



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



C1

FILE:

WAC 99 088 51644

Office: CALIFORNIA SERVICE CENTER

Date: MAR 28 2007

IN RE:

Petitioner:

Beneficiary:

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:



**PUBLIC COPY**

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, initially approved the employment-based immigrant visa petition. Upon further review, the director determined that the petition had been approved in error. The director properly served the petitioner with a notice of intent to revoke, and subsequently revoked the approval of the petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the AAO's previous decision will be affirmed and the revocation will remain in effect.

The petitioner is a constituent church of the Church of Scientology, subordinate to Scientology Missions International. 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 public contact director. The director determined that the petitioner had not established: (1) that it had not made a qualifying job offer to the beneficiary, with regard to the level of compensation offered; (2) that the proffered position qualifies as a religious vocation; (3) that the proffered position qualifies as a religious occupation; (4) that the beneficiary had the requisite two years of continuous work experience in the position immediately preceding the filing date of the petition; or (5) the petitioner's ability to pay the beneficiary's full compensation. In its decision dismissing the appeal, the AAO withdrew the first basis identified above, and upheld the remaining grounds.

On motion, the petitioner submits a brief from counsel and new exhibits.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

*Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Matter of Ho*. The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.* at 582.

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

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

The first issue is whether the petitioner seeks to employ the beneficiary in a qualifying occupation. The regulation at 8 C.F.R. § 204.5(m)(2) defines "religious occupation" as an activity which relates to a traditional religious function. Examples of individuals 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. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature.

Citizenship and Immigration Services therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

Furthermore, 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 March 15, 1999. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a public contact director throughout the two years immediately prior to that date. The two-year experience issue is tied to the question of the beneficiary's work, because if the beneficiary's work does not qualify as a religious occupation, then it follows that the beneficiary cannot have engaged in a qualifying religious occupation during the two-year qualifying period. At issue here is not whether the beneficiary worked for the petitioner during that period, but whether such work qualifies him for the benefit sought.

The director found that the petitioner had not established that the beneficiary's position qualifies as a religious occupation. In affirming that finding, the AAO concluded that the beneficiary's duties, as described, included a significant amount of fund raising (which, by regulation, is not a qualifying religious occupation). The beneficiary's income was largely contingent on "Staff Book Commissions" and "Production Bonuses." Counsel, on motion, argues that the AAO's finding regarding fund raising is "a new theory" which the petitioner did not have the opportunity to rebut prior to the revocation notice.

The finding that the beneficiary engages in fund raising was part of a larger overall finding that the beneficiary's position does not appear to be a religious occupation – a finding that was presented in the notice of intent to revoke. The petitioner was advised that the petitioner had not adequately established that the beneficiary's position amounts to a religious occupation, and published regulations have long made it known fund raising does not qualify. We will consider, here, the petitioner's arguments and evidence on motion relating to the fund raising issue, but the fact that the AAO went into greater detail than the director does not compel a reversal, on procedural grounds, of the AAO's prior decision.

Counsel, on motion, maintains the petitioner's previously stated position that the beneficiary is a missionary rather than a fund raiser. Counsel quotes prior descriptions of the beneficiary's work, and notes the repeated use of the word "missionary" in these descriptions. As the AAO already observed in its dismissal notice, the use of the term "missionary" does not compel the finding that the beneficiary is, in fact, a missionary. *Cf. Matter of Rhee*, 16 I&N Dec. 607, 610 (BIA 1978), in which the Board of Immigration Appeals found that "accommodating religious organizations" could circumvent immigration law through liberal issuance of unearned ministerial credentials. Similarly, denying that the beneficiary is a fund raiser does not establish definitively that he is not, in fact, a fund raiser.

In a new declaration, [REDACTED] of the petitioning entity, states:

The distribution of religious literature and sectarian aids is the primary method of propagation and dissemination utilized by a Scientology mission. . . . Book-selling is not a fund-raising activity; it is the essential proselytizing activity of a missionary. . . .

The sole purpose of the activity of book-selling is to make the religious teachings of Scientology available through its written materials to enlighten the public. . . .

Book-selling is not a fund-raising activity for the Mission because the income is primarily reinvested in the purchase of more books. . . . These books are purchased by the Mission from the Church publishing house, Bridge Publications. Even at a discounted bulk rate, the profit margin of buying and selling paperback books is insignificant compared to the overall income of the Mission.

If the primary goal is simply to disseminate the writings of Scientology, the widest possible audience, the petitioner could simply give the books away. Instead, the petitioner sells the books, to cover the cost of publication and distribution. This constitutes fund raising, unless taking in money in order to meet operational expenses is not fund raising. There is no inherent, indissoluble link between proselytizing and soliciting donations or selling products.

Furthermore, has observed that the proceeds of the book sales are "reinvested in the purchase of more books . . . from the Church publishing house, Bridge Publications." Thus, even though the petitioner does not keep the proceeds from the books, those proceeds remain within the Church of Scientology. Therefore, the beneficiary's sales activities are still, ultimately, a fund-raising venture for the church.

Counsel states that the petitioner's duties are not limited to book sales. Photographs show the beneficiary engaged in "auditing" various persons, using a device called an "E-meter." Signs in the photographs refer to a "Free Stress Test," presumably involving the E-meter. Some of the photographs show the beneficiary at a shopping mall kiosk bearing the legend "DIANETICS." The kiosk is stocked with dozens of copies of a book of that title, which subsequently became one of Scientology's basic scriptures after Scientology became a religion.

Auditing is an activity that is only performed within the Church of Scientology, and can be considered a traditional religious function within that religion. The E-meter has no evident secular use. The petitioner, however, has not shown that the beneficiary engaged in auditing at the time the petition was filed in 1999. Although the director had previously, on more than one occasion, instructed the petitioner to provide specific details regarding the beneficiary's work, the petitioner's previous descriptions of the beneficiary's work never mentioned auditing as being one of his duties. Although the beneficiary was described, earlier, as holding a certificate as a Hubbard Dianetics Auditor, he also held several other certificates, and there is no evidence that every Scientologist certified as an auditor routinely performs audits. Because the petitioner has never previously claimed that the beneficiary's regular duties involve auditing, there is no affirmative evidence that the beneficiary was, in fact, active in auditing at the time the petition was filed. As described in the AAO's previous decision, the petitioner is known to have paid the beneficiary sales commissions, and significant fluctuations in the amount of the beneficiary's remuneration are consistent with a finding that such commissions constitute a large fraction of the beneficiary's overall compensation.

Pursuant to the above discussion, the AAO affirms its prior finding that the petitioner has not met its burden of proof to demonstrate that the beneficiary's activities constitute a qualifying religious occupation, or (by extension) that the beneficiary continuously carried on a qualifying religious occupation during the two years immediately prior to the filing of the petition.

The next issue concerns the petitioner's ability to compensate the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*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.

Counsel introduces this issue by stating: "The AAO decision sustained the revocation by inferring a proffered wage and citing a presumption that the petitioner does not possess the ability to pay the beneficiary." As the AAO demonstrated in its prior decision, the regulations operate on the presumption of a proffered wage, or at least on defined terms of compensation. With regard to the "presumption that the petitioner does not possess the ability to pay the beneficiary," this is simply another way of phrasing the fact that the law places the burden of proof on the party seeking benefits. If the petitioner has not actively demonstrated ability to pay, we are under no obligation whatsoever to presume the petitioner has that ability.

In its prior decision, the AAO explained its position that special immigrant religious worker petitions are covered by 8 C.F.R. § 204.5(g)(2). Counsel, on motion, contests this finding. Counsel argues that, at the time the regulation was promulgated, "the Immigration Act of 1990 included provisions for the former third preference petition, which could be filed by the alien in his own behalf," and that any such petitions, still pending in 1991, would have fallen under 8 C.F.R. § 204.5(g)(2). This does not show that special immigrant religious worker petitions are exempt from the regulation. 8 C.F.R. § 204.5(a) lists the types of "Petitions for employment-based immigrants." That list includes "special immigrants under section 101(a)(27)(C)" of the Act, *i.e.*, special immigrant religious workers. Such petitions, therefore, demonstrably fall within the compass of the regulations at 8 C.F.R. § 204.5. Nothing in the wording of 8 C.F.R. § 204.5(g)(2) explicitly or implicitly exempts special immigrant religious worker petitions from the requirements therein.

Counsel states: "the application of 8 C.F.R. § 204.5(g)(2) to a special immigrant religious worker petition results in the anomalous request that a tax-exempt organization be required to provide its federal tax returns." We note, here, that a tax-exempt religious organization that is not a church would be required to file a Form 990 return, which is comparable to a tax return except that no tax is paid. For our purposes here, however, it is more important that counsel misstates the regulatory requirement. The regulation states that the employer must provide copies of its annual reports, federal tax returns, or audited financial statements. While a church may be exempt from filing tax returns, nothing precludes the preparation of audited financial statements. Indeed, on motion, the petitioner submits copies of "Audit Summaries" dating back to 1997. It is hardly onerous or unreasonable to require the submission of financial documents already in the petitioner's possession.

We note that the summaries submitted on motion only address the petitioner's income, not its expenses or liabilities, and therefore they do not provide a complete picture of the petitioner's financial status. Even

assuming (for the sake of argument) that the complete reports would remove all doubts concerning the petitioner's ability to compensate the petitioner at the level originally stated, the petitioner did not submit the complete reports, and still has not done so, and it is now too late to do so. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Counsel also observes that, while the Form I-140 petition (used for other employment-based immigrant classifications) requests specific wage information, the Form I-360 petition does not. This proves nothing. While the Form I-140 petition requests substantial information about the position offered, the Form I-360 petition does not include any space for any information at all about proposed religious work. The form's only reference to special immigrant religious workers is a check-box on the front page in Part 2, "Classification Requested." Therefore, while it is true that the Form I-360 has no line for wage information, it also lacks lines for other critical details that the regulations obviously require. The design of the Form I-360 petition does not exempt religious organizations from the evidentiary requirements of 8 C.F.R. § 204.5(g)(2).

8 C.F.R. § 204.5(m)(4), which begins with the phrase "job offer," requires the petitioner to establish the terms of compensation. Counsel contends that the vague wording of that regulation means that a religious organization need not set forth a specific proffered wage. 8 C.F.R. § 204.5(m)(4), however, does not supersede or supplant 8 C.F.R. § 204.5(g)(2), which requires every prospective employer to establish its ability to meet its terms of compensation.

In its dismissal notice, the AAO had quoted two letters from [REDACTED]. In a letter dated November 19, 2001, [REDACTED] had stated: "The salary varies from week to week. It will be maybe about \$200 per week." A subsequent letter dated September 1, 2003 contained essentially the same assertion. The AAO also cited evidence in the record to show that "payments to the beneficiary have fallen increasingly short of the proffered level since 1999."

On motion, [REDACTED] states: "No proffered wage can be stated as this would violate staff covenant and be contrary to directive." Counsel states: "The AAO has misinterpreted two letters from 2001 and 2003 . . . as if a proffered wage amount had been declared. . . . Petitioner was not put on notice, prior to the AAO decision, that the amount of \$200 per week would be arbitrarily selected as a proffered wage." The director raised the issue of the petitioner's ability to compensate the beneficiary in the notice of intent to revoke, and again in the revocation notice; the issue did not first surface in the AAO's dismissal notice. The AAO cited the figure of \$200 per week because that was the only figure that the petitioner offered. If counsel is correct that the reference to "about \$200 per week" did not represent an actual offer or commitment to pay that amount, then the petitioner has not set forth any concrete terms of remuneration. Such an omission would be a disqualifying factor, not a mitigating one, and a prospective employer cannot evade the "ability to pay" requirement simply by refusing to state specific terms of employment. Similarly, an employer cannot meet the requirements of 8 C.F.R. § 204.5(m)(4) simply by asserting that the beneficiary will receive some unspecified level of compensation. Regarding the "staff covenant," we reiterate here the AAO's un rebutted finding that the petitioner's own materials contradict one another with regard to the beneficiary's status within the petitioning entity. The beneficiary signed a series of declarations, acknowledging that he "is not an employee," but at the same time the petitioner has issued documents such as Internal Revenue Service (IRS)

Form W-2 Wage and Tax Statements which indicate that the beneficiary is and has been the petitioner's "employee" for legal purposes such as taxation.

Counsel states that the "\$200 per week" figure was "admittedly an approximation" and therefore should not be considered to be a firm offer or commitment. Citing the beneficiary's IRS 1999 Form W-2 Wage and Tax Statement, counsel notes that the petitioner, in 1999, paid the beneficiary an average of "\$179.40 per week, which is not outside an approximation of 'about \$200 per week.'" Counsel provides no standard for how far the actual remuneration can drop below the "approximation" before the shortfall would reach a disqualifying level. Counsel correctly states that the beneficiary earned, on average, \$179.40 per week in 1999, but counsel neglects to mention that, in 2002, the beneficiary earned only \$159.92 per week, hence the AAO's finding that "payments to the beneficiary have fallen increasingly short of the proffered level since 1999."

Counsel then claims that the AAO "withdrew the [director's] specific holding for revocation concerning the ability to remunerate." Counsel follows this claim with a quotation from the dismissal notice that has nothing to do with the petitioner's ability to pay under 8 C.F.R. § 204.5(g)(2). The AAO withdrew a specific finding regarding the terms of employment, because the director had misquoted a clause in the regulations. The director found that the beneficiary would likely "be dependent on supplemental employment or solicitation of funds for support." The AAO withdrew the director's finding because 8 C.F.R. § 204.5(m)(4) requires the petitioner to show that the beneficiary will not be *solely* dependent on supplemental employment or solicitation of funds; the director had omitted the term "solely." In that same paragraph, quoted in counsel's brief, the AAO stated: "it is of concern that the petitioner pays the beneficiary a salary that hovers near the poverty line and fluctuates in a manner that calls into question the petitioner's ability to pay the beneficiary a living wage." Given these facts, counsel's contention that the AAO withdrew the director's finding "concerning the ability to remunerate" is groundless and inexplicable.

Counsel then quotes from *Camphill Soltane v. US Department of Justice, Immigration & Naturalization Service*, 381 F.3d 143, 2004:

The requirement that the position be "salaried" appears to be inconsistent with the list of religious occupations given in the regulation itself, which includes positions-perhaps most notably "missionaries"-who do not always receive salaries. We further note that in promulgating the final rules at issue, the agency explicitly stated that they had been "revised to account more clearly for *uncompensated* volunteers, whose services are engaged but who are not technically employees." 56 Fed. Reg. 66965 (Dec. 27, 1991) (emphasis added).

According to the record of proceeding, the beneficiary's intended place of work is in California, which is not under the jurisdiction of the Third Circuit. *Camphill Soltane* was never a binding precedent for this case.

It is also crucial to note that the cited passage from the Federal Register concerns a regulation that applies only to R-1 nonimmigrant religious workers, not to special immigrant religious workers. The final rule for special immigrant religious workers was promulgated separately, at 56 Fed. Reg. 60897 (Nov. 29, 1991).

There is nothing in the implementing regulations for special immigrant religious workers to indicate that “uncompensated volunteers” can qualify for that classification. For nonimmigrants, the regulation at 8 C.F.R. § 214.2(r)(3)(ii)(D) requires petitioners to specify “[t]he arrangements made, *if any*, for remuneration for services to be rendered by the alien” (emphasis added). This “if any” clause was inserted “to account more clearly for uncompensated volunteers,” as reported in the Federal Register. With regard to the immigrant classification, the parallel regulation at 8 C.F.R. § 204.5(m)(4) contains no comparable “if any” clause.

Counsel’s attempts to show that the petitioner need not establish a proffered wage, or its ability to pay that wage, fail for the reasons outlined above. The AAO affirms its previous finding in this regard.

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 not sustained that burden. The petitioner has not demonstrated that the AAO erred in its prior decision, and the petitioner has not submitted new evidence that would affect the outcome of the proceeding. Accordingly, the previous decision of the AAO will be affirmed.

**ORDER:** The AAO’s decision of August 9, 2006 is affirmed. The revocation remains in effect.