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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 1 1 2009

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IN RE: Petitioner: [redacted]
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, initially approved the preference visa petition. Subsequently, the director issued a Notice of Intent to Revoke (NOIR) the approval of the petition. In his Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140 petition.[1] The matter is now before the Administrative Appeals Office (AAO) on certification by the director. The matter will be remanded to the Nebraska Service Center.

The petitioner is a long term care and assisted living facility. It seeks to employ the beneficiary permanently in the United States as a registered nurse under Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification. On April 13, 2009, the director determined that the beneficiary is ineligible for the classification sought based on the beneficiary's fraudulent marriage to a United States citizen and revoked the petition's approval pursuant to Section 204(c) of the Act, 8 U.S.C. § 1154(c).

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.l(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 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).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: *"Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: *"Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The regulation at 8 C.F.R. § 103.l(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;
>
> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

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[1] The director initially revoked the petition's approval on February 9, 2009. In the February 9, 2009 decision, the director erroneously informed the petitioner that it had 33 days from the date of the notice in which to file an appeal. Pursuant to 8 C.F.R. § 205.2(d), the petitioner was afforded only 18 days in which to file an appeal of the revocation.

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

> Notwithstanding the provisions of subsection (b)[2] no petition shall be approved if:
>
> (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
> (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

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." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

A notice of intent to revoke "must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence (*e.g.*, the investigative report)." *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained. *See also Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

On December 31, 2008, the director sent a NOIR to the petitioner stating the following:

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[2] Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

> The evidence of record reflects that a Petition for Immediate Relative (Form I-130) that was filed on the beneficiary's behalf on September 24, 1997 was denied on June 15, 2001. A review of that record indicates that this petition was denied due to a fraudulent or sham marriage which attempted to circumvent the immigration laws to enable the alien to receive an immigration benefit.
>
> In view of the foregoing circumstances, [USCIS] concludes that the beneficiary, under the provisions of section 204(c) cited above, was ineligible to have the I-140 immigrant petition approved on his behalf and it appears that the approval for that petition should be revoked.

Although the beneficiary's Form I-130 was denied as a fraudulent or sham marriage, the NOIR does not state the facts underlying the proposed revocation, nor does it advise the petitioner of derogatory evidence in the record as required by *Estime* and *Arias*. Specifically, the director failed to point out the inconsistencies in the record that would warrant a denial if unexplained and unrebutted. Therefore, the NOIR was not properly issued for good and sufficient cause.

This matter will be remanded for the director to issue a new NOIR which details the evidence in the record which supports revocation of the approval of this petition.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action and issuance of a new decision which may be certified to the Administrative Appeals Office for review.