

Supplemental Questions and Answers: Final Religious Worker Rule Effective November 26, 2008

U.S. Citizenship and Immigration Services (USCIS) published the final rule on the special immigrant and nonimmigrant religious worker visa categories on November 26, 2008. This rule became effective immediately on the date of publication.

USCIS published an initial set of questions and answers related to the final religious worker rule on November 21, 2008. Below are a supplemental group of questions and answers that provide additional details on the program.

Supplemental Qs and As

Part 1 – Special Immigrant Religious Workers (I-360 petitions)

Q1. The final religious worker rule contains a stipulation that any unauthorized employment in the United States does not count towards and interrupts the two-year continuous period of experience required for classification as a special immigrant religious worker. Does this provision conflict with section 245(k) of the Immigration and Nationality Act (Act), which allows individuals who have been out of status and/or worked without authorization for up to 180 days to apply for adjustment of status to that of a permanent resident?

A1. No. The provisions in the final religious worker rule governing the eligibility requirements for special immigrant religious workers, specifically the experience requirements, do not negate the statutory provisions of section 245(k) of the Act relating to the subsequent adjustment of status application. Section 245(k) of the Act applies to adjustment of status (I-485) applications, and 8 CFR 204.5(m)(4) applies to special immigrant (I-360) petitions. Because the final rule was enacted largely to combat fraud, any employment in the United States that the religious worker seeks to have counted towards the 2-year experience requirement to qualify as a special immigrant religious worker must be authorized. Unauthorized employment in the United States will break the continuity of the required religious work experience for the purpose of I-360 adjudications. If the two-year period is interrupted, the qualifying period of employment must re-start but may be completed in the United States or abroad. If the applicant is in the United States once the I-360 petition for special immigrant religious worker classification is approved, and if he/she is in valid status or has been out of status for less than 180 days in the aggregate, he/she may proceed with applying for adjustment of status and may utilize section 245(k) of the Act, if applicable.

Q2. Does any break in employment in the United States disrupt the two-year continuous period of qualifying experience for special immigrant classification?

A2. No. USCIS regulations at 204.5(m)(4) state that a break in the continuity of the work during the preceding two years will not affect eligibility so long as: (i) the beneficiary was still employed as a religious worker; (ii) the break did not exceed two years; and (iii) the nature of the break was for further religious training or for sabbatical that did not involve unauthorized work in the United States. However, the beneficiary must have been a member of the petitioner's denomination throughout the two years of qualifying employment. Additionally, as a point of clarification, the supplemental information section to the final rule published on November 26, 2008 indicates that events such as sick leave, pregnancy leave, spousal care, and/or vacations are typical in the normal course of any employment and will not be seen as a break of the two-year requirement as long as the beneficiary is still considered employed during that time and such employment is pursuant to a valid employment authorization.

Q3. Regarding the definition of a religious occupation, how do religious novices and those in formation qualify for a religious occupation? The preamble to the final rule addresses this issue and states that a missionary and a novice would qualify under a religious occupation; however, the regulations at 8 CFR 204.5(m)(5) and 214.2(r)(3) state that “religious study or training for religious work does not constitute a religious occupation.”

A3. The preamble to the final rule states that missionaries and novitiates may not be qualified to be considered as religious workers performing a religious vocation if vocations in their denominations do not require a lifetime commitment. However, missionaries and novitiates may qualify as religious workers under the religious occupation definition if they are coming to the United States primarily to perform the duties described in 8 CFR 204.5(m)(5) and 214.2(r)(3). These regulations further state that a religious worker may pursue study or training incident to status. If the religious novices and those in formation are coming primarily to attend theological institutions or to pursue religious study or training, F-1 student visas would be more appropriate than R-1 religious worker visas.

Q4. USCIS regulations at 8 CFR 204.5(m)(5) and 214.2(r)(3) state that a religious vocation must be “distinguished from the secular member of the religion.” Do the religious communities’ standards determine membership in the religious order?

A4. USCIS regulations at 8 CFR 204.5(m)(5) and 214.2(r)(3) further define “religious worker” as an individual engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister. Although it is the religious communities' standards that will determine membership in the religious order, a formal lifetime commitment to a religious way of life must be demonstrated in order for an individual to qualify as a religious worker in a religious vocation, within the specific meaning of section 101(a)(27)(C)(ii)(I) of the Act and 8 CFR 204.5(m)(2)(ii).

Q5. How can an organization filing an I-360 petition for a special immigrant religious worker or an I-129/R-1 petition for a nonimmigrant religious worker establish their eligibility as a tax exempt organization?

A5. Under the final religious worker rule, there are three ways for the petitioning organization to establish tax exempt status that will support an I-360 or an I-129R filing.

- If the petitioner is a religious organization with its own determination from the Internal Revenue Service (IRS) as a tax exempt organization, it must submit a copy of its valid 501(c)(3) determination letter.
- If the petitioner is a religious organization recognized as tax exempt under group IRS tax exempt determination, it must submit a copy of a currently valid 501(c)(3) determination letter for the group.
- As an individual tax exempt organization affiliated with a religious denomination: If the petitioner is an individual tax exempt organization affiliated with a religious organization, in addition to a copy of its valid 501(c)(3) determination letter, it must also submit:
 - A currently valid 501(c)(3) determination letter from the IRS;
 - Documentation establishing its religious nature and purpose, such as a copy of the organizing instrument, specifying the nature and purpose of its own organization;
 - Organizational literature, such as books, articles, brochures, calendars, flyers, and other literature describing the religious purpose and nature of its own activities; and
 - A religious denomination certification, (which may be in the form of a letter) which is part of the Form I-360 with the revision date of 11/26/08 or later, from the affiliated religious organization certifying that both organizations are affiliated.

Q6. USCIS regulations at 204.5(m)(9)(ii) and 214.2(r)(10)(ii) require evidence of education at an accredited theological institution and documents to establish that the theological institution is accredited by the denomination. Is submission of an ordination certificate alone sufficient to establish that a religious worker meets the requirements for ministers seeking to establish they have received education at an accredited theological institution?

A6. No. For a religious denomination that requires a prescribed theological education, a certificate of ordination alone would not be sufficient evidence to establish that the beneficiary received his/her education at an accredited theological institution. The certificate of ordination must be accompanied by documentation reflecting acceptance of the beneficiary's qualifications as a minister in the religious denomination and evidence that the educational institution is accredited by the denomination. If, however, the denomination operates under specific laws and regulations regarding the accreditation of a theological institution and the issuance of ordination certificate, a copy of such laws and regulations may be attached to the certificate and be deemed sufficient. For denominations that do not require a prescribed theological education, the required evidence is enumerated at 8 CFR 204.5(m)(9)(iii) and 214.2(r)(10)(iii).

Q7. Is a financial statement from the petitioner sufficient to verify how the petitioner intends to compensate the individual?

A7. If IRS documentation, such as IRS Form W-2 or certified tax returns, is available, it must be provided. If IRS documentation is not available, an explanation for its absence must be provided, along with comparable, verifiable, documentation such as an audited financial statement from the petitioner.

Q8. What type of documentation does the IRS provide to document non-salaried compensation? Is a job experience letter for experience gained in the U.S. or abroad alone sufficient in lieu of IRS documentation of non-salaried compensation? For members who have taken vows of poverty, is a letter from an authorized official of the religious community attesting to its support and experience of the individual over the last two years sufficient?

A8. The petitioner's IRS documentation such as tax returns may reflect expenses incurred as a result of providing non-salaried compensation to the beneficiary. Additionally, individuals with non-salaried compensation are not precluded from filing a tax return with the IRS. If IRS documentation is unavailable, the petitioner must provide an explanation for its absence along with comparable, verifiable documentation reflecting non-salaried compensation. Examples of documentation that establish non-salaried compensation include, but are not limited to, lease or purchase agreements for vehicles and lease or ownership documents relating to housing. While a letter from an authorized official of the religious community is very helpful in explaining the non-salaried compensation for those religious workers who have taken vows of poverty, it must nevertheless be supported by verifiable evidence.

Part 2 – Non-immigrant Religious Workers (I-129 petitions)

Q9. USCIS regulations at 8 CFR 214.2(r)(4)(i) require a visa exempt individual to present original documentation of the petition approval. Many Canadians are traveling home for the holidays and due to significant delays in processing I-129 petitions, will not have an approved petition in time for their intended return. Are Canadians who are visa exempt and are traveling with current I-94s valid for multiple entries permitted to enter the U.S. without an approved petition?

A9. The final religious worker rule became effective immediately upon publication. See 73 FR, 72276-72297, November 26, 2008. Effective November 26, 2008, nonimmigrant religious workers may no longer be issued R-1 visas unless they are the beneficiary of an approved R-1 nonimmigrant visa petition. This requirement also applies to visa exempt religious workers, e.g., Canadians. See 8 CFR 214.2(r)(4)(i), which states in part that, "[i]f visa exempt, the alien must present original documentation of the petition approval." Religious workers in possession of valid R-1 nonimmigrant visas issued on or before November 25, 2008, whether based on an approved R-1 petition or not, may be admitted for the duration of the visa's validity, provided they are otherwise admissible. All subsequent R-1 visa issuance must be in accordance with the November 26, 2008 final rule. Similarly,

visa-exempt aliens whose current I-94s are valid for multiple entries and granted before November 26, 2008 without an approved R-1 petition may be admitted for the duration of the I-94's validity period, provided they are otherwise admissible, and only if they are traveling to and from the contiguous U.S. territories for less than 30 days. However, if the visa-exempt alien is traveling to and from the contiguous U.S. territories for more than 30 days or beyond the contiguous U.S. territories, the alien will be required to present evidence that he or she is the beneficiary of an approved I-129 petition in order to be admitted into the United States.

Q10. Since the final rule became effective immediately on the date of publication, many employers and individuals that had been making international travel plans in reliance on the old regulations may need to change those plans. Will USCIS commit to expedited processing of religious worker petitions?

A10. Because the extension of the sunset provision for special immigrant non-minister religious workers was contingent upon the publication of the final rule, the rule was made to be effective immediately in order to allow the maximum possible period of extension. While USCIS will try to process R-1 nonimmigrant visa petitions as quickly as possible, it cannot commit to expediting them, due to the site visit requirement. As noted in Q&A #11, below, USCIS is making accommodations for early filing of R-1 petition extensions for visa exempt religious workers who do not have an R-1 petition approved on their behalf.

Q11. The Form I-129 instructions indicate that a Form I-129 petition may not generally be filed more than six months prior to the date employment is scheduled to begin. How do visa exempt religious workers comply with the new requirement to have an approved R-1 petition on their behalf for admission to the United States, and at the same time, comply with the I-129 filing instructions?

A11. As a point of clarification, visa exempt religious workers in possession of a valid Form I-94 and who are traveling to a contiguous territory for 30 days or less, may continue using that I-94 for the duration of the overall admission without the need to have an R-1 petition filed on their behalf. If an extension is later sought, an R-1 petition must be filed to comply with the November 26, 2008, final rule. For visa exempt religious workers who are traveling to a non-contiguous territory, they cannot be readmitted to the United States unless an R-1 petition has been approved on their behalf. To accommodate visa exempt religious workers affected by the final rule who anticipate the need to travel to a noncontiguous territory, and to ensure compliance with the final rule, USCIS will accept the R-1 petition with a request for an extension, regardless of the I-94 expiration date.

Q12. May R-2 dependents study in the United States while they are accompanying the R-1 principal?

A12. Yes. Dependents in valid R-2 status may study in the United States.

Q13. If a religious worker was issued an R-1 visa under the old regulations without an approved petition, will he/she be readmitted with that visa or must a petition be filed?

A13. As the final rule is not retroactive, individuals who had been issued a valid R-1 visa under the previous regulations may be admitted for the duration of the visa's validity, provided they are otherwise admissible, and will not be required to have an approved I-129 for readmission in R-1 status. Upon application for extension, however, the new requirements must be met. Please see Q&A #11 above regarding visa-exempt individuals who have been approved for R-1 status prior to November 26, 2008.

Q14. May an individual with a valid I-797 approval notice granted prior to the enactment of the new regulations apply for a new R-1 visa?

A14. As previously mentioned above, the final rule is not retroactive. Hence, an individual may apply for an R-1 visa based on an I-129 R petition approved under the previous regulations as long as the prior approval has not been revoked under the new regulations.

Q15. May an individual with a valid visa and a pending application for extension of status and/or change of employer depart the United States and be re-admitted using his/her valid R-1 visa and I-129 receipt notice?

A15. If an individual with a pending I-129 R-1 petition for extension of status possesses a valid R-1 visa, he or she may depart the U.S. and be readmitted using his or her R-1 visa during its validity period. Likewise, if an individual with a pending I-129 R-1 petition for change of employer continues to work for the same original employer for whom the initial petition was approved and otherwise maintains his or her R-1 status, he or she may depart the U.S. and be readmitted using his or her R-1 visa during its validity period. However, if an employment of an individual with a pending I-129 R-1 petition for change of employer has been terminated, such individual will no longer be in valid R-1 status and therefore will be unable to be readmitted in R-1 status after he or she departs the U.S. unless the I-129 petition is approved and the petitioner has not terminated the employment.

Q16. If the individual departs the United States, will a pending I-129 petition for extension of status and/or change of employer be denied for abandonment?

A16. An I-129 R-1 nonimmigrant petition for extension of status and/or change of employer will not be denied for abandonment as long as the individual is in a valid status during the time of departure and readmission. It should be noted, however, that an individual who is requesting a change of status to R-1 status would not be able to be admitted in R-1 status until the I-129 petition is approved by USCIS. An individual who is requesting an extension of stay in R-1 status may depart the U.S. and be readmitted in the same status as long as he or she is in possession of a valid, unexpired R-1 visa.

Q17. Can an individual who was granted R-1 status without a petition prior to the rule's effective date and now filing an extension of stay in an R-1 status request more than 30 months of extension, as long as the total period of time spent in R-1 status does not exceed five years?

A17. No. The final rule allows an extension of R-1 stay or readmission in R-1 status for the validity period of the petition, up to 30 months, provided the total period of time spent in R-1 status does not exceed the statutory maximum of five years (or 60 months). See 8 CFR 214.2(r)(5). As such, an I-129 petition requesting an extension of stay in R-1 status for an alien who was admitted or granted a change of status to an R-1 prior to the rule's effective date may be approved for the requested period of up to 30 months or for the remaining period in R-1 status within the statutory maximum of five years but not to exceed 30 months, whichever is shorter. The extension petition must be accompanied by documentation such as Form I-94, visa stamps, and evidence of work and compensation, as required under 8 CFR 214.2(r)(12)(i). Assuming the legal requirements for an extension have been met, the period of time the religious worker has already spent in the United States in R-1 status will be deducted from the maximum allowable time in determining the validity period of the extension.

Q18. Under the prior regulations, brief and intermittent visits to the United States did not disrupt the required one year of physical presence outside the country. The new regulations are silent on this point. Please confirm that brief and intermittent visits to the United States will not disrupt the requirement of one year of physical presence outside the U.S.

A18. Consistent with the treatment of absences for determining other nonimmigrant eligibility benefits, brief and intermittent visits to the United States will not be deemed to be disruptive of the one year physical presence outside the United States required for a subsequent term of R-1 admission.

Q19. Would a missionary program that previously brought in its missionaries in B-1 status be eligible to bring in missionaries in R-1 status?

A19. The final rule provides that R-1 missionaries may be self-supporting, but only if they seek admission as part of an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination. An established program is one that has previously sponsored R-1 missionaries. If the missionary is to be self-supporting, both the B-1 and the R-1 options would be available to the petitioning organization, but only if it has previously sponsored R-1 missionaries. Both the B-1 and R-1 options would also be available if the missionary will not be self-supporting, i.e., will receive compensation.

Q20. Would new missionary programs be excluded from bringing missionaries to the U.S. in R-1 status under the regulations at 8 CFR 214.2(r)(11)(ii)(B), which define an established program?

A20. Yes, they would be excluded. A missionary program is as an established program for

temporary, uncompensated work. One of the criteria for defining a missionary program is that foreign workers must have previously participated in R-1 status. As a new missionary program would not have foreign workers previously participating in R-1 status, it would not qualify as an established missionary program. However, the new missionary program may bring missionaries to the U.S. in B-1 status.

Q21. USCIS regulations at 8 CFR 214.2(r)(12)(i) require evidence of work and compensation in R-1 status “for the preceding two years.” Please confirm that there is no two-year experience requirement for extensions of stay. An individual who has been in the U.S. in R-1 status for less than two years would only be able to submit evidence of work and compensation in that status for the length of his period of stay in the U.S.

A21. The regulations allow an initial period of R-1 admission of up to 30 months. As such, the regulations pre-suppose an initial admission of at least two years in the context of this section. However, if the petition was approved and/or the beneficiary was admitted for a lesser period of time, evidence of work and compensation in that status for the duration of the beneficiary’s authorized admission would be acceptable.

Q22. Regarding employer obligations described at 8 CFR 214.2(r)(14), if an employer is delayed or fails to notify DHS of a religious worker who has been released or terminated from employment, what penalties does the employer face? Please clarify the procedures by which a petitioning employer must notify DHS of such changes and by which DHS will confirm receipt of such information.

A22. The regulations do not specify the consequence of the employer’s delay in notification or failure to meet the employer obligation. However, it may result in the denial of future immigration benefits. USCIS is currently in a process of implementing the specific notification procedures and will notify the public once they are in place.

Q23. Will an applicant for subsequent admission be denied admission because of a pending or approved visa petition?

A23. The filing of a labor certification application or an immigrant visa petition will not result in the denial of R-1 admission if all eligibility criteria continue to be met and the religious worker is not otherwise inadmissible. 8 CFR 214.2(r)(15) states, in pertinent part, that a nonimmigrant petition, application for initial admission, change of status, or extension of stay in R classification may not be denied solely on the basis of a filed or an approved request for permanent labor certification or a filed or approved immigrant visa preference petition.