U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 165 53013 Office: CALIFORNIA SERVICE CENTER Date: MAR 07 2006

IN RE: Petitioner:
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:

[redacted]

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 Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is subsidiary church of the Church of Scientology. It seeks to classify the beneficiary 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 services as a "Professional Word Clearer." The director determined that the petitioner had not established its ability to pay the beneficiary's proffered wage, or that the beneficiary possessed the minimum qualifications for the position offered or the requisite two years of continuous work experience immediately preceding the filing date of the petition.

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,
> >
> > (II) before October 1, 2008, 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 October 1, 2008, 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
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> (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

First, we shall examine the petitioner's ability to pay the beneficiary's proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability

> shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In a letter accompanying the initial filing of the petition, [redacted] the petitioner's personnel director, states that the petitioner's "compensation averages approximately US$330.00 per week," or $17,160 per year. The petitioner must establish this ability from May 7, 2003 (the petition's filing date) onward.

The initial filing contained no financial documentation. Accordingly, the director issued a request for evidence (RFE) on August 6, 2003, instructing the petitioner to submit financial documents. In response, the petitioner has submitted copies of Form W-2 Wage and Tax Statements indicating that the petitioner paid the beneficiary $8,177.27 in 2001 and $14,473.39 in 2002. Copies of pay vouchers show that, between January and April 2003, the petitioner paid the beneficiary an average of $361.35 per week, not including occasional small commissions. The last pay voucher is dated May 1, 2003, which was the last voucher issued before the petition's filing date. Thus, the pay vouchers do not address the beneficiary's compensation after the filing date (which is the relevant period in terms of calculating the petitioner's ability to pay).

A quarterly withholding report reproduced in the record indicates that the petitioner has 15 employees, too low a number for the petitioner to avail itself of the provision at 8 C.F.R. § 204.5(g)(2) regarding companies that employ 100 or more workers. The same report indicates that the beneficiary earned $4597.29 during the second quarter of calendar year 2003. This amount averages $353.64 per week, which exceeds the proffered wage. We note that, in a letter submitted with the response to the August 2003 RFE, Mr. [redacted] stated that the beneficiary's "remuneration averages $340.00 per week," which is slightly higher than the amount quoted in the initial filing.

The petitioner also submitted an unaudited "Statement of Financial Position" indicating that the petitioner had current assets of $274,220.66 in current assets as of December 31, 2002, against $5,997.45 in current liabilities.

The director issued a second RFE on October 21, 2003, instructing the petitioner to "[s]ubmit audited financial statements or IRS-certified federal tax returns . . . for 2002 as evidence of the petitioner's current ability to pay the proffered wage." The director requested other evidence as well. The petitioner responded to the RFE, but that response included no audited financial statement or tax returns, nor any explanation for their absence.

In denying the petition, the director found that the petitioner had failed to submit the types of evidence required by the regulations, and that other documents in the record show that "the petitioner has **not** been paying the proffered wage" (director's emphasis). With regard to this finding, the director evidently was referring to the Forms W-2 from 2001 and 2002, both of which showed that the beneficiary received, on average, less than $330 per week in both of those years. The petitioner, however, need only establish ability

to pay from the filing date forward. Because the filing date was in May 2003, the petitioner's ability to compensate the beneficiary during 2001 and 2002 is not at issue.

On appeal, counsel argues that 8 C.F.R. § 204.5(g)(2), which requires employers to demonstrate ability to pay the proffered wage, does not apply to religious workers. Counsel claims that 8 C.F.R. § 204.5(m)(4), "which is specific to religious workers," supersedes 8 C.F.R. § 204.5(g)(2). We disagree with this reasoning; 8 C.F.R. § 204.5(m)(4) requires religious entities to "state. . . how the alien will be paid or remunerated," but this does not establish a separate standard of evidence for religious employers; the regulation merely requires the employer to describe the terms of the job offer (including the rate of pay). 8 C.F.R. § 204.5(g)(2), by its plain wording, applies to "any petition filed by or for an employment-based immigrant which requires an offer of employment." Because the special immigrant religious worker classification requires an offer of employment, it falls within the compass of that regulation. Furthermore, pursuant to 8 C.F.R. § 204.5(c), for most employment-based immigrant classifications that require an offer of employment, only the employer may file the petition. An alien cannot, for example, self-petition as an outstanding professor or researcher. The only employment-based immigrant classification that requires a job offer, and for which current regulations permit an alien to self-petition, is the special immigrant religious worker classification. Thus, the reference at 8 C.F.R. § 204.5(g)(2) to "any petition filed by . . . an employment-based immigrant which requires an offer of employment" can only refer to special immigrant religious workers.

In any event, counsel's unsuccessful argument that the petitioner need not establish its ability to pay is moot, as we shall demonstrate here. The petitioner submits payroll records from May 2003 to September 2005, showing that the beneficiary's pay has varied significantly from week to week, but most payments have been well above $330 per week. Some payments were less than $330, but on average the payments exceed the proffered wage (which the petitioner has always stated as an average rather than as a fixed rate of pay).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has shown that it has paid the beneficiary, on average, in excess of the proffered wage since the filing date. The director's concerns about the beneficiary's low pay in 2001 and 2002 are legitimate and understandable, but given the evidence now available, we cannot conclude that the petitioner was unable to pay the wage after May 2003 because the petitioner has, in fact, paid that wage. We therefore withdraw the director's finding to the contrary.

We turn, next, to the issue of the beneficiary's qualifications for the position offered. CIS regulations at 8 C.F.R. § 204.5(m)(3)(ii)(D) require the petitioner to submit a letter an authorized official of the religious organization in the United States which establishes that the alien is qualified in the religious vocation or occupation. [redacted] states:

> [The beneficiary] has been working for the Church since Dec. 1998 when he was first train[ed] in our hierarchical government, structure, practices and spiritual counseling. [The beneficiary] is train[ed] in the higher level of Scientology instruction to guide our

> parishioners in different areas of religious study obtaining the certification of "Hubbard Professional Word Clearer," intended to assist our congregation in their spiritual advancement.
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> Scientology churches offer a variety of religious services including Sunday worship, marriage and funeral services and Marriage Counseling; but the main religious services are known as Auditing and Training. Auditing is a form of spiritual counseling, in which trained Scientology Practitioners (known as Auditors) guide parishioners to examine their existence through a carefully structured series of steps. Training is the study of Scientology's scriptures (which, all-told, encompass more than 500,000 pages of writings and some 3,000 recorded lectures) and of the description of their procedures.
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> In addition [to] this earlier mention[ed] instruction level [the beneficiary] has been successfully trained as a Scientology Practitioner (Auditor), having graduated from the previous 7 qualifying courses up to what is known as Class I Auditor.

In the August 2003 RFE, the director instructed the petitioner to "[p]rovide a detailed description of the . . . training and experience necessary to do the [beneficiary's] job." In response, Mr. [redacted] indicates that the position requires completion of five courses, such as the "Hubbard Graduate of Study Tech Course," and completion of the "Hubbard Pro Word Clearer Internship." Mr. [redacted] asserts that the beneficiary "obtained these classifications before he was posted in the mentioned position for our Mission."

In the October 2003 RFE, the director requested "documentary evidence to establish that the beneficiary possessed the minimum education, training, and experience required for the proffered position." Elsewhere in the RFE, the director specifically instructed the petitioner to submit two certificates earned by the beneficiary, "Hubbard Graduate of Study Tech" and "Hubbard Professional Word Clearing Course." These are two of the six courses that the petitioner had identified as required for the beneficiary's position.

The director, in the denial decision, acknowledged the petitioner's submission of the two aforementioned certificates, but stated "the petitioner did not submit documentary evidence that the beneficiary completed the remainder of the requirements." On appeal, the petitioner submits copies of the certificates for the other courses listed in Mr. [redacted]'s response to the August 2003 RFE. Counsel observes that the director, in the October 2003 RFE, "ask[ed] for original documents for two of the courses. There was no specific request for the additional listed courses. . . . Had the CSC Director requested the [remaining] certificates . . . they would have been provided" at that time. The certificates are dated 2000 or early 2001, and the record contains nothing to impugn the credibility or authenticity of these documents.

While the director did give the petitioner the general instruction to submit "evidence to establish that the beneficiary possessed the minimum education, training, and experience required for the proffered position," the director's simultaneous request for only two of the training certificates could, as counsel argues, reasonably be construed to imply that only those two documents were necessary. We find that the petitioner has overcome this ground for denial, and accordingly we withdraw the director's adverse finding.

The remaining issue regards the beneficiary's experience. The regulation at 8 C.F.R. § 204.5(m)(1) indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on May 7, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of the proffered position throughout the two years immediately prior to that date.

In his initial letter, Jeffrey Kronen states that the beneficiary "has been working for the church since Dec. 1998" in various locations, and specifically for the petitioning church "since Sept. 2000." In the August 2003 RFE, the director instructed the petitioner to submit "evidence of the beneficiary's work history beginning May 07, 2001 and ending May 07, 2003. . . . Ideally, this evidence should come in a way that shows monetary payment, such as W-2 forms." As noted elsewhere in this decision, the petitioner's response to that RFE included Forms W-2 from 2001 and 2002, and pay stubs from the relevant part of 2003.

The director's October 2003 RFE included a request for "copies of the beneficiary's pay statements for each pay period from May 2001 through May 2003," but made no other direct mention of the beneficiary's experience. The petitioner's response includes a weekly breakdown of payments to the beneficiary.

In the denial notice, the director observed that "the beneficiary earned in 2001 only 56% of his 2002 wage," and therefore "it appears that the beneficiary did not work for the petitioner in the same capacity or for the same intensity or duration in 2001 (from March through December) that he did in 2002." While it is true that the beneficiary earned less in 2001 than he did in 2002, the weekly breakdown shows no significant interruptions in the beneficiary's work between May and December 2001; only short gaps consistent with vacations and the like, which are not disqualifying interruptions to continuous employment. The record is devoid of evidence that directly indicates any change in the beneficiary's duties between May 2001 and May 2003. The petitioner has stated that those duties remained the same, and the record does not reveal any basic credibility issues that would give the director reason to doubt the petitioner's claims. The change in the beneficiary's compensation, while peculiar, is not *prima facie* evidence that the beneficiary performed non-qualifying duties during 2001 or any other part of the qualifying period. For this reason, we withdraw this final remaining ground for denial.

Pursuant to the above discussion, the petitioner has overcome the stated grounds for denial. Upon review of the record, we see no readily apparent obstacle to the approval of the petition. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.