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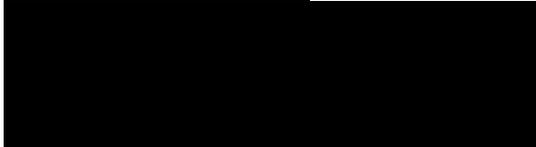
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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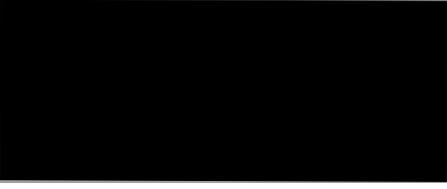


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAY 19 2009**  
EAC 06 160 52694

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Mari Plunson*

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO remanded the matter to the Director, California Service Center (“the director”) for issuance of a new decision under substantially revised regulations. The director again denied the petition and, on the AAO’s instruction, certified the decision to the AAO for review. The AAO will affirm the director’s decision to deny the petition.

The beneficiary is a minister who seeks classification as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform ministerial services as a missionary and assistant head of the New York branch of the International Center of Integral Theotherapy (CENTI).<sup>1</sup> The director determined that the petitioner had not established that the beneficiary had the requisite two years of continuous and lawfully authorized work experience as a minister immediately preceding the filing date of the petition. In response to the certified decision, counsel contends that the beneficiary possesses more than two years of authorized and qualifying experience.

Part 1 of the Form I-360 petition identifies CENTI as the petitioner. Review of the petition form, however, indicates that the alien beneficiary is the petitioner. An applicant or petitioner must sign his or her application or petition. 8 C.F.R. § 103.2(a)(2). In this instance, Part 9 of the Form I-360, “Signature,” has been signed not by any organizational official of CENTI, but by the alien beneficiary himself. Thus, the alien, and not CENTI, has taken responsibility for the content of the petition. This does not affect our consideration of the proceeding, however, because the attorney who appealed the initial denial, and subsequently responded to the notice of certification, is the self-petitioning alien’s attorney of record, pursuant to a Form G-28, Notice of Entry of Appearance as Attorney or Representative, executed on June 11, 2007.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 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;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

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<sup>1</sup> The acronym CENTI derives from the organization’s Spanish-language name, *Centro de Teoterapia Integral*.

(II) before September 30, 2009, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before September 30, 2009, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

When the petitioner filed the petition in 2006, older regulations governed the special immigrant religious worker program. Subsequently, however, Congress enacted the Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 (2008).<sup>2</sup> As required under section 2(b)(1) of that statute, U.S. Citizenship and Immigration Services (USCIS) promulgated a rule setting forth new regulations for special immigrant religious worker petitions. Supplementary information published with the new rule specified: “All cases pending on the rule’s effective date . . . will be adjudicated under the standards of this rule. If documentation is required under this rule that was not required before, the petition will not be denied. Instead the petitioner will be allowed a reasonable period of time to provide the required evidence or information.” 73 Fed. Reg. 72276, 72285 (Nov. 26, 2008).

Section 557(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 557(b), provides that an initial agency decision is not final if “there is an appeal to, or review on motion of, the agency within time provided by rule.” Because there was a pending appeal in this proceeding when the new statute became law, the matter is still pending and therefore subject to the new rule.

Because the regulations under which the petition was originally adjudicated are no longer in effect, it would serve no useful purpose to discuss the early stages of this proceeding. We shall concentrate, instead, on how the petitioner’s evidence relates to the regulations now in effect, and the director’s actions under those new regulations.

The USCIS regulation at 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary has been working as a minister or in a qualifying religious occupation or vocation, either abroad or in lawful immigration status in the United States, continuously for at least the two-year period immediately preceding the filing of the petition. The regulation at 8 C.F.R. § 204.5(m)(11) reads, in

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<sup>2</sup> The use of the term “nonminister” in the name of the statute simply acknowledges that certain provisions of the statute that pertained to nonministers – but not to ministers – had expired and therefore required reauthorization in order to remain in effect. Therefore, the term “nonminister” does not mean that the new regulations apply only to nonministers. Many key provisions in the regulations, including the provisions relating to past experience, apply equally to both ministers and nonministers.

part: "Qualifying prior experience during the two years immediately preceding the petition . . . if acquired in the United States, must have been authorized under United States immigration law."

On Form I-360, filed May 4, 2006, the petitioner claimed to have been in the United States since November 19, 2000, more than five years prior to the filing date. Therefore, the petitioner must establish that he was continuously performing qualifying religious work, under lawful immigration status permitting such work, throughout the two years immediately prior to May 4, 2006.

Also on Form I-360, under "Current Nonimmigrant Status," the petitioner wrote "R-1 Expired," with an expiration date of May 18, 2001. Elsewhere on the same form, asked whether he had "ever worked in the U.S. without permission," the petitioner answered "No." By signing Form I-360, the petitioner certified under penalty of perjury that "this petition and the evidence submitted with it is true and correct."

The director initially denied the petition on May 10, 2007, based on questions regarding CENTI's ability to compensate the petitioner at the proffered rate of \$45,000 per year. The petitioner appealed that decision on June 12, 2007. On December 12, 2008, the AAO remanded the matter to the director for adjudication under the new regulations.

On February 4, 2009, the director issued a notice of intent to deny the petition. In the notice, the director quoted the new regulations, including the requirement that, if the alien worked in the United States during the two-year qualifying period, such work must have been authorized under United States immigration law. On February 23, 2009, the director received a response from CENTI.

[REDACTED], CENTI's Senior Pastor and International Field Director, attested at length to the organization's mission and hierarchical structure. In a separate letter, [REDACTED] asserted that the petitioner "is a well qualified Pastor" with "over 33 years" of experience. Accompanying documents included CENTI's articles of incorporation and documentation of its tax-exempt status, as well as Internal Revenue Service Forms 1099-MISC showing payments from CENTI to the petitioner in 2006 and 2007. None of this information addressed the issue at hand, which is that unauthorized employment is not qualifying experience, and the petitioner has admitted that he was not authorized to work in the United States during the 2004-2006 qualifying period.

We note that the record contains two Forms 1099-MISC for 2007. One shows that CENTI paid the petitioner \$26,764.75 in "Nonemployee compensation"; the other shows \$35,535.40 in the same category. Neither the petitioner nor any CENTI official has explained why these forms show two different totals for the same year. These apparently contradictory documents call into question the actual amount, if any, that the petitioner paid the beneficiary in 2007. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On March 27, 2009, the director denied the petition, stating that, according to the record, the petitioner had "no authorization . . . to engage in employment in the United States" after May 2001,

and therefore the record did not show that the petitioner engaged in authorized employment during the 2004-2006 qualifying period. Pursuant to 8 C.F.R. § 103.4(a)(2), the director permitted the petitioner 30 days to submit a brief in response to the notice of certification.

In response, counsel cites new “supporting evidence attached to this brief **clearly demonstrating** that the [petitioner] was in [lawful] status at the time of the filing, and that the beneficiary had worked while authorized for [CENTI] more than two years prior to the filing of the Form I-360 petition.” Documents submitted with the brief indicate that CENTI filed a Form I-360 petition, receipt number EAC 01 216 54813, on the alien’s behalf in April 2001. The documents further indicate that the director denied that petition on July 22, 2003, and that CENTI appealed that decision on August 26, 2003. Counsel asserts that CENTI never received notification of the outcome of the appeal.

The 2003 appeal does not demonstrate that the petitioner was authorized to work in the United States in 2004-2006. The regulation at 8 C.F.R. § 274a.12(c) lists the classes of aliens who may apply for employment authorization, and that list does not include beneficiaries of pending special immigrant religious worker petitions or denied petitions with pending appeals. Therefore, a pending petition or appeal would not have provided the petitioner with employment authorization, either automatically or by application.

Even then, USCIS records show that the 2003 appeal was summarily dismissed on July 9, 2004, almost two years before the petition’s May 2006 filing date, because the petitioner had failed to articulate any substantive grounds for appeal. CENTI’s failure to receive the notice of dismissal, for whatever reason, does not nullify the dismissal or prevent it from taking effect. The petitioner had no pending appeal after July 9, 2004.

While counsel has provided copies of filing receipts for petitions and an appeal, the response to the certified denial does not include copies of filing receipts for Form I-765, Application for Employment Authorization. USCIS records do not show that the petitioner ever filed such a form. The record is, therefore, devoid of evidence that the petitioner was authorized to work in the United States after his R-1 nonimmigrant religious worker status expired in 2001.

For the above reasons, we affirm the director’s finding that the petitioner was not in lawful status during the 2004-2006 qualifying period.

Counsel notes that the petitioner has worked for CENTI since 1976. The apparent argument is that the petitioner’s long experience with CENTI, some of it abroad and some of it under R-1 status, amounts to “more than two years” of qualifying experience “prior to the filing of the Form I-360 petition.” The AAO does not dispute this experience, but the statute and regulations do not simply require two years of experience prior to the petition’s filing date. Rather, the qualifying experience must take place “immediately preceding” the filing date.

The regulation at 8 C.F.R. § 204.5(m)(4) states that a break in the continuity of the work during the preceding two years will not affect eligibility so long as:

- (i) The alien 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.

Here, however, the issue is not a break in the continuity of the petitioner's work, but rather the expiration of the petitioner's lawful immigration status.

The petitioner's work prior to May 2004, whether authorized or not, falls outside the two-year qualifying period and is, therefore, irrelevant to the question of whether or not the petitioner worked, with authorization, during the two-year qualifying period.

Because the petitioner lacked lawful immigration status throughout the 2004-2006 qualifying period, he was unable to accumulate qualifying experience pursuant to 8 C.F.R. §§ 204.5(m)(4) and (11). The AAO affirms the director's decision to deny the petition based on this lack of qualifying experience.

Review of the record reveals another issue of concern. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

8 C.F.R. § 204.5(m)(7) reads:

Attestation. An authorized official of the prospective employer of an alien seeking religious worker status must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. If the alien is a self-petitioner and is also an authorized official of the prospective employer, the self-petitioner may sign the attestation. The prospective employer must specifically attest to all of the following:

- (i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;
- (ii) The number of members of the prospective employer's organization;
- (iii) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;

- (iv) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;
- (v) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;
- (vi) The title of the position offered to the alien, the complete package of salaried or non-salaried compensation being offered, and a detailed description of the alien's proposed daily duties;
- (vii) That the alien will be employed at least 35 hours per week;
- (viii) The specific location(s) of the proposed employment;
- (ix) That the alien has worked as a religious worker for the two years immediately preceding the filing of the application and is otherwise qualified for the position offered;
- (x) That the alien has been a member of the denomination for at least two years immediately preceding the filing of the application;
- (xi) That the alien will not be engaged in secular employment, and any salaried or non-salaried compensation for the work will be paid to the alien by the attesting employer; and
- (xii) That the prospective employer has the ability and intention to compensate the alien at a level at which the alien and accompanying family members will not become public charges, and that funds to pay the alien's compensation do not include any monies obtained from the alien, excluding reasonable donations or tithing to the religious organization.

The director listed the above requirements in the February 4, 2009 notice of intent to deny the petition. The record contains letters from [REDACTED] addressing some but not all of the above points.

[REDACTED] did not state the number of members of the organization or the number of employees at the location of the petitioner's intended employment. [REDACTED] provided no information about other beneficiaries working for CENTI, and did not state that the alien will not be engaged in secular employment. The attestation is, therefore, deficient in the above respects.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The director's decision of March 29, 2009 is affirmed. The petition is denied.