

SELECTED SECTIONS OF CHAPTER 26 OF IMMIGRATION AUTHORITY
BY MATHEW BENDER

NONIMMIGRANTS

Nonimmigrant Religious Workers *

*. Updated by Kathleen M. Sullivan, San Francisco, CA.

The Immigration Act of 1990 created a new category for the temporary admission of religious workers, effective October 1, 1991. 1.

The new provision is described in § 101(a)(15)(R) of the Immigration and Nationality Act ("INA"), 2. and hence has been given the nonimmigrant visa symbol "R-1." Three subcategories are covered:

- ministers of religion,
- religious professionals, and
- other religious workers.

These subcategories are the same as are covered by the "special immigrant" provision for permanent immigration by religious workers, discussed elsewhere in the treatise. 3.

1. See generally Paul Schmidt, Religious Workers Under the Immigration Act of 1990, in *Understanding the Immigration Act of 1990: AILA's New Law Handbook*, 137 (P. Schmidt ed. 1990); and Ortiz, Religious Workers Under the Immigration Act of 1990, 93-1 *Immigration Briefings* (Jan. 1993).

2. 8 U.S.C. § 1101(a)(15)(R), as added by the Immigration Act of 1990 (the "1990 Act"), 1990, Pub. L. No. 101-649, § 209(a)(3), 104 Stat. 4978.

3. See *infra* § 35.05. In fact, in INA § 101(a)(15)(R), 8 U.S.C. § 1101(a)(15)(R), the subcategories of beneficiaries under the nonimmigrant provision are defined via cross-reference to the special immigrant provision found in INA § 101(a)(27)(C), 8 U.S.C. § 1101(a)(27)(C). Two of these special immigrant categories, religious professionals and other religious workers, which were scheduled to expire on September 30, 1994, were extended to September 30, 1997 by the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 214, 108 Stat. 4305, and again to September 30, 2000 by Pub. L. No. 105-54, 111 Stat. 1175 (1997). Even if these two categories sunset for purposes of special immigrant status, religious professionals and other religious workers will still be eligible for R nonimmigrant visas. See *infra* § 26.04[3].

Prior to the Immigration Act of 1990, the INA contained no specific provision for temporary admission of religious workers as nonimmigrants. Religious workers were forced to rely on the normal nonimmigrant business categories of business visitor (B-1), professional (H-1B), trainee (H-3), intracompany transferee (L-1), or exchange visitor (J-1). For various reasons, these other nonimmigrant categories often were unavailable to temporary religious workers.

A primary problem was that religious occupations and jobs with nonprofit religious organizations required qualifications different from those used in filling professional positions or management positions within multinational corporations. Moreover, the corporate structure of religious organizations often did not support intracompany transferee (L-1) status. 1. Therefore, religious organizations often were left with no viable alternatives for bringing aliens into the United States for temporary employment. 2.

Religious worker legislation was supported by a broad coalition of Catholic, Protestant, and Jewish groups. The need for such legislation was noted in 1989 testimony before the House Subcommittee on Immigration, Refugees, and International Law. 3.

A religious worker provision, enjoying bipartisan support, was included in bills introduced by Bruce Morrison, then chairman of that subcommittee, and by Rep. Charles Schumer (D-NY). A somewhat broader religious worker provision, covering both permanent and temporary religious workers, was contained in the original House-passed immigration bill, H.R.-4300. The original Senate-passed immigration bill, S. 358, did not contain any provisions relating to temporary religious workers.

Following the conference process, the religious worker provision emerged in a somewhat narrower version containing special numerical limitations and sunset provisions applying to religious professionals and other religious workers under the special immigrant category. 4.

Statutory Requirements

[1]--In General

R-1 religious worker nonimmigrant status is available to three categories of religious workers:

- ministers of religion;
- persons serving in a professional capacity, either in a religious vocation or occupation; and
- other religious workers performing a religious occupation or serving in a religious vocation.

The definitions applicable to those categories will be discussed below. Each category requires that the individual applicant "for the two years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and seeks to enter the United States for a period not to exceed five years" 1.

Definitions of "religious denomination" and "bona fide nonprofit religious organization" will be discussed below.

[2]--Religious Denomination

INS regulations define "religious denomination" as "a religious group or community of believers 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, and religious congregations, or comparable indicia of a bona fide religious denomination." 2.

This definition appears to be derived from prior case law 3. and Internal Revenue Service guidelines. 4.

These factors appear to be illustrative only, and should be applied flexibly in recognition of the great diversity among the world's religions. 5. That the term "denomination" is to be broadly construed is suggested by a State Department instruction which states by way of example that membership in the Roman Catholic church at large satisfies the membership requirement needed for entry to serve a specific Catholic order. 6.

Consistent with this broad definition of "denomination", it would seem that a two-year member of a Baptist Church would qualify as a Protestant to serve in the United States with a Methodist church; and a Conservative or Orthodox Jew with a Reformed congregation. Moreover, INS and DOS regulations state that an inter-denominational religious organization that is exempt from federal taxation shall be treated as a "religious denomination." 7.

[3]--Nonprofit Religious Organization

INS regulations define a bona fide nonprofit religious organization in the United States as "an organization exempt from taxation as described in Section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations, or one that has never sought such exemption but establishes to the satisfaction of the Service that it would be eligible therefor if it had applied for tax exempt status." 8.

Proof of tax exempt status or of the religious organization's eligibility for 501(c)(3) designation must accompany filings for R nonimmigrants. 9.

[4]--Ministers of Religion

Ministers of religion may qualify for R-1 nonimmigrant status if they seek to enter the United States "solely for the purpose of carrying on the vocation of a minister" of the religious denomination of which they have been members for the preceding two years. 10.

INS regulations define a minister as "an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion." 11. In all cases, there must be a reasonable connection between the activities performed and the religious calling of minister. 12.

INS regulations state that the term "minister" does not include a "lay preacher not authorized to perform such duties;" 13. however, under DOS rules, deacons may be ministers if they have received ordination or similar authorization, and are authorized to lead congregations and perform other functions that are traditionally considered the province of a "minister." 14.

The INS has stated that its definition of minister is derived primarily from past case law and the Foreign Affairs Manual. 15.

For R-1 nonimmigrant purposes, the scope of the minister of religion definition may not be critical to a successful application by an individual religious worker, since many individuals found not to be ministers may qualify as religious professionals or other religious workers. 16. The definition could, however, have greater significance for eventual permanent immigration purposes in light of the sunset provisions and special numerical limitations applicable to the latter two categories, but not to ministers of religion (who are, however, subject, to the overall 10,000 limitation on special immigrants). 17.

[5]--Religious Professionals

A religious professional may enter the United States as an R-1 nonimmigrant to work for the bona fide non-profit organization at the organization's request "in a professional capacity in a religious vocation or occupation." 18.

The INS regulations define professional capacity as "an activity in a religious vocation or occupation for which the minimum of a United States baccalaureate degree or a foreign equivalent degree is required." 19. Unlike the INS's treatment of H-1B professional nonimmigrants, 20. this interpretation does not recognize experience alone or a combination of work experience and education as the equivalent of a baccalaureate degree. This restrictive reading may be mitigated, however, by the broader "other religious worker" provisions described below.

[6]--Other Religious Workers

Other religious workers may enter the United States temporarily as R-1 nonimmigrants "to work for the [denomination's nonprofit religious] organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in § 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation." 21.

This is a broad provision that covers individuals who may not qualify as either ministers of religion or religious professionals under the definitions described previously.

The INS regulations define a "bona fide organization which is affiliated with the religious denomination" as "an organization which is both closely associated with the religious denomination and is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations." 22.

[7]--Definitions of Religious Occupation and Religious Vocation

Two types of persons may qualify for the "other religious worker" subcategory within the R-1 classification. These are persons performing a "religious occupation" or serving in a "religious vocation."

Tracking the House Judiciary Committee Report, 23. INS regulations define "religious occupation" as "an activity which relates to a traditional religious function." Examples of persons in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. A director/producer of religious programming for international radio broadcast has been found to be performing a "religious occupation." 24.

INS regulations exclude from the definition of "religious occupation" workers such as "janitors, maintenance workers, clerks, fund raisers, or persons involved solely in solicitation of donations." 25.

The regulations define "religious vocation" as "a calling to religious life evidenced by the demonstration of commitment practiced in the religious denomination, such as the taking of vows. Examples of persons with a religious vocation include, but are not limited to, nuns, monks, and religious brothers and sisters." 26.

The distinction between persons performing a "religious occupation" and persons serving in a "religious vocation" becomes important when it comes to clerical workers, janitors, bakers, and similar personnel.

Lay individuals performing clerical-type work with religious organizations do not qualify for R nonimmigrant status, because such work is excluded from the INS definition of "religious occupation." If, however, this work is performed by someone who has taken religious vows, she or he may qualify for the R-1. For example, the INS has indicated that a nun or a monk working for a qualifying religious organization will be considered engaged in a "religious vocation" even if their duties would be clerical in nature. 27.

In these situations, the key to a successful R-1 application may be in demonstrating to INS or DOS that the individual whose job it will be to sift flour for the monastery's famous fruitcakes is pursuing a religious vocation.

Comparison With Special Immigrant Category

[1]--In General

Although the requirements for R-1 religious nonimmigrants and special immigrant religious workers overlap in many ways, there are a number of significant differences which will be discussed below.

[2]--No Two Year Prior Work Experience Requirement

In the Immigration Act of 1990, Congress provided that special immigrant religious workers must demonstrate that they have carried on their ministry, religious occupation, or religious vocation for a period of two years before seeking immigrant status. 1.

In contrast, Congress provided that R-1 nonimmigrants must show only that they have been a member of a qualifying denomination for the immediately preceding two years. 2.

Instead of specifying qualifications for R-1 workers, INS regulations therefore merely require R-1 candidates to show that they "meet the criteria" to perform services under the R-1. 3.

Despite the lack of a prior experience requirement in the statute or regulations, however, INS's interpretation of the R-1 may be changing to require more stringent prerequisites for R-1 applicants. The clearest example is posed by the ongoing litigation involving the Tenacre Foundation, a Christian Science nursing facility in New Jersey. The Tenacre case relates to a change of status application for James N. Kihu, a Christian Scientist performing post-completion F-1 practical training in the area of Christian Science nursing. 4.

In 1993, Tenacre filed with INS an application for change in status to R-1 to permit Mr. Kihu to continue his work and studies at Tenacre with the eventual goal of becoming qualified to advertise as a Christian Science nurse in *The Christian Science Journal*. 5. In its initial application, Tenacre apparently stated that Mr. Kihu would be a "Christian Science nurse's aide," who would receive further training in Christian Science nursing. 6. INS determined that, unlike the position of Christian Science nurse, a Christian Science nurse's aide was not a "religious occupation," and that the applicant was not qualified to receive an R-1 if he was merely to work as a nurse's aide and receive training. 7. Although in subsequent administrative proceedings Tenacre clarified that Mr. Kihu would be an "entry-level Christian Science nurse," not a "nurse's aide," INS's position remained consistent: Mr. Kihu could not receive R-1 status until he was "fully qualified" to be employed in a religious occupation. INS determined Mr. Kihu was not "fully qualified," due to the fact that his training in the area of Christian Science nursing was ongoing. 8. Tenacre asserted throughout the administrative and federal court proceedings involving Mr. Kihu that INS maintained a policy to deny R-1 status to Christian Science nurses who would receive any training while working as nurses at the Tenacre Foundation. Eventually the D.C. Circuit Court of Appeals, ruling on an appeal from the district court's denial of an injunction against INS, in dicta disagreed that the INS had such a policy. The court also disagreed that INS, in effect, had established a prior qualification or experience requirement for R-1 applicants. 9. Although the Tenacre case is not fully resolved, several aspects of the Tenacre situation should serve as cautions to practitioners in this area. First, although neither the R-1 statute nor INS's regulations require that the R-1 applicant demonstrate experience qualifying him or her for a religious occupation or vocation, 10. the AAU suggests in its March 1996 Tenacre decision that applicants must show they have done something to qualify for the R-1. 11. At minimum, this seems to squarely contradict INS's definition of a "vocation" as a "calling to religious life," 12. since as ordinarily understood, a "calling" is something that a person experiences, not something that he or she does. If this interpretation continues, some service centers may equate "showing what the alien has done" with a prior experience requirement. In fact, in approving Mr. Kihu's R-1 change of status after reopening the matter, the AAU appears to have relied on Tenacre's evidence that Mr. Kihu had "already worked as a nurse." 13.

Second, neither the AAU nor the courts discussed in Tenacre whether entry-level training was inappropriate for someone performing a religious vocation in R-1 status, as distinguished from a religious occupation: in fact, the AAU and the courts failed to make any distinction between persons in religious occupations and those in religious vocations. This is despite the Tenacre Foundation's argument that Mr. Kihu was pursuing a religious vocation for which the Christian Science institution alone was qualified to establish criteria, 14. and the fact that, under INS's own interpretation of the statute, some activities that do not qualify as "religious occupations" are acceptable when the R-1 applicant is pursuing a religious vocation. 15.

The Tenacre case argues for careful, thorough planning on the part of a religious organization's representative, particularly when the applicant will apply for R-1 status within, and not outside, the United States. Without conceding the prior experience or training issue, counsel dealing with aliens pursuing religious vocations or occupations should spell out in detail the organization's criteria for religious vocations or occupations and their process for selecting persons for these positions. Counsel should also detail carefully the religious significance of the work and/or training that the person pursuing the vocation or occupation will perform in R-1 status.

[3]--No Three Year Sunset

Significantly, the provision "sunsetting" the religious professional and other religious worker provisions for special immigrant purposes 16. does not apply to R-1 nonimmigrants. 17. What this means is that, even if the special immigrant provisions containing definitions of "religious professional" and "other religious worker" are eliminated from the INA, 18. aliens still may apply for nonimmigrant R-1 status as religious professionals or other religious workers. The R-1 beneficiary could not later, however, adjust status to permanent resident unless he or she could qualify as a "minister of religion" under INA § 101(a)(27)(C)(I) .

[4]--No Numerical Limitations

Unlike special immigrants, 19. there are no numerical limitations of any type on R nonimmigrants.

[5]--No Petition Requirement

While special immigrant religious workers must submit a petition to the INS, 20. there is no such requirement for R-1 nonimmigrants. Therefore, as described below, prospective R-1 nonimmigrants may apply for an R-1 visa directly to a consular officer abroad or to the INS in the United States. 21. Practitioners report that consular officers do not always understand that no petition is required. It may be prudent for counsel to mention in the cover letter to an R-1 application submitted to a consulate that no petition is required, and include in the package a copy of the appropriate section of the FAM.

However, as explained below, an R nonimmigrant seeking an extension of stay in the United States or a nonimmigrant seeking to change to R nonimmigrant status must file a petition with the INS on Form I-129NONIMMIGRANTS

Statutory Requirements

[1]--In General

R-1 religious worker nonimmigrant status is available to three categories of religious workers:

- ministers of religion;
- persons serving in a professional capacity, either in a religious vocation or occupation; and
- other religious workers performing a religious occupation or serving in a religious vocation.

The definitions applicable to those categories will be discussed below. Each category requires that the individual applicant "for the two years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and seeks to enter the United States for a period not to exceed five years" 1.

Definitions of "religious denomination" and "bona fide nonprofit religious organization" will be discussed below.

[2]--Religious Denomination

INS regulations define "religious denomination" as "a religious group or community of believers 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, and religious congregations, or comparable indicia of a bona fide religious denomination." 2.

This definition appears to be derived from prior case law 3. and Internal Revenue Service guidelines. 4.

These factors appear to be illustrative only, and should be applied flexibly in recognition of the great diversity among the world's religions. 5. That the term "denomination" is to be broadly construed is suggested by a State Department instruction which states by way of example that membership in the Roman Catholic church at large satisfies the membership requirement needed for entry to serve a specific Catholic order. 6.

Consistent with this broad definition of "denomination", it would seem that a two-year member of a Baptist Church would qualify as a Protestant to serve in the United States with a Methodist church; and a Conservative or Orthodox Jew with a Reformed congregation. Moreover, INS and DOS regulations state that an inter-denominational religious organization that is exempt from federal taxation shall be treated as a "religious denomination." 7.

[3]--Nonprofit Religious Organization

INS regulations define a bona fide nonprofit religious organization in the United States as "an organization exempt from taxation as described in Section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations, or one that has never sought such exemption but establishes to the satisfaction of the Service that it would be eligible therefor if it had applied for tax exempt status." 8.

Proof of tax exempt status or of the religious organization's eligibility for 501(c)(3) designation must accompany filings for R nonimmigrants. 9.

[4]--Ministers of Religion

Ministers of religion may qualify for R-1 nonimmigrant status if they seek to enter the United States "solely for the purpose of carrying on the vocation of a minister" of the religious denomination of which they have been members for the preceding two years. 10.

INS regulations define a minister as "an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion." 11. In all cases, there must be a reasonable connection between the activities performed and the religious calling of minister. 12.

INS regulations state that the term "minister" does not include a "lay preacher not authorized to perform such duties;" 13. however, under DOS rules, deacons may be ministers if they have received ordination or similar authorization, and are authorized to lead congregations and perform other functions that are traditionally considered the province of a "minister." 14.

The INS has stated that its definition of minister is derived primarily from past case law and the Foreign Affairs Manual. 15.

For R-1 nonimmigrant purposes, the scope of the minister of religion definition may not be critical to a successful application by an individual religious worker, since many individuals found not to be ministers may qualify as religious professionals or other religious workers. 16. The definition could, however, have greater significance for eventual permanent immigration purposes in light of the sunset provisions and special numerical limitations applicable to the latter two categories, but not to ministers of religion (who are, however, subject, to the overall 10,000 limitation on special immigrants). 17.

[5]--Religious Professionals

A religious professional may enter the United States as an R-1 nonimmigrant to work for the bona fide non-profit organization at the organization's request "in a professional capacity in a religious vocation or occupation." 18.

The INS regulations define professional capacity as "an activity in a religious vocation or occupation for which the minimum of a United States baccalaureate degree or a foreign equivalent degree is required." 19. Unlike the INS's treatment of H-1B professional nonimmigrants, 20. this interpretation does not recognize experience alone or a combination of work experience and education as the equivalent of a baccalaureate degree. This restrictive

reading may be mitigated, however, by the broader "other religious worker" provisions described below.

[6]--Other Religious Workers

Other religious workers may enter the United States temporarily as R-1 nonimmigrants "to work for the [denomination's nonprofit religious] organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in § 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation." 21.

This is a broad provision that covers individuals who may not qualify as either ministers of religion or religious professionals under the definitions described previously.

The INS regulations define a "bona fide organization which is affiliated with the religious denomination" as "an organization which is both closely associated with the religious denomination and is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations." 22.

[7]--Definitions of Religious Occupation and Religious Vocation

Two types of persons may qualify for the "other religious worker" subcategory within the R-1 classification. These are persons performing a "religious occupation" or serving in a "religious vocation."

Tracking the House Judiciary Committee Report, 23. INS regulations define "religious occupation" as "an activity which relates to a traditional religious function." Examples of persons in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. A director/producer of religious programming for international radio broadcast has been found to be performing a "religious occupation." 24.

INS regulations exclude from the definition of "religious occupation" workers such as "janitors, maintenance workers, clerks, fund raisers, or persons involved solely in solicitation of donations." 25.

The regulations define "religious vocation" as "a calling to religious life evidenced by the demonstration of commitment practiced in the religious denomination, such as the taking of vows. Examples of persons with a religious vocation include, but are not limited to, nuns, monks, and religious brothers and sisters." 26.

The distinction between persons performing a "religious occupation" and persons serving in a "religious vocation" becomes important when it comes to clerical workers, janitors, bakers, and similar personnel.

Lay individuals performing clerical-type work with religious organizations do not qualify for R nonimmigrant status, because such work is excluded from the INS definition of "religious

occupation." If, however, this work is performed by someone who has taken religious vows, she or he may qualify for the R-1. For example, the INS has indicated that a nun or a monk working for a qualifying religious organization will be considered engaged in a "religious vocation" even if their duties would be clerical in nature. 27.

In these situations, the key to a successful R-1 application may be in demonstrating to INS or DOS that the individual whose job it will be to sift flour for the monastery's famous fruitcakes is pursuing a religious vocation.

Comparison With Special Immigrant Category

[1]--In General

Although the requirements for R-1 religious nonimmigrants and special immigrant religious workers overlap in many ways, there are a number of significant differences which will be discussed below.

[2]--No Two Year Prior Work Experience Requirement

In the Immigration Act of 1990, Congress provided that special immigrant religious workers must demonstrate that they have carried on their ministry, religious occupation, or religious vocation for a period of two years before seeking immigrant status. 1.

In contrast, Congress provided that R-1 nonimmigrants must show only that they have been a member of a qualifying denomination for the immediately preceding two years. 2.

Instead of specifying qualifications for R-1 workers, INS regulations therefore merely require R-1 candidates to show that they "meet the criteria" to perform services under the R-1. 3.

Despite the lack of a prior experience requirement in the statute or regulations, however, INS's interpretation of the R-1 may be changing to require more stringent prerequisites for R-1 applicants. The clearest example is posed by the ongoing litigation involving the Tenacre Foundation, a Christian Science nursing facility in New Jersey. The Tenacre case relates to a change of status application for James N. Kihu, a Christian Scientist performing post-completion F-1-practical training in the area of Christian Science nursing. 4.

In 1993, Tenacre filed with INS an application for change in status to R-1 to permit Mr. Kihu to continue his work and studies at Tenacre with the eventual goal of becoming qualified to advertise as a Christian Science nurse in The Christian Science Journal. 5. In its initial application, Tenacre apparently stated that Mr. Kihu would be a "Christian Science nurse's aide," who would receive further training in Christian Science nursing. 6. INS determined that, unlike the position of Christian Science nurse, a Christian Science nurse's aide was not a "religious occupation," and that the applicant was not qualified to receive an R-1 if he was merely to work as a nurse's aide and receive training. 7. Although in subsequent administrative proceedings Tenacre clarified that Mr. Kihu would be an "entry-level Christian Science nurse," not a "nurse's aide," INS's position remained consistent: Mr. Kihu could not receive R-1 status until he was "fully qualified" to be employed in a religious occupation. INS determined Mr. Kihu was not "fully qualified," due to the fact that his training in the area of Christian Science

nursing was ongoing. 8. Tenacre asserted throughout the administrative and federal court proceedings involving Mr. Kihu that INS maintained a policy to deny R-1 status to Christian Science nurses who would receive any training while working as nurses at the Tenacre Foundation. Eventually the D.C. Circuit Court of Appeals, ruling on an appeal from the district court's denial of an injunction against INS, in dicta disagreed that the INS had such a policy. The court also disagreed that INS; in effect, had established a prior qualification or experience requirement for R-1 applicants. 9. Although the Tenacre case is not fully resolved, several aspects of the Tenacre situation should serve as cautions to practitioners in this area. First, although neither the R-1 statute nor INS's regulations require that the R-1 applicant demonstrate experience qualifying him or her for a religious occupation or vocation, 10. the AAU suggests in its March 1996 Tenacre decision that applicants must show they have done something to qualify for the R-1. 11. At minimum, this seems to squarely contradict INS's definition of a "vocation" as a "calling to religious life," 12. since as ordinarily understood, a "calling" is something that a person experiences, not something that he or she does. If this interpretation continues, some service centers may equate "showing what the alien has done" with a prior experience requirement. In fact, in approving Mr. Kihu's R-1 change of status after reopening the matter, the AAU appears to have relied on Tenacre's evidence that Mr. Kihu had "already worked as a nurse." 13.

Second, neither the AAU nor the courts discussed in Tenacre whether entry-level training was inappropriate for someone performing a religious vocation in R-1 status, as distinguished from a religious occupation: in fact, the AAU and the courts failed to make any distinction between persons in religious occupations and those in religious vocations. This is despite the Tenacre Foundation's argument that Mr. Kihu was pursuing a religious vocation for which the Christian Science institution alone was qualified to establish criteria, 14. and the fact that, under INS's own interpretation of the statute, some activities that do not qualify as "religious occupations" are acceptable when the R-1 applicant is pursuing a religious vocation. 15.

The Tenacre case argues for careful, thorough planning on the part of a religious organization's representative, particularly when the applicant will apply for R-1 status within, and not outside, the United States. Without conceding the prior experience or training issue, counsel dealing with aliens pursuing religious vocations or occupations should spell out in detail the organization's criteria for religious vocations or occupations and their process for selecting persons for these positions. Counsel should also detail carefully the religious significance of the work and/or training that the person pursuing the vocation or occupation will perform in R-1 status.

[3]--No Three Year Sunset

Significantly, the provision "sunsetting" the religious professional and other religious worker provisions for special immigrant purposes 16. does not apply to R-1 nonimmigrants. 17. What this means is that, even if the special immigrant provisions containing definitions of "religious professional" and "other religious worker" are eliminated from the INA, 18. aliens still may apply for nonimmigrant R-1 status as religious professionals or other religious workers. The R-1 beneficiary could not later, however, adjust status to permanent resident unless he or she could qualify as a "minister of religion" under INA § 101(a)(27)(C)(I) .

[4]--No Numerical Limitations

Unlike special immigrants, 19. there are no numerical limitations of any type on R nonimmigrants.

[5]--No Petition Requirement

While special immigrant religious workers must submit a petition to the INS, 20. there is no such requirement for R-1 nonimmigrants. Therefore, as described below, prospective R-1 nonimmigrants may apply for an R-1 visa directly to a consular officer abroad or to the INS in the United States. 21. Practitioners report that consular officers do not always understand that no petition is required. It may be prudent for counsel to mention in the cover letter to an R-1 application submitted to a consulate that no petition is required, and include in the package a copy of the appropriate section of the FAM.

However, as explained below, an R nonimmigrant seeking an extension of stay in the United States or a nonimmigrant seeking to change to R nonimmigrant status must file a petition with the INS on Form I-129