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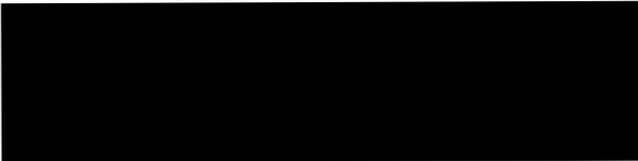
Date: **JUN 27 2008**

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director) initially approved the employment-based preference visa petition. Thereafter, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). On August 29, 2006, in a Notice of Revocation (NOR), the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on certification.¹ The director's decision will be affirmed.

The petitioner is a church, and seeks to employ the beneficiary permanently in the United States as a pastoral assistant (Bible Instructor). As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). On August 29, 2006, the director revoked the petition's approval² based on a determination of fraud, and accordingly, the labor certification was deemed invalid.

The AAO maintains plenary power to review the matters before it 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).³

The procedural history in this case is documented by the record and incorporated into the decision. The procedural history in this case is long, and will be outlined in greater detail.

The petitioner seeks to classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the

¹ *See* 8 C.F.R. § 103.4(a)(5). The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. §§ 103.4(a)(1),(5).

² 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."

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary obtains lawful permanent residence. *See generally Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The history of the case, documented by the record and incorporated into the decision, is quite lengthy and complicated, but pertinent to this matter, and in order to fully understand its progression, is summarized in a chronology as follows:

- On April 28, 2000, the petitioner filed Form ETA 750 on behalf of the beneficiary for the position of pastoral assistant (Bible Instructor), at a pay rate of \$11.50 per hour, 35 hours per week, equivalent to an annual salary of \$20,930 per year;
- On September 19, 2001, DOL approved the Form ETA 750;
- On January 9, 2002, the petitioner filed Form I-140 on behalf of the beneficiary. The petitioner listed the following information on the I-140 Petition: established: 1994; gross annual income: \$395,832.39; net annual income: not listed; and current number of employees: 2.
- On April 16, 2002, the director issued a Request for Evidence (RFE) for the petitioner to submit documentation related to the petitioner's ability to pay the beneficiary the proffered wage, including any evidence of wages paid to the beneficiary, in the form of the beneficiary's W-2 statements for 2000 and 2001, and the petitioner's bank statements from April 2000 to the present;⁴
- On August 6, 2002, the director approved the I-140 petition;
- On October 22, 2002, the beneficiary filed an I-485 Adjustment of Status application based on the approved I-140;
- On March 25, 2004, CIS interviewed the beneficiary in connection with his I-485 Adjustment of Status application;
- On April 5, 2006, the director issued a Notice of Intent to Revoke based in part on the following:

Officers from USCIS had made "numerous unannounced visits to the Norland Seventh-Day Adventist Church over the last five years at various times of the day. Not once have the officers found or discovered anyone working there outside of the maintenance people and ladies working in the day care center. On several occasions the offices [sic] have taken photos of the church and its directory showing the activities for the week. At most there are only two or three activities occurring there during the week lasting only 2 or 3 hours in duration, with the exception of the day care center. The ETA 750 indicates that the beneficiary will work from 9:00 a.m. to 5:00 p.m. Friday, Saturday, Sunday, Monday, and Tuesday. The information provided by the Service Officer indicates that there are not activities on all of the days of the ETA 750 indicates that the beneficiary will work [sic].

Additionally, the NOIR provided that the Florida Conference of Seventh-Day Adventist Churches informed the CIS officer that it would be "extremely unlikely" that a Bible Instructor position would be a full-time and paid position.

CIS interviewed the beneficiary on March 25, 2004 in connection with his I-485 Adjustment of Status application. At that time, the beneficiary asserted that "he has been working for the church for seven years as

⁴ The petitioner provided copies of its bank statements, as well as a letter from the Florida Conference of Seventh-Day Adventists certifying that the petitioner was incorporated as a 501(c)(3) tax-exempt organization and attached a confirmatory letter from the Internal Revenue Service. The petitioner did not submit any Forms W-2 or Forms 1099 in response to the RFE. The record does contain one Form 1099 that the petitioner issued to the beneficiary in 2004 in the amount of \$15,600, but does not contain Forms W-2 or Forms 1099 in any other year.

a volunteer and was recently placed on payroll.”⁵ The beneficiary asserted that he taught two bible instruction classes on Saturday, and on class on Wednesday, and that he also “performs community outreach in order to spread the word.” He listed his hours of work as:

Tuesday	7:30 a.m. to 4:30 p.m.
Wednesday	8:00 a.m. to 9:00 p.m.
Saturday	9:00 a.m. to 8:00 p.m.
Sunday	8:00 a.m. to 5:00 p.m.

As stated in the NOIR, on April 21, 2004, two CIS officers conducted a visit to the site and:

Upon arriving at the church it was apparent to the officers that there was no one at the church and no activities were being conducted at that time. A review of their service schedule indicates that services are conducted only on Saturday, which is normal for this religious denomination. The directory showed only one class of bible instruction, which is held on Saturday.

On January 6, 2006, CIS received a phone call from [REDACTED], a Secretary in Human Resources of the Florida Conference of Seventh-day Adventist in Orlando, Florida. She asserted that the beneficiary had not been employed with the church since 2001 and that he had only been employed on a part-time basis.

Further, the NOIR provided that the letters the petitioner submitted to document the beneficiary’s prior experience contained conflicting information. The letter from Opa Locka Seventh-Day Adventist indicated that the beneficiary was employed on a full-time basis as a Bible Instructor/Preacher from September 1993 to April 1995. Another letter from the East Jamaica Conference indicated that the beneficiary had been employed as a full-time Bible Evangelist from 1988 to 1994. Further, evidence indicated that the beneficiary entered the U.S. on September 7, 1993. The director questioned how the beneficiary could be employed in both Florida and Jamaica in 1993 and 1994 at the same time.

Additionally, the director noted that the petitioner had not established that the beneficiary had two years of prior required experience as a Bible Instructor since the letter from East Jamaica showed that the beneficiary was employed as a Bible Evangelist and not as a Bible Instructor.

Counsel responded to the director’s NOIR. Counsel stated that the pastor informed her that while the Florida Conference pays the salary of its pastors, that each church retains the authority to hire staff with individual church funds, and that the position offered was from the church and not the conference. Further, counsel asserted that the labor certification was an offer of future employment, and that there was no requirement that the beneficiary be currently working for the church. Instead, he was “volunteering, with slight exceptions, for many years for the church precisely because of his immigration situation.”⁶ Additionally, as the beneficiary indicated that he was involved in church “outreach,” he would not be present at the church for the full 35 hours a week.

⁵ The record contains the beneficiary’s 2003 federal tax return, which lists that the beneficiary’s 2003 occupation as “construction,” and not as a “bible instructor.”

⁶ If as counsel stated the beneficiary had not been employed at the church as claimed, but was volunteering (presumably without pay), then the question arises how the beneficiary provided for himself and his three family members identified on Form I-485 since May 1994.

In response to the NOIR, the petitioner's former pastor, 2006, which stated:

provided a letter, dated April 19,

The [petitioner] made a good faith offer of fulltime paid employment to [the beneficiary] to work as a Bible Instructor and assistant to me as the pastor. However, as this case has taken 6 years to process, changes have occurred and I am no longer with the [petitioner]. As a result, we can no longer proceed with the petition on behalf of [the beneficiary]. However, I do wish to point out that you are incorrect in your conclusion that the original offer was not for fulltime paid employment as much of [the beneficiary's] duties, as previously explained were for outreach to the community and his presence at the church itself would not be required during his 35 hours of weekly service to the Church.

Counsel additionally provided another letter that dated March 15, 2005. That letter stated in pertinent part:

wrote to the CIS Miami District Office,

I . . . have been the Pastor [of the petitioner] since May 1996.

[The beneficiary] currently serves our congregation of over 800 members as a Bible Instructor . . . He has been an Elder at our church since June 1996 and has been performing the duties of a Bible Instructor since June 1996.

....

The job of Bible Instructor remains open to [the beneficiary]. The primary responsibility of this position is conducting Bible Classes and Sabbath School Classes . . .

The second most important part of this job is "outreach." The Bible Instructor visits congregants who are sick or infirmed at their homes and/or in the hospital . . . Most often he visits them during the day, when other family members are not available . . . He also visits prospective congregants who have expressed an interest in joining our church . . . We reach out and do not wait for people to come in.

....

[The beneficiary] also assists the pastors with preparing sermons. He selects a relevant passage or topic from the Bible, researches it and prepares a sermon which he delivers in church.

We further note that the record contains the beneficiary's 2003 federal tax return, which lists that the beneficiary's 2003 occupation as "construction," and not as a "bible instructor." See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The record contains only one Form 1099 statement issued by the petitioner to the beneficiary for the year 2004 in the amount of \$15,600. His wife received a Form 1099 issued by the Florida Conference of SDA exhibiting payment in the amount of \$18,000. The record does not contain a copy of the beneficiary's individual Form 1040 for 2004.

As the beneficiary's tax return lists his 2003 occupation as construction, this evidence conflicts with both the beneficiary's claims that he was employed with the petitioner, as well as with Pastor Robinson's claims that the petitioner employed the beneficiary in 2003. *Id.* at 591.

[The beneficiary] also assists in baptisms.

The petitioner provided a copy of another letter dated April 10, 2004 addressed to the CIS Miami Office that the position offered to the beneficiary was full-time, and that the position would entail: providing instructions on the teaching of the church; and assisting the pastor with: religious observances and occasions, communion services, baptism, prayer, bible study, evangelistic activities, religious counseling, youth group activities, and other activities that the pastor engages in. Further, the letter stated that “we conduct 4 services on Saturday and other services on Sundays and Wednesdays. In addition, Bible study, instruction and prayer out in the community is an integral part of the job as is community outreach and evangelical activities.”

The petitioner provided a page from its website, www.tagnet.org/norlandsda. This page includes a “Weekly Schedule” listing the following:

Saturday

Sabbath School – 9:15 am

Divine Service – 11:00 am

Bible Class – 3:30 pm

Sunday

Pathfinder – 10:00 am

Sunday Outreach – 3:30 pm

Tuesday

Temple Choir Rehearsal – 7:30 pm

Wednesday

Wednesday Night Prayer – 7:30 pm

Radio Broadcast (wavs 1170) – 9:30 – 10:00 pm

www.wavs1170.com

Friday Choir Rehearsal

This schedule does reflect a service on Wednesday evening, but is still not consistent with the information provided by [REDACTED]. Specifically, it does not show four services on Saturday or a Sunday service. Significantly, only one Bible class is listed.

Another letter from the Pastor, dated February 28, 2005, confirms the petitioner’s job offer and provides that the petitioner will place the beneficiary on payroll once the petitioner has received confirmation from CIS that the beneficiary’s application for permanent residence has been approved.

By letter dated March 20, 2005, the pastor asserted that the petitioner employs four individual paid staff members, a property manager, a church custodian, a church ministries coordinator, and a community services coordinator, as well as five paid staff in the child development center.⁷

The petitioner also provided five photocopies of photos not labeled or identified; 15 pages of church and church conference statistics as well as the petitioner's bank checking statements; a copy of a white pages telephone book providing the petitioner's telephone number and address; three letters of appreciation for the beneficiary's services;⁸ and a directory of the petitioner's church officer's for 2004-2006 listing the beneficiary as head elder.

On August 29, 2006, the director issued a Notice of Certification, in which she revoked the petition's approval. 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. at 590(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

The revocation noted that CIS officers made several unannounced visits to the petitioner's premises over the last five years at various times of the day and on various days of the week, and "not once have the officers found or discovered anyone working there outside of the maintenance people and the ladies working in the day care center." Additionally, the Florida Conference of Seventh-day Adventist Churches and several other Seventh-day Adventist Church officials throughout the country informed CIS that, "it would be extremely unlikely that a position of Bible Instruction would be full time and a paid position."

The revocation further addressed CIS' interview of the beneficiary in connection with his I-485 Adjustment of Status application. At that time, the beneficiary indicated that he had been working for the petitioner for seven years and was only recently placed on payroll. CIS had received a phone call that indicated the beneficiary had not been employed with the church since 2001, and that the beneficiary had only been employed on a part-time basis. When CIS questioned the beneficiary on the hours he worked and his job duties, his answers were vague and inconsistent. When CIS officers visited the site, no one was at church and

⁷ The petitioner did not provide Forms W-2, Forms 1099, or Forms 941 to show that it paid these four individuals, or the child development staff.

⁸ One letter dated February 19, 2005 provides thanks to the beneficiary for his role as a "very good counselor and support in our family;" another letter dated July 1, 2004 asserts that a congregant and her husband were "honored" that the beneficiary and his family could attend their wedding anniversary party.

there were no activities at that time. Accordingly, the evidence did not demonstrate that the petitioner had a paid position as a Bible Instructor to offer the beneficiary.

Additionally, the revocation noted the inconsistencies in the letters provided to document the beneficiary's experience. Two of the letters asserted that the beneficiary was employed on a full-time basis in two different locations. Further, one of the letters indicated that the beneficiary had been employed as a Bible Evangelist and not as a Bible Instructor, and, therefore, the petitioner had not demonstrated that the beneficiary had the required two years of experience as a Bible Instructor.

Regarding the conflict in the dates, the petitioner had asserted that there was no conflict, but rather that it was a typographical error, and that the petitioner had insufficient time to provide a new letter in response to the NOIR. The director found that the petitioner had failed to overcome the conflict in the evidence, and therefore, the letters could not be accepted to document the beneficiary's work experience.

Regarding the beneficiary's job duties, counsel asserted that she was informed that many of the church weekly activities were not listed on the bulletin board, and that she was awaiting written confirmation from the Pastor. As of the date of revocation, the director noted that the petitioner failed to provide any additional evidence related to the beneficiary's duties.

With respect to the issue of whether the petitioner employed the beneficiary, the director asserted that, while as counsel notes, the petitioner does not have to employ the beneficiary until permanent residence is approved, to resolve inconsistencies in the evidence, the petitioner could provide either evidence that it employed the beneficiary, or a statement that it did not. The petitioner did not provide either.

The director found that the labor certification involved fraud or willful misrepresentation, and, therefore, the labor certification should be deemed invalid pursuant to 20 C.F.R. § 656.31(d). As the labor certification was invalid, the petitioner had not met the requirements of 8 C.F.R. § 204.5(1)(3) and Section 203(b)(3)(C) of the Act and the petition's approval was, therefore, revoked based on good and sufficient cause. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

The matter is now before the AAO on certification. We will review the record related to the beneficiary's experience and then examine the documentation provided on certification. To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the certified labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, bible instructor, with duties including:

Instruct children and adults in the teachings of the Seventh Day Adventist Church. Assist Pastor in religious observances and occasions (communion services, baptism, prayer, Bible study, evangelistic activities, religious counseling, youth group activities, etc.).

The petitioner did not list that the position required any education, or any other special requirements in Item 15 of Form ETA 750A.

The beneficiary listed his education and prior experience on Form ETA 750B, and signed his name under a declaration that the contents of the form were true and correct under the penalty of perjury. The beneficiary listed the following work experience: (1) for the petitioner, from May 1994 to present (date of signature, April 18, 2000),⁹ in the position of Elder/Bible Studies Instructor/Assistant to Pastor for 40 hours each week. He listed his duties as assisting in communions and baptisms, conducting Bible study/classes for adults and children, evangelism and baptism crusades, religious counseling and as the elder in charge of the youth department; (2) for Opa Locka Seventh-day Adventist Church, Opa Locka, Florida, from September 1993 to April 1995, in the position of Bible instructor/preacher, full-time, with duties of conducting Bible study/classes for adults, evangelism, and performing communion and baptisms; and (3) for East Jamaica Conference of Seventh-day Adventists, Kingston, Jamaica, from June 1988 to August 1993, in the position of bible evangelist, full-time, where he performed the duties of evangelism and baptismal crusades, and Bible study classes.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner submitted the following letters:

⁹ Form G-325, the Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status lists the beneficiary's last five years of employment from the date of preparation and signing the form (in this case, signed on October 14, 2002). Form G-325 lists that the beneficiary was employed with the petitioner from October 1997 to the present time, and not since 1994 as listed on Form ETA 750. The form additionally asks that the applicant list his address for the last five years. The beneficiary listed an address in Florida where he has resided since October 1997.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591 (BIA 1988).

We acknowledge, however, that the applicant may have filled the form out literally and listed just "the last five years" from the date of signature, which would be October 1997, or five years prior to October 2002.

Letter from [REDACTED], Senior Pastor, Opa Locka Seventh-Day Adventist Church Miami, Florida, dated October 23, 2001;
Position title: Bible Instructor/Preacher;
Dates of employment: September 1993 to April 1995;
Description of duties: "he was responsible for conducting and instructing Bible study/classes for adults in the teachings of the Seventh Day Adventist Church, evangelism, performing communions and baptisms, also crusade, making visits to constituents and assisting the pastor with conducting Sabbath school and mid-week services."

Letter from [REDACTED], Ministerial Secretary, East Jamaica Conference of Seventh-Day Adventist Church, Kingston, Jamaica, dated November 16, 1999;
Position title: Bible Evangelist;
Dates of employment: 1988 to 1994 full time;
Description of duties: not listed.

On certification, counsel asserts that CIS revoked the petition based on "undisclosed investigative findings," and that CIS "makes its own determination of what is 'normal' for this Church's denomination." Further, counsel asserts that CIS bases its determination on one letter that contained a clerical or typographical error, and that there was no fraud or misrepresentation, that the job offer was legitimate. The one letter incorrectly identified that the beneficiary was employed with the East Jamaica Conference from 1988 to 1994, and not until August 1993 as the beneficiary listed elsewhere and as listed on Form ETA 750. The beneficiary then entered the U.S. in September 1993. The petitioner submitted a new letter on appeal:

Letter from [REDACTED], Executive Secretary (signed as "For [REDACTED]" and signed by another individual, name illegible), East Jamaica Conference of Seventh-Day Adventist Church, Kingston, Jamaica, dated May 9, 2006;
Position title: "Bible Evangelist and Worker;"
Dates of employment: 1988 to 1993;
Description of duties: "His duties include religious community out reach to teach and spread the word of the Lord. He assisted with all types of religious activities including religious instruction, counseling, communions, prayer and baptisms."

Further, counsel asserts that the labor certification requires only two years of experience, and that the beneficiary would have the two years of experience even if the East Jamaica letter were in error. Counsel also provides that CIS is "arbitrary and capricious" to allege fraud and misrepresentation based on a letter written by a third party.

The initial letter from East Jamaica includes dates of employment that conflict with the petitioner's entry into the United States. Thus, this letter has no evidentiary value. The new letter is signed on behalf of the executive secretary by an unidentified individual and provides no explanation for the previous letter. This new letter is insufficient to overcome the doubts raised. See *Matter of Ho*, 19 I&N Dec. at 591-592. Significantly, the petitioner did not provide any independent objective evidence such as pay records to verify employment, or other documents to evidence his employment or residence in or around the time period in question of September 1993 to 1994 to independently confirm the beneficiary's experience.¹⁰ Thus, the petitioner has not

¹⁰ While not raised by the director, we note that the beneficiary's passport, issued in 1991, lists the beneficiary's profession as "jeweller."

established through the submission of credible evidence, that the beneficiary has the experience required for the position.

The beneficiary has less than two years of documented experience with the other prior employer, Opa Locka Seventh-Day Adventist, in the required position.

Counsel contends that CIS wasted valuable resources to discover whether the beneficiary was employed with the petitioner when the petitioner is not required to employ the beneficiary until the beneficiary obtains permanent residence, and that the issue is instead the petitioner's intent. Counsel asserts that the petitioner intended to employ the beneficiary, and that the beneficiary had the intent to work for the petitioner. Counsel further asserts, however, that the beneficiary did work for the petitioner, sometimes on payroll, and at other times as a volunteer. Counsel also asserts that CIS' allegation that the beneficiary's answers at his adjustment interview were "vague and inconsistent" cannot be verified as there is no transcript for the interview, and, therefore, no way to confirm whether there were any "miscommunications." Further, counsel maintains that there were no inconsistencies, only a "soft-spoken, God-fearing human being who was intimidated by the attitude of the interviewing officer." Counsel quotes the director's revocation:

It is logical to conclude that if the Beneficiary were actually employed by the Petitioner evidence of this employment would be readily available. If he was not employed by the petitioner, a letter from the petitioner could clearly state so. The petitioner as submitted neither and thus the record contains conflicting evidence regarding the beneficiary's employment at the Petitioner.

Counsel contends that there is no conflict in the dates that the beneficiary worked for the petitioner, and that, further, this point is irrelevant to the case. Counsel terms any inconsistencies regarding whether the beneficiary was on payroll, and what hours he worked as "irrelevant and immaterial to the case."

Related to the CIS officers' on-site visits, and only finding maintenance workers and day care staff, counsel asserts that the beneficiary is not required to perform the duties of the labor certification until permanent residence is obtained. Further, counsel asserts that the beneficiary had been performing services for the petitioner, but that his duties and hours were varied. Additionally, the beneficiary's absence from the church would not represent fraud as the beneficiary's absence was not inconsistent with his alleged performance of outreach activities and work off-site for some of his duties. Regarding the CIS officers' claim that the bulletin board did not list certain activities, counsel asserts that the board was not always up to date, which the pastor confirms in a letter.

Counsel further asserts that the investigative memos and reports from on-site visits have not been disclosed and the petitioner should be allowed to confront the alleged derogatory information. Further, counsel contends that the "various presumptions, conclusions, and statements made by [CIS] . . . though self-proclaimed as 'logical,' do not support a revocation pursuant to [*Matter of Estime*]."

While the petitioner is not required to employ the beneficiary in the certified position prior to adjustment, the beneficiary indicated at his adjustment of status interview that the petitioner had employed him in the position offered. Therefore, when CIS officers investigated one month later, and discovered that the beneficiary was not on-site and there was no activity on-site, the absence of the beneficiary and any activity raised issues of credibility and whether the job offer was a realistic bona fide job offer. Doubt cast on any aspect of the petitioner's proof may, of course, 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. at 591. Following approval of

the labor certification, that labor certification forms the basis for the job offer to the beneficiary. The petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). It is within CIS' role to determine whether the job offer is realistic and that the petitioner intends to employ the beneficiary in accordance with the terms of the labor certification. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (R.C. 1979); *see also* 20 C.F.R. § 656.30(c)(2). Therefore, the inconsistencies are material and in no way irrelevant as counsel asserts.

With respect to the issue of whether the position was bona fide, counsel asserts: "It would seem obvious that the filing of a labor certification, which was approved by the Department of Labor, and more than one official letter from the Petitioner, all stating that the position is being offered to the Beneficiary, that it is full-time, and that it pays \$402.50 per week, is evidence that the position exists and that it is a full-time, paid position." Counsel asserts that the petitioner's pastor issued letters dated April 19, 2006, and again on September 25, 2006 reiterating that the position was a good faith offer of employment. The petitioner submitted a letter from the petitioner's former pastor, [REDACTED], dated September 25, 2006, which provided that although he has moved to a new church, that the offer to the beneficiary "was a good faith offer of full-time (35 hours per week), paid employment in the position of Bible Instructor."

Section 204(b) of the Act provides that CIS shall approve a petition after an investigation of the facts in each case and only if we determine that the facts stated in the petition are true. The burden of proof for establishing eligibility is on the petitioner. Section 291 of the Act. The mere filing of a Form ETA 750 does not create a presumption of a valid job offer, especially where the record contains serious inconsistencies regarding the beneficiary's past employment for other employers and the petitioner. *See generally Matter of Ho*, 19 I&N Dec. at 591.

The petitioner has not sufficiently explained the absence of personnel and activity on the petitioner's premises during the CIS officers' investigations other than to assert that the beneficiary is involved in "outreach" activity, which takes place off premises,¹¹ and that not all of the petitioner's activities are listed on its bulletin board. Related to the petitioner's bulletin board, the pastor did not adequately explain how information is conveyed to the congregation.¹² If activities are ongoing at regular times, it would seem likely that the church would have a paper schedule or bulletin to provide members of the congregation, which would evidence times of regular activities. The petitioner did not provide any such document to CIS. The petitioner did not provide any evidence related to the church's regularly scheduled, on-going, on-site activities to overcome the concerns raised by the CIS officers' on-site investigation. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10

¹¹ We note that Form ETA 750 and Form I-140 fail to identify that the beneficiary will work off-premises, or that he will work in any location other than the petitioner's premises.

¹² On certification, the petitioner additionally submitted a letter from the petitioner's former pastor, [REDACTED], dated September 25, 2006, which provided that the bulletin board was not always updated and that the board served more to inform members of special events rather than the church's usual activities or classes. This assertion is not consistent with the photographs of the petitioner's marquee sign, taken by the CIS officers on April 21, 2004, which lists the petitioner's Sabbath School and 11 am worship service. The pastor asserted that the church "ran around 20 or so activities and meetings weekly in the church (youth groups, religious study and instruction . . .) . . . Also many of our 'activities' include community outreach, outside of the church, to congregants in hospitals, confined to homes, or in prison."

(D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act; see *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

Regarding CIS' "alleged information" received from an unnamed Seventh Day church authority that church positions are generally paid by the Conference rather than the Church, the petitioner provided a letter from [REDACTED] asserting that although pastors are generally paid through the Conference, each Church is able to hire and pay staff as needed. The petitioner's pastor provided a letter to confirm this, and counsel asserts that an allegation from an unknown source that the position is not a bona fide offer should be discounted.

The petitioner provided a letter, which stated who the petitioner employed and at what salary, however, the petitioner did not provide evidence, such as Forms 941 to document wages paid to employees. Further, counsel fails to address the other "named" source that provided information related to the beneficiary's prior employment. Ms. [REDACTED] a Secretary in Human Resources of the Florida Conference of Seventh-day Adventist in Orlando, Florida, had provided that the beneficiary had not been employed with the church since 2001 and that he had only been employed on a part-time basis. The petitioner did not specifically address this allegation. Moreover, as discussed above, the Internet materials from the petitioner's own website, provided by the petitioner, does not support [REDACTED]'s assertions regarding the number of services and Bible classes. Significantly, the March 15, 2005 letter from [REDACTED] states that the beneficiary's primary duties would be conducting Bible Classes and Sabbath School classes, but the website schedule shows only one Bible class and one Sabbath School class, both on Saturday. All of these issues again relate to credibility and inconsistencies. The CIS investigation, including both a review of the schedule listed on the petitioner's Marquee and observing the absence of church staff at the church on several occasions, is more consistent with the Internet schedule than the assertions of [REDACTED]. Doubt cast on any aspect of the petitioner's proof may, of course, 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. at 591. It is incumbent on 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. *Id.* at 591-592.

Given the totality of the evidence, the petitioner has failed to overcome the basis for revocation and has not explained the inconsistencies raised in the NOIR and final revocation, which form the basis of the director's decision to revoke the petition's approval on fraud and misrepresentation. *Matter of Ho*, 19 I&N Dec. at 591. Lastly, counsel asserts that the "beneficiary has lawfully ported" as the I-140 was approved, and the beneficiary's adjustment of status had been pending for over 180 days. Counsel does not indicate the date that the beneficiary changed employment. In support, counsel has submitted a letter from [REDACTED] M.Dv. of the First Ebenezer SDA Church, Hollywood, Florida, dated May 8, 2006, stating that the beneficiary is employed there 35 hours weekly as a bible worker. Counsel asserts on appeal that the petition is still "approvable" due to the terms of the American Competitiveness in the Twenty First Century Act of 2000 (Public Law 106-313) (hereinafter "AC21"). Contrary to counsel's assertion, nowhere in the letter from Pastor Price does he make a new job offer to the beneficiary under the terms of the labor certification. The letter does not state that the beneficiary is paid, or that he will be paid. No evidence of pay was attached.

Further, as the approval of the initial petition was revoked, the beneficiary would seek portability based on a revoked, and unapproved Form I-140 petition. Additionally, the labor certification was deemed invalid

pursuant to 20 C.F.R. § 656.30(d), and the Form I-140 is no longer supported by a valid labor certification. No related statute or regulation would render the beneficiary portable under these facts.

The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Section 204(a)(1)(F) of the Act includes the immigrant classification for individuals holding baccalaureate degrees who are members of the professions and skilled workers under section 203(b)(3) of the Act, the classification sought in the underlying petition.

An immigrant visa is immediately available to an alien seeking employment-based preference classification under section 203(b) of the Act (such as the beneficiary in this case) when the alien's visa petition has been approved and his or her priority date is current. 8 C.F.R. § 245.1(g)(1), (2). Hence, adjustment of status may only be granted "by virtue of a valid visa petition approved in [the alien's] behalf." 8 C.F.R. § 245.1(g)(2).

Section 204(j) of the Act prescribes that "A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers." The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term "valid," as used in section 204(j) of the Act, refers to an approved visa petition.

Statutory interpretation begins with the language of the statute itself. *Hughey v. U.S.*, 495 U.S. 411, 415 (1990). We are expected to give the words used in the statute their ordinary meaning. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984)). We must also construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988). *See also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561, 573 (1989); *Matter of W-F-*, 21 I&N Dec. 503, 506 (BIA 1996).

With regard to the overall design of the nation's immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C.

§ 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.”

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs CIS’s authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).¹³

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien “entitled” to immigrant classification under the Act “may file” a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that CIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted CIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until CIS approves the petition.

Therefore, to be considered “valid” in harmony with the portability provision of section 204(j) of the Act and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by CIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with CIS or through the passage of 180 days.

Section 204(j) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

Accordingly, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and

¹³ We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word “pending.” *See* section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.¹⁴

In the case at hand, the Form I-140 petition's approval was revoked for good and sufficient cause as the petitioner had failed to establish a valid job offer and failed to overcome inconsistencies in the evidence, which led the director to invalidate the labor certification. The petitioner failed to provide any evidence on appeal to overcome the basis for revocation. The beneficiary would therefore not have a valid immigrant visa petition approved on their behalf to be eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

The enactment of the portability provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require CIS to approve an immigrant visa petition prior to granting adjustment of status. Accordingly, as this petition's approval was revoked, it cannot be deemed valid by improper invocation of section 204(j) of the Act.

Accordingly, the petition's approval was properly revoked with good and sufficient cause. 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 met that burden.

ORDER: The director's decision of August 29, 2006, is affirmed. The approval of the petition is revoked.

¹⁴ Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge's jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien's application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when "an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status." *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a "previously approved I-140 Petition for Alien Worker"); *Perez-Vargas*, 478 F.3d at 193 (stating that "[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved"). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.