U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 2 3 2004

IN RE: Petitioner: [redacted]
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:

[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.

Elizabeth O'Brien
Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The Director, California Service Center initially approved the special immigrant religious worker petition. On the basis of new information received and on further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and exercised his discretion to revoke the approval of the petition on February 4, 2004. The petitioner appealed this decision to the Administrative Appeals Office (AAO). The director subsequently obtained additional information that was not previously considered in the revocation decision, and requested that the AAO remand the matter to the California Service Center. The AAO remanded the matter to the director, at the director's request, for further consideration. The director then reopened and vacated the February 4, 2004 decision. The director issued a Notice of Intent to Deny and again revoked approval of the petition on July 7, 2004. The director certified the decision to the AAO for review. The AAO will affirm the director's decision to revoke the approval of the petition.

We note that this matter is the subject of currently pending litigation. The AAO's appellate jurisdiction is limited to review of the director's decision on the underlying petition, and does not encompass constitutional, evidentiary or other such issues raised in the litigation.

The petitioner is a church. 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 minister of music. The director determined that the petitioner has failed to establish (1) its continuous existence as a distinct, *bona fide* church; (2) that the beneficiary had the requisite two years of continuous work experience as a music minister immediately preceding the filing date of the petition; (3) its ability to pay the beneficiary's proffered wage; or (4) its *bona fide* intent to employ the beneficiary as a music minister.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General 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 unrebutted, 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*, at 590. 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 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).

On May 18, 2004, when the director withdrew the previous denial decision, the director also reopened the matter and issued a "Notice of Intent to Deny" (NOID). This should have been called a notice of intent to *revoke*, given the prior approval of the petition, but this miswording is immaterial to the matter at hand. The important issue is the content of the notice, rather than its heading.

In response to the NOID, counsel states that the director had no authority to reopen the petition because "Judge Taylor has already determined that he has jurisdiction to review the Constitutional issues raised in this matter, and has stated that he would, on Plaintiff's motion, consider whether exhaustion of administrative relief should be excused."[1] Counsel indicates that the director was only entitled to reopen this matter to take favorable action. We note that the director was acting within the scope of his regulatory authority under 8 C.F.R. § 205.2(c) in revoking the approval of the petition on notice, and in reopening the previous revocation on his own motion, with notice to the petitioner, under the regulation at 8 C.F.R. § 103.5(a)(5)(ii). Absent any evidence of a formal finding by the court that the notice was impermissibly issued, the AAO must proceed on the assumption that the notice is valid.

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[1] We note that there was "no administrative relief available" in September 2003, because the statute authorizing the visa classification was then about to "sunset." Congress has since reauthorized the statutory provision for special immigrant religious workers, which is now valid until September 30, 2008. Thus, to the extent the petitioner's argument regarding the absence of administrative relief may have referred to the sunset of the visa classification (which appear to have formed the primary justification for litigation), and not to the doctrine of "exhaustion of administrative remedies," this argument no longer applies.

We shall restrict consideration here to the issues raised in the NOID and the revocation/denial notice, and will not address whether the federal court's jurisdiction of the litigation prohibited CIS from taking further action on the underlying petition. The NOID raises several issues, and these same issues necessarily figure in the subsequent revocation decision. In the interest of clarity, we shall address each issue individually, followed by counsel's response to each issue.

The director noted that the petitioner has used various addresses throughout the course of this proceeding. According to an investigative report prepared by Immigration and Customs Enforcement (ICE), ICE investigators were unable to locate any address used by the church between October 2001 and December 2001, or between January 2003 to October 2003. The director stated that the church used the following addresses during the following periods:

1997 – 10/2001

1/2002 – 1/2003
10/2003 – present

From October 2003 to March 2004, the petitioning church operated under a different name, apparently having been absorbed into the New Life Grapevine Church under the leadership of a different pastor.

The director concluded that the petitioner was not a *bona fide* church because "[t]he petitioning church had several apparent gaps of existence," and only one of its many addresses is reflected in its tax exemption letter from the Internal Revenue Service (IRS).

In response, counsel asserts that the petitioner has submitted an IRS letter establishing that the petitioning church is tax-exempt. Counsel asserts that the exemption attaches to the organization, rather than to the specific address, and therefore the changes of location do not void the tax exemption. The director's concern appears to have been not the address *per se*, so much as the question of whether the church at the new address is the same entity as the church named in the IRS letter. If a church at a given address is dissolved, and a completely new church appears elsewhere, using the same name, that church is not entitled to the tax exemption of the defunct original church. There must be persuasive evidence of continuity between the church at the address on the IRS letter and the present church; sharing a name and a pastor is not sufficient evidence to show that the IRS considers the old church and the new church to be one and the same.

Counsel denies that there are gaps in the church's existence, and counsel labels the ICE investigation as "woefully amateurish and incomplete," as well as "unlawful" and "a demonstration of the agency's bad faith." The AAO cannot rule on whether the ICE investigation was "unlawful," and leaves that question to the court as part of the ongoing litigation. The AAO must instead rely on the available information, which includes the report from that investigation.

Counsel asserts that the director's chronology, reproduced above, is incomplete. Counsel offers the following alternative chronology with no gaps:

1997 – 1/2002
1/2002 – 4/2003
4/2003 – 9/2003
9/2003 – present

The petitioner submits a letter purportedly signed by of the dated June 2, 2004. The official states that the petitioner "was renting our facility during from October 1997 thru January of 2002." The author of the letter fails to explain why church officials had previously told ICE investigators that the petitioner "had rented space with the from 1997 until October of 2001." The letter does not include any documentation of the petitioner's rent payments during the last months of 2001, or any other first-hand, contemporaneous evidence that would definitively resolve the conflicting statements of church officials.

Bank statements in the record were mailed to the petitioner at the address as late as May 2003, indicating that the petitioner was not always diligent in providing timely notification of its several changes of address. The record contains nothing that would settle the issue of precisely when the petitioner left the

Counsel asserts that the ress is "an elder's home," where the congregation worshiped "while it searched for a new facility," and that the petitioner's "church bulletins for this period clearly show the address of the elder's home." The petitioner submits a letter from identified as the church elder who lives at the , to corroborate the assertion that the petitioner "used my house for and Activities." The petitioner submits original church bulletins dated throughout the relevant period. The last bulletin, dated September 7, 2003, contains several references to 18422 Bloomfield We cannot determine the context of these references, because the bulletins are in Korean with no translations provided, but it would be consistent with counsel's claims if these references were announcements to the congregation that the church was about to move to that address.

The petitioner submits a new IRS letter, dated June 9, 2004, affirming the 1995 issuance of a tax exemption letter, which "is still in effect." The letter was sent to the pastor, rather than to any of the church's claimed addresses. The record shows that the petitioner has repeatedly merged with other churches, changing its name several times in the process, which raises the question of whether the current church shares any meaningful corporate identity with the entity that secured the exemption nine years ago.

The director, in revoking the petition, stated that "it is not readily evident that Dong Ha Lee, the property owner or [the petitioner] has secured the necessary permit" to use the property at 1613 Sunset Lane, Fullerton, as a church. The director also noted the lack of evidence that this property is sufficiently large to accommodate nearly a hundred parishioners.

The director acknowledged the petitioner's submission of purported church bulletins from between April and September of 2003. The director noted, however, that the petitioner has filed a nonimmigrant religious worker petition (receipt number WAC 03 268 51625) for a different alien, and submitted, with that petition, church bulletins dated August 2003, which identify the church's address as The director concluded, therefore, that church bulletins produced by the petitioner are not reliable evidence of the church's location, and that the submission of such conflicting evidence undermines the petitioner's overall credibility.

The record contains copies of the conflicting church bulletins, and the AAO has inspected the original bulletins, verifying the accuracy of the copies. The petitioner has prepared and submitted two conflicting sets of church bulletins for two separate petitions for the month of August 2003, showing two different addresses for the church. The existence of conflicting sets of church bulletins necessarily calls into question when, and for what purpose, these bulletins were actually printed. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho.*

Beyond the church bulletins described by the director, the record of proceeding for WAC 03 268 51625 contains several other documents that raise doubts about the petitioner's credibility. The initial filing of that petition included a cover letter, dated August 25, 2003, on church letterhead. The letterhead shows the petitioner's address as This is not simply a case of the petitioner using old, outdated stationery. In the body of the letter itself pastor of the petitioning church, states "[o]ur church . . . is located at ." Other correspondence from Rev. Oh continues to use the address until early 2004. The petitioner had also submitted a copy of what purported to be its Form 990 Return of Organization Exempt From Income Tax for 2002, a form which would have been filed in 2003. This form also lists the ddress, both as the church's address and as the physical location of the church's financial records. All of the above evidence consists of documents that the petitioner freely submitted for consideration, and is not derogatory third-party evidence of which the petitioner has been heretofore unaware.

All of the above documents are contradicted by contact with the occupants of the Studebaker Road property, and the petitioner has now stipulated that it left the Studebaker Road address no later than January 2002, even though it continued using that address for two more years.

In the brief submitted in response to the certified revocation notice, counsel maintains that there are no gaps in the petitioner's existence, and that even if there were such gaps, no such gaps have been alleged during the two-year period ending March 22, 2001, the date the petition was filed. Therefore, counsel asserts, the gaps would not affect the beneficiary's continuous employment during the statutory qualifying period defined by 8 C.F.R. § 204.5(m)(1).

At issue, however, is not only the narrow issue of the petitioner's location during given periods of time. Rather, there is also the broader issue of the petitioner's overall credibility. The petitioner, in this petition, has provided a series of mailing addresses, and indicated that it left n 2002. At the same time, the same petitioner continued to use the address in other submissions to immigration authorities. The petitioner has, therefore, provided contradictory evidence, and *Matter of Ho* permits those authorities to take this credibility issue into account when evaluating other aspects of the petitioner's claim.

Counsel, in the latest brief, offers several arguments regarding the question of the petitioner's location. Counsel does not, however, rebut or acknowledge the director's observation that the petitioner has submitted two sets of conflicting church programs. Counsel, therefore, does not claim that both sets of programs are authentic, nor does counsel claim that one set of programs has been falsified but that we are somehow obliged to ignore this falsification. The director's finding, confirmed by the AAO's review of the record of proceeding in WAC 03 268 51625, is entirely uncontested.

The petitioner has failed to overcome the director's finding that it is not a *bona fide* church. Contrary to counsel's assertions, the director is not bound to simply accept evidence of the church's tax exempt status from the Internal Revenue Service as a non-profit religious organization in satisfaction of the regulations at 8 C.F.R. § 204.5(m)(2) and (3)(i)(A) or (B). In this case the church has failed to credibly establish its identity as a *bona fide* ongoing concern.

The regulation at 8 C.F.R. § 204.5(m)(1) echoes the language of the statute, and states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file an I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation 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) states, in pertinent part, that each petition for a religious worker must be accompanied by:

> (ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:
>
> > (A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on March 22, 2001. Therefore, the petitioner must establish that the beneficiary was continuously working as a music minister throughout the two years immediately prior to that date. The petitioner has indicated that the beneficiary "is employed as a music minister in a permanent and full-time position," and that the beneficiary began working in September 1998 for $1,800 per month.

The term "continuously" has been interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948). The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980). Thus, pertinent case law indicates that intermittent, interrupted, or part-time religious work does not qualify as "continuous." When the statute pertaining to religious workers was revised in 1990, Congress approvingly cited the existing body of case law, and offered no indication that this case law was to be superseded or discarded by the new legislation. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

Copies of the beneficiary's uncertified, unsigned and undated federal tax returns from 1998 to 2001 show no income from wages or salaries. Schedules C of the beneficiary's returns instead show "gross receipts" of $21,600 (which is 12 x $1,800), except for the 1998 tax return, which shows gross receipts of $7,200 (which is 4 x $1,800). On her schedules C of the tax returns, the beneficiary called herself a minister of the petitioning church. No forms 1099-MISC issued by the petitioner accompanied the beneficiary's tax returns. This evidence, on its face, is consistent with the petitioner's description of the terms of the beneficiary's work.

Counsel observes that the petitioner has already submitted the beneficiary's tax returns from 1999 through 2001, and counsel contends that "[n]o further corroboration is required by either the pertinent statute, the pertinent regulations, or pertinent law." The regulation at 8 C.F.R. § 204.5(m)(4) specifically allows the director to request additional documentation in "doubtful cases." For obvious reasons, the discretion to determine what constitutes a "doubtful case" rests with the director and not with the petitioner.

The director, in revoking the approval of the petition, reiterates the absence of certified tax documents that would verify that the petitioner has, in fact, duly reported the beneficiary's wages to the IRS. This information would corroborate the uncertified, unsigned, undated copies of the beneficiary's tax returns. Because the regulations plainly give the director the discretion to request additional documentation, the petitioner cannot excuse its failure to provide that documentation simply by arguing that the evidence already submitted is sufficient. Certainly, if the petitioner did report the beneficiary's earnings to the IRS in 1999, 2000, and 2001, then there would be some record of this, at least at the IRS if not in the petitioner's own records.

Counsel maintains that the petitioner has submitted copies of "[n]umerous paychecks issued by [the petitioner] to [the beneficiary] from 1999 through 2004." We note that these checks continue to show the Studebaker Road address through May 2004. The checks dated 2004 are a different style than those dated 2003, which appears to indicate that the petitioner ordered new checks, showing the Studebaker Road address, well over a year after it admittedly ceased to be located at that address. We shall discuss these paychecks in greater detail below, in the context of the petitioner's ability to pay the beneficiary's salary. Here, we observe only that the checks do not represent a wholly unbroken sequence of payments to the beneficiary, and that these payments to the beneficiary are not presumptive evidence of the beneficiary's continuous (i.e., full-time and exclusive) employment with the petitioner.

Counsel asserts that there is no requirement that the work be full-time. *Matter of B and Matter of Varughese*, cited above, clearly require that the qualifying work be continuous and not interrupted or intermittent. Furthermore, regardless of whether there exists any regulatory requirement for full-time work, in this instance the petitioner has specifically referred to the beneficiary's position as "full time" in several letters signed by Rev. Oh.

Section 204(b) of the Act, 8 U.S.C. § 1154(b), states, in pertinent part: "After an investigation of the facts in each case . . . the Attorney General shall, if he determines the facts stated in the petition are true . . . approve the petition." The petitioner made the material claim that the beneficiary has worked full-time, and therefore the statute plainly authorizes "an investigation of the facts" in order to determine whether "the facts stated in the petition are true." Despite this statutory authority, counsel asserts that the director had no authority to launch an "investigation of the facts" regarding the petitioning church (which has filed, for its size, an extraordinary number of religious worker petitions, seeking immigrant or nonimmigrant status for approximately one out of every ten church members).[2] As the petitioner's credibility has been compromised, the petitioner's statements regarding the beneficiary's work schedule carry greatly diminished weight as evidence. It was within the director's authority to seek corroboration for the petitioner's claims that it has employed the beneficiary continuously. The petitioner failed to provide the evidence requested by the director proving that it consistently paid the beneficiary during the qualifying period, and thus failed to establish by a preponderance of the evidence that the beneficiary has the required two years continuous work experience in the occupation.

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[2] The petitioner has filed two nonimmigrant petitions for the beneficiary (WAC9812751727, April 2, 1998 and WAC0111754540, February 28, 2001) prior to filing the current form I-360 immigrant petition; a nonimmigrant petition (WAC0128552139, September 16, 2001) and an immigrant petition (WAC0303950107, November 18, 2002) for another beneficiary; two nonimmigrant petitions (WAC9921452106, August 2, 1999, WAC0223552418, July 18, 2002) and an immigrant petition (WAC0209050355, January 18, 2002) for a third beneficiary; and 5 unrelated nonimmigrant petitions, WAC9921052341, July 27, 1999; WAC0127556317, September 5, 2001; WAC0220653816, June 12, 2002; WAC0224451436, July 29, 2002; WAC0326851625, September 29, 2003.

The next issue concerns the petitioner's ability to pay the beneficiary's salary of $1,800 per month. 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.

The director acknowledged the petitioner's submission of "an unaudited Balance Statement for the year 2000, a Budget Statement for the year 2001 and a few bank statements for the year 2000." The director asserted that this evidence is insufficient. The director stated that "[t]he Balance Statement and Budget Statement have little evidentiary value as they are based solely on the representations of management," and that the bank statements do not provide a complete picture of the petitioner's finances.

The petitioner had previously submitted copies of paychecks issued to the beneficiary between July 2001 and January 2002. The director noted that the August 2001 check was stamped "NSF," an abbreviation for "non-sufficient funds." The director also noted the absence of Form W-2 Wage and Tax Statements and "complete certified tax documents," which would help to verify that the petitioner consistently paid the beneficiary as claimed.

Counsel, in response, states that the director "irrationally appears to suggest that the fact that one of the checks . . . is stamped 'NSF' is somehow disqualifying. The agency does not explain how this can be so, particularly since the check shows that it was successfully cashed." When the beneficiary's paychecks "bounce" due to insufficient funds, this is *prima facie* evidence that the petitioner did not have sufficient cash available at the time to cover the beneficiary's salary. While a subsequent bank statement shows that the beneficiary's check was eventually cashed, the initial return of the check does not paint a healthy financial picture of the petitioner.

The petitioner's response to the NOID includes copies of several more paychecks. Three of these checks are marked "NSF," proving that the rejection of the beneficiary's August 2001 check was not a one-time occurrence. Many checks are missing, and five of the checks reproduced in the record are not marked as having been cashed. One bank statement shows that one of the checks not marked as cashed was, in fact, cashed, but the statements corresponding to the other four unmarked checks are missing from the collection of statements submitted by the petitioner. Therefore, the petitioner has not documented a wholly unbroken sequence of monthly payments to the beneficiary.

The director noted the above gaps in the record regarding the beneficiary's payments, and reaffirmed that 8 C.F.R. § 204.5(g)(2) is, in fact, applicable to religious worker petitions. Counsel, in response, states that the director "speciously and irrationally" found that the petitioner has not established its ability to pay the beneficiary. Counsel does not explain why a check that has "bounced" due to insufficient funds is not *prima facie* evidence that the petitioner has insufficient funds.

Counsel argues that 8 C.F.R. § 204.5(m)(4) supersedes 8 C.F.R. § 204.5(g)(2) by establishing a separate standard by which religious organizations must establish their ability to pay. While parts of counsel's argument make perfect sense (such as the assertion that tax-exempt churches have no tax returns to submit),

counsel's overall argument fails because 8 C.F.R. § 204.5(m)(4) discusses only the *terms* of compensation, rather than the petitioner's *ability to pay* that compensation. 8 C.F.R. § 204.5(g)(2), by its plain wording, applies to "*[a]ny* petition filed by or for an employment-based immigrant which requires an offer of employment." Because special immigrant religious worker petitions require an offer of employment, 8 C.F.R. § 204.5(g)(2) plainly applies to special immigrant religious worker petitions. Counsel (who asserts that every word in a regulation is important and should be construed as having effect) does not explain why 8 C.F.R. § 204.5(g)(2) should not be construed precisely as it is written. Counsel merely speculates about unwritten exceptions to the regulation, which is exactly what counsel emphatically condemns elsewhere in the same brief.

Counsel states that the director "allege[s] that some checks are stamped NSF." Considering that the checks are, in fact, stamped "NSF," it is not clear how this factual observation constitutes an "allegation." That the bank honored *some* of these checks at a later date does not undermine the basic finding regarding the petitioner's financial footing.

The above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be" in the form of tax returns, *audited* financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. In this instance, the petitioner has not submitted any of the required types of evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The NSF stamps on the May, 2000, August 2001, August 2002 and September 2002 checks are *prima facie* evidence that the petitioner has not consistently had sufficient funds on hand to pay the beneficiary's salary.

As noted above, the petitioner has submitted, with another petition, a copy of what purports to be a 2002 Form 990. If the petitioner filed such a form for 2001, a copy of that form, certified by the Internal Revenue Service, would qualify as a "tax return" under 8 C.F.R. § 204.5(g)(2). The petitioner has, however, opted not to submit such evidence. Because the 2002 Form 990 contains what appears to be false information (stating that "The books are . . . Located at 13820 Studebaker Rd.," when the petitioner had in fact ceased to occupy that property at least a year earlier), we are under no obligation to presume that the remainder of the return is accurate or reliable.

While the petitioner correctly argues that actual payment to the beneficiary would be sufficient proof of the petitioner's ability to pay, as noted by the director, the petitioner has failed to submit a consistent history of monthly payments to the beneficiary, and thus has not demonstrated by this means that it has the ability to pay the proffered wage.

The final issue concerns the question of whether the petitioner has extended a *bona fide* offer of employment to the beneficiary. The director stated that, when the petitioner filed this petition, it already had "an existing full time Music Minister," whose own special immigrant religious worker petition had been approved in January 2001. The beneficiary of the earlier petition became a lawful permanent resident in February 2002 "as the music director for" the petitioning church.

The director further stated:

> Counsel claims that the petitioner has ten regularly scheduled worship services per week and a choir of 15. Counsel's claim is not consistent with the information provided by two church officials of St. John Lutheran facility. The church officials confirmed that [the petitioner]

> uses the building on Monday evenings from 7:00 P.M. to 8:30 P.M., Wednesday evenings from 7:00 P.M. to 8:30 P.M., and Sunday mornings for one service from 11:30 A.M. to 3:00 P.M. This is a total of three scheduled worship services per week. It also confirmed that the service usually has 75-80 people in attendance and has a choir of 12 people. The choir practices in the dining hall on Sundays at 10:00 am (right before service).
>
> Given the size of its congregation and the number of worship services per week, the petitioner has submitted insufficient evidence to warrant the simultaneous hiring of two full-time Music Ministers between November 1999 and February 2002. . . .
>
> The petitioner has not demonstrated that it has extended a valid job offer to the beneficiary.

Counsel asserts that the beneficiary of the earlier petition was a music *director*, rather than a music *minister*, which "is not the same position." Counsel fails to explain the difference between the two positions. Counsel dismisses the director's "mere speculation" that a small church with a 12-member choir is unlikely to require (or be able to afford) the services of both a music director and a music minister. It remains that the burden of proof is on the petitioner, not the director, to establish the *bona fides* of a given job offer, to establish that the beneficiaries are, in fact, true employees of the church, and not simply using the church as a conduit for immigration.

Counsel contends that the ICE investigators' findings that the church "has only three services a week and that the choir is currently 12 and not 15 . . . pertains to the and not to" the petitioning church. The information regarding the number of services per week was obtained on April 23, 2004, and the report states that the petitioner "uses" (present tense) the facilities on Monday evenings, Wednesday evenings, and Sunday mornings, and that the church "has" (present tense) "a choir of 12 people." By April 2004, the petitioner had been at the same address for several months, operating for some of that time under the name of until changing its name in March 2004 to that of the petitioning church. (The church's frequent name changes form another basis for questioning whether the entity declared tax-exempt several years ago is, in fact, the same one now operating at a different address.)

Counsel maintains that the petitioner "has eight services per week," but offers no documentation to contradict the assertions of officials. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Pursuant to *Matter of Ho*, the petitioner cannot simply offer a verbal explanation in an attempt to resolve contradictions or inconsistencies in the record.

In the notice of revocation, the director reiterated that counsel's account of the church's activities is not consistent with accounts provided by officials of The director also noted that, while staffing issues are internal church matters not subject to government intervention, the current matter concerns a request for a government benefit, and therefore the government has a responsibility to ensure that the immigration benefit requested is, in fact, warranted.

In response, counsel repeats prior arguments (such as the assertion that there is a significant, but never explained, difference between a "music minister" and a "music director"), asserting the director conducted an impermissible inquiry, which yielded flawed information. Counsel seems to argue that the director lacks significant authority to determine whether a given petition is *bona fide*. As noted above, the statute requires "an investigation of the facts," and the regulations permit the director the discretion to seek additional

information in "doubtful cases." The director, seeing petitions filed for at least nine aliens by a church that has provided misleading and contradictory statements about information as basic as its own address, found the instant proceeding to be a doubtful case, and properly found that the petitioner failed to establish its intention to employ the beneficiary in a permanent position.

Counsel asserts that, while the petitioner has been informed of the findings in the investigative report, the director has not provided a copy of the report itself. Counsel does not cite any statute, regulation, or case law that requires the director to provide copies of investigative reports in this manner. The petitioner has been advised of the findings in the report, in compliance with 8 C.F.R. § 103.2(b)(16)(i).

Given the credibility issues in this case, never contested or even acknowledged in counsel's 49-page brief, the omissions and inconsistencies in the evidence take on added significance. When certain key evidence would help to resolve some of these inconsistencies, the petitioner has responded only by insisting that it need not submit such evidence. Rather than overcome the findings of the ICE investigation, counsel has argued that the investigation was unwarranted, and its results are therefore inadmissible (at the same time offering the diametrically opposite argument that the director *must* consider *all* of the available evidence).

Upon a careful review of the record, we find that the beneficiary has been involved to some extent in the petitioning church, and has received some payment, but the record paints an incomplete picture. This, coupled with the unrebutted credibility issues discussed above, leads us to conclude that the petitioner has not submitted persuasive evidence sufficient to meet its burden of proof and thereby establish the beneficiary's eligibility. The director therefore acted correctly in revoking 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 not sustained that burden. The petition was approved in error, and the director properly exercised his discretion in revoking that approval. Accordingly, the director's decision will be affirmed.

ORDER: The director's decision of July 7, 2004 is affirmed. The revocation of the approval stands.