



The Honorable Rena Bitter
Assistant Secretary
Bureau of Consular Affairs
Department of State

The Honorable Ur Jaddou
Director
U.S. Citizenship & Immigration Services
Department of Homeland Security

November 17, 2023

Re: Current Issues and Recommendations for the Visa Bulletin Retrogression – EB-4 Visa Category, Religious Workers

Dear Assistant Secretary Bitter and Director Jaddou:

The Catholic Legal Immigration Network, Inc., and the U.S. Conference of Catholic Bishops' Department of Migration and Refugee Services are concerned about the impacts of the recent retrogression of the employment-based, fourth preference (EB-4) immigrant visa category on religious workers. We submit the recommendations below to reduce the negative impact on these workers who are essential to America's well-being and communities of faith. Director Jaddou and other government representatives have communicated with stakeholders regarding the issue and have noted that a Congressional solution is needed, while expressing receptivity to administrative options. We understand that that the EB-4 immigrant visa backlog requires change on a Congressional level. However, to ensure that the essential needs addressed by our religious communities do not go unserved, we offer more detailed analysis of the administrative options available to U.S. Citizenship and Immigration Services (USCIS) and the Department of State (DOS). We appreciate your careful consideration of our recommendations in an effort to minimize the current challenges for religious workers, their employers, and the communities they serve.

I. Our services and expertise

The Catholic Legal Immigration Network (CLINIC), through its Religious Immigration Services (RIS), team is one of the United States' largest stakeholders and leading experts on religious immigration law, representing more than 800 foreign-born religious workers serving in more than 120 nonprofit religious organizations annually. RIS attorneys have more than 30 years of combined experience in serving U.S.-based petitioners sponsoring foreign-born religious workers, including both temporary religious workers and those seeking permanent residency in the United States.

The U.S. Conference of Catholic Bishops (USCCB) is a nonprofit corporation whose members are the active bishops of the United States, representing nearly 200 autonomous dioceses in all 50 states and the U.S. Virgin Islands. One of the USCCB's primary roles is to promote the common good, including by sharing with federal policymakers how Catholic teaching applies to diverse areas of the nation's life, such as immigration. For almost sixty years, the Department of Migration and Refugee Services (MRS), guided by the USCCB's Committee on Migration, has advanced the Church's concern for the life and dignity of immigrants, refugees, victims of trafficking, and others on the move through direct-service programs,

advocacy, and outreach. MRS has long supported foreign-born religious workers as integral participants in the life of the Church.

II. Religious workers are essential workers

Foreign-born religious workers provide crucial services and spiritual support to communities throughout the United States. These workers come to the United States through petitions filed by religious organizations that sponsor them to work in underserved communities and provide essential services to faith-based organizations and communities at large. Besides performing duties reserved to members of the clergy, these services also include: providing support to the most needy; caring for and ministering to the sick, aged, and dying in hospitals and special facilities; assisting religious leaders as they lead their congregations and communities in worship; counseling those who have suffered trauma or hardship; supporting families in crisis; helping refugees and immigrants in the United States adjust to a new way of life; and so much more.

Despite the essential services they perform, many foreign-born religious workers are forced to stop work or depart the United States due to circumstances outside their control. In the past several years, forced departures were due to USCIS processing delays and problematic policies. More recently, the changes involving the visa bulletin retrogression for the EB-4 visa category are forcing religious workers to depart the United States before a visa becomes available to adjust their status. Clients of CLINIC's RIS attorneys are already being forced to make difficult decisions due to the retrogression, including many of the dioceses represented by the USCCB. Local communities across the United States suffer from the loss of services for the neediest and reduced religious activities due to understaffed places of worship.

We discuss ways to ease the consequences of the retrogression and have identified priorities for action in the recommendations section below.

III. Background on the issues: changes to the visa bulletin largely affect religious workers

On March 28, 2023, the Department of State announced the adoption of a different interpretation of certain provisions in the Immigration and Nationality Act (INA) affecting the allocation of immigrant visas available to the different categories of beneficiaries.¹ The North Central America (NCA) countries—Honduras, El Salvador, and Guatemala—were previously separated out from the rest of the world and affected by a significant visa backlog. Applicants from those countries are now combined with those from most other countries. As a result, the April Visa Bulletin implemented a retrogression that affects nationals from countries other than the NCA countries in the EB-4 category. Current religious workers in the EB-4 visa category will need a Form I-360 priority date (the date the employer filed an immigrant petition) prior to September 2018 to be eligible to apply for permanent residence. Those with a priority date after September 2018 must wait until their priority date becomes current to have their application for permanent residence adjudicated. There is now a minimum wait time of more than five years for religious workers' priority dates to become current. While we appreciate the need to make necessary changes to the Visa Bulletin to ensure it is consistent with federal law, the new timeframe significantly impacts the religious worker community, leaving U.S.-based religious organizations and their foreign-born workers in untenable positions. The reallocation of visas went into effect on April 1, 2023. The three-day period between the announcement of the change and its adoption left religious organizations and their foreign workers with no time to effectively plan for the significant consequences of the change.

¹ Employment-Based Preference Immigrant Visa Final Action Dates and Dates for Filing for El Salvador, Guatemala, and Honduras, 88 Fed. Reg. 18252, *available at* <https://www.federalregister.gov/documents/2023/03/28/2023-06252/employment-based-preference-immigrant-visa-final-action-dates-and-dates-for-filing-for-el-salvador>.

The heavy consequence of this change is that religious workers who seek to adjust status will now have to make a choice to depart the United States for a minimum of one year or hastily find another lawful path to remain in the United States until their priority date becomes current. But for most religious workers, any alternate paths to remain in the United States are either unavailable or would require the applicant to leave their employer and thereby leave their religious community with insufficient support. The retrogression leaves thousands of religious workers on the path to adjusting their status in a troubling predicament. Religious organizations will be left short-staffed, possibly for an extended period, and the people they serve will suffer the consequences.

IV. Administrative recommendations to help minimize the consequences of the visa retrogression

To ensure that American communities' faith-based and social needs are met, the agencies must act to reduce the harm caused by this change. While we will continue to advocate for a congressional solution to this problem, that outcome is certain to come too late for the religious workers currently in the queue to adjust status. We make the following recommendations that the agencies could implement without Congressional action to ensure minimized disruptions for the essential services religious workers provide.

A. We recommend that the agencies issue an interim final rule to shorten the one-year physical presence requirement outside the United States before religious workers can return for a new period of nonimmigrant status.

We recommend that USCIS and DOS quickly issue a rule to shorten the one-year physical presence requirement outside the United States before re-entry in a new period of nonimmigrant status to no more than thirty days.

We understand that there is a regulation included in the Unified Agenda of Regulatory and Deregulatory Actions proposing several changes to adjustment of status, and if the agencies are considering our regulatory recommendation, the change may be included with that regulation. If that rulemaking is scheduled to move forward before the end of the year, then that would be a good solution to the problem religious workers and institutions are facing. However, if that rulemaking will not be able to move forward for many months, we recommend that the agencies instead separate the rulemaking for the religious worker one-year physical presence requirement from the larger adjustment of status rule and move forward with a more rapid interim final rule. Time is of the essence. Religious institutions stand to lose capacity to serve the faith needs of their communities as time moves on.

Generally, religious workers can remain in R-1 nonimmigrant status for no more than five years. After five years they must travel abroad to fulfill a one-year physical presence requirement outside of the United States before they can re-enter and work on a new period of nonimmigrant R-1 status.² This one-year physical presence requirement is echoed in the Department of State Foreign Affairs Manual (FAM) and the USCIS Policy Manual.³

The agencies can, within their regulatory authority, issue an interim final rule that is consistent with their rulemaking standards. Executive Order 12866, titled "Regulatory Planning and Review," requires agencies to impose the least burden on the U.S. public necessary to achieve regulatory objectives.⁴ Reducing the physical presence requirement for religious workers outside of the United States would

² 8 C.F.R. § 214.2(r)(15) (2023).

³ See 9 DEP'T ST., FOREIGN AFF. MANUAL §402.16-14(B), available at https://fam.state.gov/fam/09FAM/09FAM040216.html#M402_16_14_B, and 2 U.S. CITIZENSHIP & IMMIGR. SERVICES, POL'Y MANUAL, Part O, Ch. 7, available at <https://www.uscis.gov/policy-manual/volume-2-part-o-chapter-7>.

⁴ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

demonstrate that the agencies are dedicated to reducing the significant burdens placed on religious workers and the religious institutions that employ them. An interim final rule can provide the remedy needed in a much shorter timeframe than the standard notice and comment procedures. An agency is authorized to issue an interim final rule where the agency finds *good cause* to do so, as defined by 5 USC § 553. The Administrative Procedure Act (APA) allows for a *good cause* exception to bypass public notice and comment on a rule by demonstrating that it would be “impracticable, unnecessary, or contrary to the public interest” to follow notice and comment procedures.⁵ The opportunity for comment can still be presented after the rule is published to ensure that the agency still considers public input for necessary revisions to the rule.

According to the Congressional Research Service (CRS) report on *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, the good cause analysis can be broken down into three different categories: “(1) emergencies; (2) contexts where prior notice would subvert the underlying statutory scheme; and (3) situations where Congress intends to waive Section 553’s requirements.”⁶ Within the category of emergencies, it is recognized that an interim final rule may be utilized when a regulation is needed to serve the public good.⁷

If the agencies delayed regulatory change by following standard notice and comment procedures for the issuance of a rule to shorten the one-year physical presence requirement, many religious workers would be forced to interrupt their work and leave the United States for at least a year. Such consequences will not only affect the religious workers but have a domino effect on the local communities they serve. Therefore, the good cause exception to the notice and comment requirement of the APA would be applicable in the present circumstances to serve the public good. Communities, schools, healthcare systems, and other institutions all rely on religious workers who are now at risk of being forced to remain outside of the United States for at least a year. Religious organizations and religious workers made plans and projections based on agency policies and practices that were changed very suddenly. They relied on the representations made by the agencies and the practices they carried out over many years as they adjudicated religious workers’ applications for immigrant visas and permanent residence. The agencies can reduce the harm caused by this sudden reversal by expeditiously implementing an interim regulatory amendment to reduce the physical presence requirement outside the United States to no more than thirty days.

B. We recommend that the agencies issue a final rule to shorten the 1-year physical presence requirement for religious workers after implementing the interim rule.

After issuing an interim final rule to minimize the one-year physical presence requirement outside the United States for religious workers, we recommend that DOS and USCIS finalize the regulatory change by conducting a subsequent full notice and comment rulemaking under the APA. Once the public good has been served by reducing the burden on religious workers and religious institutions through an interim rule, the agencies should collect public comments for a full 60-day period and issue a final rule that takes those comments into consideration. We recognize the great value of the APA’s notice and comment process and recommend only that the full process be delayed until after the interim rulemaking.

⁵ 5 U.S.C. § 553 (b)(3)(B) (2018).

⁶ CONG. RES. SERVICE, *THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 5* (2016), available at <https://crsreports.congress.gov/product/pdf/R/R44356>.

⁷ Id. at 6.

C. We recommend that the agencies reinforce language in their regulations and officer training regarding dual intent.

We recommend that the agencies reinforce language in their regulations and officer training to ensure that religious workers expressing intent to permanently immigrate to the United States is not a reason to deny a new period of R-1 nonimmigrant status.

Under current regulations, religious workers may have “dual intent.” Dual intent allows religious workers to enter the United States on a nonimmigrant visa to work on a temporary basis under that status and at the same time to express intent to stay permanently in the United States, for example, through an immigrant petition filed by their employer as a first step toward an application for permanent residence. However, religious workers have reported experiencing difficulties being readmitted in R-1 status while their I-360 petition for special immigrant status is pending. The FAM indicates that dual intent is permissible for R visa holders.⁸ While the FAM is clear on the policy, it is still up to the discretion of the reviewing consular officer to determine whether the beneficiary will receive the R-1 visa. As more religious workers appear for visa interviews where dual intent is an issue, they may face delays, additional questions, and potentially wrongfully denied R-1 visas. Legal practitioners want to know that their client’s request for a new five-year period in R-1 status is not going to be denied simply because they have a pending immigrant petition.

We recommend that USCIS and DOS reinforce language in their interim final rule and the subsequent notice and comment rulemaking that religious workers may have dual intent when applying for an R-1 nonimmigrant visa. We also recommend that DOS reinforce in consular officer training that immigrant intent is not a sufficient reason to delay or deny an R-1 nonimmigrant visa application.

D. The Visa Bulletin should be reissued with a phased-out approach due to the reliance religious workers and organizations held on the previous system.

DOS should consider creating a phased-out approach to the Visa Bulletin retrogression for EB-4 workers who had approved I-360s and relied on the policies and practices utilized by the agencies for many years prior to April 2023.

Since 2016, religious organizations and their foreign workers relied on DOS’s published policies and practices regarding the allocation of immigrant visas among the types of immigrants in the EB-4 visa category to prepare for their future. Religious workers who wanted to remain and contribute to the United States as permanent residents could do so usually without being forced to leave the country while the request was adjudicated. The sponsoring organizations could rest assured that they would have reliable and consistent staff to serve their local communities. When DOS provided only a few days’ notice of the significant Visa Bulletin change, religious workers and their sponsors were left with inadequate time to prepare for the future. The sudden implementation of the decision was overly burdensome to religious workers and others in the EB-4 category. DOS should honor the reliance interests of the individuals and employers who have already begun the permanent residence process and create a phased approach to the retrogression. This will permit stakeholders who relied on DOS’s policy decisions to continue to adequately serve their religious communities and plan differently for the future as the retrogression is rolled out over time. Doing so will ensure that the community is less burdened by the changes.

⁸ 9 DEP’T ST., FOREIGN AFF. MANUAL §402.16, *available at* <https://fam.state.gov/fam/09FAM/09FAM040216.html>.

E. Additional policy recommendations for the Department of State and USCIS

In the event that a religious worker is the beneficiary of multiple approved immigrant petitions, we recommend that the agencies allow religious workers to retain the earliest priority date.⁹ Currently, religious workers in the EB-4 visa category do not qualify to use an immigrant petition to retain an earlier priority date for an immigrant visa, even though they may be the beneficiary of multiple approved petitions.¹⁰ Making this change for religious workers who qualify will mean they can significantly shorten their wait time for an immigrant visa.

We also commend DHS's recent announcement that they will extend the validity of employment authorization documents issued to religious workers with pending applications for permanent residence from two years to five years.¹¹ We hope that this change will be implemented soon, so that impacted religious workers will be able to benefit from the extended validity period. We also recommend that the validity of travel authorization documents be similarly extended to reduce renewal costs to religious institutions, and to reduce the processing burdens on USCIS.

V. Most religious workers cannot change nonimmigrant status and continue to work for their employer.

A solution that the agencies offered after this change in practice is for religious workers to consider utilizing other employment-based nonimmigrant categories to remain in the United States once they have reached their maximum of 5 years in R-1 status. After analysis, we find that these alternatives are not appropriate for the great majority of religious workers.

The H-1B category typically requires a higher salary than many religious workers are permitted to receive, according to their faith bylaws. H-1B regulations require a salary of at least \$60,000 per year. The financial structures of Catholic religious workers frequently do not meet this minimum. There is also a lottery system for the H-1B category that would limit the availability of visas for religious workers.

The L-1A or L-1B category is very unlikely to fit the circumstances of many religious workers. Many Catholic foreign-born religious workers are sent to the United States to initially join a religious order and begin the formation process to become a religious sister or brother. Generally, they have not worked for the petitioning organization abroad prior to transfer, nor would they be considered an employee with specialized knowledge, as required by the L-1B category. For those sent to the United States as a priest to be assigned to a parish in need, the relationship between the foreign entity and the United States entity very likely does not fit the ownership and control requirements of the L-1 category, as they are intended for standard corporate structures, rather than religious entities.

A religious worker may be eligible to apply for F-1 status as a student if they wish to pursue further education in the United States. One barrier to this option is that an applicant for F-1 status must demonstrate that he or she is eligible for non-immigrant status and must overcome a presumption of immigrant intent, which may have been expressed during his or her time in R-1 status. In addition, if a religious worker transitioned to F-1 student status while he or she is waiting for an immigrant visa, the worker would be able to stay in the United States, but he or she would not be able to continue full-time

⁹ 8 C.F.R. § 204.5(e) (2023).

¹⁰ 8 C.F.R. § 204.5(e)(1) (2023) (granting authorization to retain an earlier priority date to beneficiaries of EB-1, 2, and 3 petitions, but the omission of EB-4 beneficiaries does not grant religious workers the same ability).

¹¹ Fact Sheet: The Biden-Harris Administration Takes New Actions to Increase Border Enforcement and Accelerate Processing for Work Authorizations, While Continuing to Call on Congress to Act, DEPARTMENT OF HOMELAND SECURITY, <https://www.dhs.gov/news/2023/09/20/fact-sheet-biden-harris-administration-takes-new-actions-increase-border> (Sept. 20, 2023).

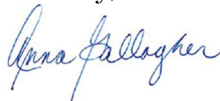
work in the religious community. That would leave his or her religious organization petitioner understaffed and the community unsupported.

VI. Conclusion

We urge the agencies to issue a rulemaking quickly to reduce the physical presence requirement outside of the United States as a first step to ensure that religious workers do not have to leave for an unreasonable amount of time before coming back to their position and employer, whether that be through inclusion in a pre-existing rulemaking that can move quickly, or by issuing an interim final rule. DOS's announcement of this change in practice did not provide a reasonable amount of time for religious workers or their employers to make sure that the needs of religious communities can be met. Religious organizations will lose workers that they will not be able to replace for some time. Religious workers will have to return abroad, leaving ministries understaffed, and U.S. communities will suffer as a result of the loss of dedicated and caring religious workers who serve the public good of the United States in their daily work.

Thank you for your attention to these concerns. For additional information or to schedule an engagement to discuss these recommendations, please reach out to Karen Sullivan, CLINIC's Director of Advocacy, at ksullivan@cliniclegal.org or 301-565-4831.

Sincerely,



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William Canny
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CC: Julie Stufft, Deputy Asst. Secretary for Visa Services, Bureau of Consular Affairs, DOS
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