and others properly regard an opportunity to apply as a distinct benefit that confers constitutional standing and reflects a fundamental policy of U.S. immigration law over the generations: ñShutting off the opportunity to come to the United States actually is a crushing deprivation to many immigrants. Very often it destroys the hopes and aspirations of a lifetime, and it frequently operates not only against the individual immediately but also bears heavily upon his family in and out of the United States.ò *Matter of S—and B—C--,* 9 I&N Dec. 436, 446 (Atty. Gen. 1961) (quoting from the Report of the Presidentôs Commission on Immigration and Naturalization, Jan.

1, 1953, p. 177). In effect, the agencyôs position on standing would have this Court overlook defects with the I-360 denial and assume the role of an immigration adjudicator or consular officer, to determine not only that a beneficiary is ineligible for statutory benefits, but also that he is ineligible for any of the exceptions to the complex grounds of inadmissibility. The agency wants the Court to rule in the first instance that the law does not protect the plaintiffsô religious exercise even when it comes to future applications for benefits that may flow from an approval of the I-360 petition. But the Court should not reach so far, particularly when the agencies that are charged with adjudicating such claims have not yet reached these questions. *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

B. Section 1101(a)(27)(C) states all of the requirements for qualifying as a special immigrant religious worker.

The statute governing petitions for Special Immigrant Religious Worker status requires only that the prospective immigrant must have: 1) ñfor at least two years preceding the time of application for admission, . . . been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;ò 2) be coming to the United States ñsolely for the purpose of carrying on the vocation of a minister of that religious denominationò or ñin order to work for the organization at the request of the organization in a . . . religious vocation or occupation;ò and 3) have ñbeen carrying on such vocation, professional work, or other work continuously for at least the 2-year periodò preceding the time of application for admission. 8 U.S.C. § 1101(a)(27)(C). The three requirements listed above do not include any requirement that prior experience in a religious vocation or occupation be authorized by the U.S. immigration agencies.

The agency argues that for prior work experience in the United States to count towards this two-year requirement, the beneficiary had to be authorized to work in that capacity. The

agency argues that because nothing in the language of the above statute specifically forbids such a requirement, they are free to impose it by regulation. (Deftsô Br. at 25.) But this argument is not appropriate where the statute makes conferral of a benefit mandatory upon the meeting of specified criteria. *See American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). That is the case here. 8 U.S.C. § 1153(b)(4) states that ñ[v]isas *shall* be made available . . . to qualified special immigrants described in section 1101(a)(27) of this title. . .ò (emphasis added). And 8 U.S.C. § 1154(b) states that ñ[a]fter an investigation of the facts in each case, . . . the Attorney General *shall*, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made . . . is eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition . . .ò (emphasis added). Approval of an I-360 petition is thus mandatory provided the beneficiary meets all the criteria laid out in § 1101(a)(27). As § 1101(a)(27) does not make special immigrant religious worker status contingent on having gained prior experience while in lawful immigration status, the agencyôs insistence that beneficiaries meet this additional requirement before it will approve I-360s is *ultra vires*.

The governmentôs other argument is that § 1101(a)(27)(C) is ambiguous because it does not specify whether prior work experience can take place abroad or in the United States. (Deftsô Br. at 25.) In particular it points to the phrase ñseeks to enterò as creating this ambiguity about where prior work experience may take place. (Id.) The governmentôs argument is faulty because the words ñseek to enterò have no relation in the statute to the work experience requirement. They refer only to the intending immigrantôs reasons for immigrating. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) (explaining that courts, in

applying the *Chevron* analysis, should review the statute to see if Congress has ñdirectly spoken to the *precise* question at issue.ò) (emphasis added).

Congress only imposed two conditions on the work experience requirement. First, it required the experience occur during the two year period preceding the application for admission. Second, it required that the experience be in a qualifying religious vocation or related religious work. Congress could have, but did not, impose any other requirements. As the District Court found, the statute is not silent on the character of the prior experience and there is no gap for the agency to fill in this regard.

Section 1101(a)(27)(C)(iii)ôs only comment about when the work experience must take place is that it must take place in the ñperiod described in clause (i).ò Clause (i) in turn refers to the period ñfor at least 2 years immediately preceding the time of application for admission . . . .ò This phrase is not ambiguous about whether work experience may occur inside as well as outside the United States. Applicants for adjustment of status are assimilated into the position of applicants for admission. The Immigration and Nationality Act (ñINAò) requires that applicants for adjustment of status be admissible to the United States. 8 U.S.C. § 1255(a). It also states that ñupon approval of an application for adjustment of status, the Attorney General shall record the alienôs *lawful admission* for permanent residence . . . .ò *Id.* § 1255(b) (emphasis added). Thus qualifying work experience may have occurred either abroad immediately prior to an application for entry to the United States on an immigrant visa, or in the United States immediately prior to an application for adjustment of status. Nowhere in this section does the statute require that work that occurs immediately prior to an application for adjustment of status be authorized by U.S. immigration law.

In addition, to the extent that the government is arguing that any ambiguity anywhere in a statute gives it the right to interpret the entire statute, including non-ambiguous portions, they are incorrect. Such an interpretation would gut the requirement that agencies give effect to unambiguous statutory language. It is hard to imagine a statute that does not have some ambiguity in it somewhere. So if this were enough to allow use of step two of the analysis in *Chevron,* step one of *Chevron* would become a nullity. Government agencies would be able to create interpretative gaps in statutes where none exist.

C. Other sections of the INA show Congress did not intend to require that religious workers have received their experience by working with employment authorization.

The governmentôs interpretation of § 1101(a)(27)(C) conflicts with several other sections of the immigration statute and imposes an unjustly higher burden on religious workers seeking to immigrate than on other workers. These sections of the INA show a clear intent by Congress to be lenient with respect to previous unauthorized employment by religious workers seeking to immigrate. For example, as discussed above, beneficiaries of immigrant visa petitions are able to adjust their status in certain circumstances notwithstanding having worked in the United States without authorization. *See* 8 U.S.C. §§ 1255(i)(allowing for adjustment of status when the applicant has worked without authorization provided that the applicant is the beneficiary of an immigrant visa petition or an application for labor certification filed on or before April 30, 2001) and 1255(k)(allowing beneficiaries of employment-based petitions to adjust their status despite having worked without authorization so long as such employment did not exceed 180 days). The agencyôs interpretation of § 1101(a)(27)(C) prevents religious workers - and only religious workers - from taking advantage of either of these provisions. Under the governmentôs proposed interpretation, religious organizations cannot file immigrant visa petitions for religious workers who have ever worked without authorization. Because an approved visa petition is a prerequisite

for applying for lawful permanent resident status, the governmentôs proposed interpretation would prevent religious organizations from sponsoring religious workers in these circumstances. The agency maintains that § 1101(a)(27)(C) is completely independent of § 1255(k), and by implication § 1255(i), because ineligibility for benefits under one section has no bearing on eligibility for benefits under another. (DeftsôBr. at 31-32.) But the agency never explains how a religious worker ineligible for a visa petition because of unauthorized employment may use either § 1255(i) or § 1255(k) to forgive that unauthorized employment and adjust regardless.

The agency fails to recognize that its interpretation of the statute discriminates against religious workers and subjects religious organizations to severe hardship. The inability of religious organizations to petition for permanent immigration status for their religious workers can leave religious communities without adequate leadership. In many religious organizations, particularly within the Catholic Church, numbers of clergy and other religious vocations in the United States are declining, and the organizations must increasingly rely on foreign religious workers to meet the needs of their members. A nonimmigrant visa for a religious worker, known as an R-1 visa, is valid for a maximum of five years. But religious communities typically need quality and consistent leadership for more than five years to build trust and loyalty among the members of the community. Furthermore, a religious vocation is not like a typical job or profession. It represents a deep personal commitment and sacrifice that is a form of religious expression protected by the U.S. Constitution. Similarly, the ability of a religious organization to express itself freely depends on it being able to freely select its leaders and place them in the position best suited to their abilities and the organizationôs needs without regard to immigration status. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 703 (2012) (ñThe Establishment Clause prevents the Government from appointing ministers, and

the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.ò); *Bollard v. The Cal. Province of the Society of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999) (describing a churchôs selection of clergy as a ñcore matter of ecclesiastical self-governance with which the state may not constitutionally interfere,ò and stating that ñ[a] church must retain unfettered freedom in its choice of ministers because ministers represent the church to the people.ò); *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006) (concluding that ñ[a] minister serves as the churchôs public representative, its ambassador, and its voice to the faithful. Accordingly, the process of selecting a minister is *per se* a religious exercise.ò).

Congress recognized these special qualities of religious vocations and occupations by creating a separate visa status for them that is more generous than that for other occupations. For example, religious organizations are not required to obtain approved applications for labor certification for their religious workers before sponsoring them for an immigrant visa. 8 C.F.R. §§ 204.5(k)(4), (l)(3)(i), (m)(8)-(11). And they have their own separate immigrant visa category with visas set aside especially for them. 8 U.S.C. § 1153(b)(4). So they are not subject to the long wait times for immigrant visas that non-religious workers often face. Therefore it is incongruous and makes little sense that Congress would have chosen to forbid religious workers from seeking forgiveness for periods of unauthorized employment in situations where non-religious workers are allowed to. The intent of Congress was to make immigration provisions more generous for religious workers, not less.

The agency itself appeared to accept this interpretation of the laws governing immigration of religious workers until November 2008 when the regulation at issue in this case was promulgated. The agency has never adequately explained this change in its position. *See Castillo v. Attorney General of the United States*, 729 F.3d 296, 309 (3d Cir. 2013) (explaining

that ñerraticò interpretations are not reasonable and that while the agency can change its policies, it ñacts arbitrarily if it does so without proffering a principled reason or explanation.ò) (internal citations and quotation marks omitted). Its only explanation for the need to change years of long-standing policy is its claim that the change is needed to prevent fraud in the religious worker categories. (DeftsôBr. at 27-29.) But this explanation makes little sense. Prior unauthorized employment is not evidence of fraud in a visa petition for an immigrant worker. It is just evidence of prior unauthorized employment. Fraud would be someone using the religious worker visa categories who is not truly a religious worker or religious organization. The government does not explain how prohibiting people who have worked without authorization from receiving visas as special immigrant religious workers helps USCIS detect non-religious workers who are fraudulently applying for benefits in the religious worker visa categories. A far more effective way to detect and prevent fraud would be to rigorously investigate the facts attested to in I-360 petitions to make sure they are truthful. USCIS already does this through regular site visits of I-360 petitioners to make sure they are actually religious organizations who would employ the beneficiary in a religious vocation or occupation. *See* 8 C.F.R. § 204.5(m)(12). Because USCISôs regulations in this case conflict with the statutory scheme in the INA and represent an unexplained change in policy, the Court should strike them down.

IV. CONCLUSION

The Court should declare the requirement at 8 C.F.R. §§ 204.5(m)(4) and (11) that prior work experience be authorized in accordance with the U.S. immigration laws to be *ultra vires* because it is contrary to the plain language of the statute and the statutory scheme intended by Congress. The Court should give effect to the generous provisions for allowing immigration by religious workers, which Congress put in place to recognize the special needs of religious

communities. It should also conclude that immigrant visa petitioners and beneficiaries have standing to challenge the denial of visa petitions regardless of whether the beneficiary will ultimately be eligible for lawful permanent resident status.

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIR. R. 31.1(c)

I Scott D. Pollock, hereby certify that the above brief is an amicus brief containing no more 7000 words of proportionally spaced text. I further certify that the electronically filed brief is identical to the paper copies of the brief and that a scan run using the AVG 2012 virus protection software disclosed no viruses in the electronically filed brief.

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