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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
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Office: VERMONT SERVICE CENTER

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EAC-02-038-53589

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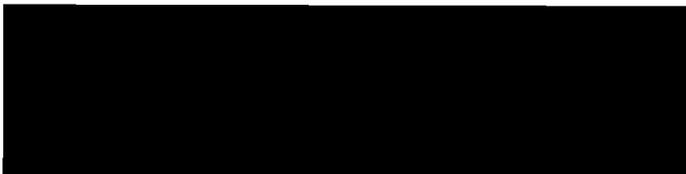
Petitioner:

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director (Director), Vermont Service Center. Based on the recommendation from the United States Embassy in Abidjan, Côte d'Ivoire, the director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a Mediterranean restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (Mediterranean cook). As required by statute, a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner failed to submit any documentary evidence to establish that [REDACTED] is the beneficiary's biological daughter as he claimed on the Form I-140 while the DNA paternity test has found to be improbable. The director revoked the approval of the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On appeal, counsel asserts that the director erred in revoking the approval of the I-140 petition on the basis that the beneficiary was not the biological father of the daughter listed on the I-140 immigrant petition.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department 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." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Section 212(a)(6)(C)(i) of the Act provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The director revoked the approval of the petition based on the finding that the beneficiary made a fraudulent or willful misrepresentation of a material fact involving the immigrant processing. However, the AAO concurs with counsel's arguments on appeal that the director lacked good and sufficient cause to revoke the approval of the instant petition. It is noted that the DNA paternity test proves that the beneficiary is not the biological father of the child he claimed as his biological daughter on the Form I-140, however, the record does not contain any documentary evidence that the beneficiary willfully misrepresented the fact. Furthermore, while it is acknowledged that whether [REDACTED] is the biological daughter of the beneficiary is critical to her immigrant application at the U.S. Embassy in Abidjan, the AAO finds that the fact is not material to

the Form I-140 immigrant petition itself because adjudication of the immigrant petition is not dependent on whether the beneficiary is the biological father of the children he claimed on the Form I-140. Accordingly, the AAO cannot concur with the director that the petition must be denied or the approval of the petition must be revoked because the petitioner or beneficiary willfully misrepresented a material fact involving the I-140 immigrant petition processing. Therefore, the AAO finds that the director lacked good and sufficient cause to revoke the approval of the immigrant petition in the instant case under section 204 of the Act and accordingly the director's May 7, 2009 NOR will be withdrawn.

However, beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional grounds of ineligibility and will discuss these issues below. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 8, 2004.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal counsel submits an affidavit of [REDACTED] who certifies that the two different translations describe the same original Chinese employment verification. Relevant evidence in the record includes two employment verification letters with their English translations. The record does not contain any other evidence relevant to the beneficiary's qualifications.

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

¹ 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).

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 20, 2001. The proffered wage as stated on the Form ETA 750 is \$20.90 per hour (\$43,472.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 record indicates the petitioner is structured as a limited liability company (LLC) and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established on March 9, 1999 but did not claim the number of its current employees. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on January 10, 2001, the beneficiary claimed to have worked for the petitioner since March 1999.

² An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 750, 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. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit any documentary evidence to demonstrate that it paid the beneficiary the proffered wage from the priority date although the beneficiary claimed that he had worked for the petitioner since March 1999. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ An LLC's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record contains the petitioner's Form 1065, U.S. Return of Partnership Income for 2000 which stated that the petitioner had net income of \$363,571⁴ and net current assets of \$11325 in 2000. The petitioner's tax return for 2000 demonstrated that it had sufficient net income to pay the proffered wage while it had insufficient net current assets that year. The director approved the petition accordingly.

However, the petitioner's tax return for 2000 is not necessarily dispositive in determining the petitioner's ability to pay the proffered wage since the priority date in this case is February 20, 2001. The petitioner must demonstrate that it had the ability to pay the proffered wage beginning on the priority date and continue until the beneficiary obtains lawful permanent residence. The petitioner's tax return for 2000 cannot establish its ability to pay the proffered wage in 2001 onwards. It is noted that the petitioner's tax return for 2001 was not available before the director when he initially approved the petition on December 21, 2001. However, the record does not contain any other regulatory-prescribed documentary evidence required under 8 C.F.R. § 204.5(g) (2), such as annual reports or audited financial statements, to establish the petitioner's ability to pay the proffered wage in 2001. In addition, the petitioner's 2000 tax return submitted by counsel is a faxed copy without signature of the petitioner's legal representative or preparer. Furthermore, USCIS records show that the petitioner filed another I-140 immigrant petition for another beneficiary with the priority date of April 5, 2001 which was approved on August 8, 2002.⁵ Therefore, the petitioner must demonstrate that it had sufficient net income to pay at least two proffered wages during the years from 2001 to 2002. With such a photographic copy, USCIS cannot determine whether this is the true copy of the filing with Internal Revenue Services (IRS). Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, and accordingly the director approved the petition in error based on incorrect conclusion on the petitioner's ability to pay the proffered wage.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In

⁴ For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedules K have relevant entries for additional deductions in and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

⁵ EAC-02-175-53501.

evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

As mentioned previously, Form ETA 750 item 14 expressly requires two years of experience in the job offered, i.e., Mediterranean cook. The duties are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on January 10, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked as a Mediterranean Cook with the petitioner since March 1999 and as an Apprentice Mediterranean Cook with [REDACTED] from February 1996 to March 1999.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The record of proceeding contains an employment verification letter. This letter, dated May 16, 1999, was on a computer created letterhead of [REDACTED], and signed by a person named [REDACTED]. The letter states in pertinent part:

This is to certify that [the beneficiary] was employed with us a[s] an Apprentice Mediterranean Cook from February 1996, through March 1999. His job was consisting as follows:

Mixing lentil Salad, Endives Salad with Roquefort Cheese, Bacalo Croquette, served with soft Polenta, fois Gras with Potatoes and Fennel in Balsamic Vinegar, Prosciutto di Carpegna e Pere. Amarant salad with Grilled Chicken, Arugula, Tomatoes, Grilled Eggplant, Asparagus and Potatoes, Grilled Zucchini, Squashed Eggplant, Tomatoes, Radicchio Trevisano, Portobello Mushroom, Asparagus with soft Spanish Goat

⁶ The address of the restaurant was not provided on the Form ETA 750B.

⁷ This office accessed the New York Department of State, Division of Corporations, official website (accessed on January 29, 2010) and noted that a company named [REDACTED], formed on December 5, 1975 as New York domestic business corporation, was dissolved on June 20, 2000.

Cheese, Lobster served with Radicchio, Endives, Watercress and Cremini Mushroom in Citrus dressing.

The regulation requires such evidence must be in the form of letter from current or former employer or trainer and must include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. This experience letter was from and signed by [REDACTED] however, the letter did not provide this person's title with the restaurant. Therefore, it is not certain whether the letter was from the beneficiary's former employer or coworker. Therefore, this employment letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case.

The letter verified that the beneficiary worked for [REDACTED] as an Apprentice Mediterranean Cook for three years but provided exactly same job description as the one for the beneficiary's current position at the petitioner as a Mediterranean Cook and the one described for the proffered position on the Form ETA 750A. It raises questions whether an experience obtained while working as an Apprentice Mediterranean Cook meets the requirement of "experience in the job offered". i.e. in the position of a Mediterranean Cook; how the experience obtained from working for [REDACTED] as an Apprentice Mediterranean Cook can be exactly same as the duties with the petitioner as a Mediterranean Cook and further can so perfectly meet the requirements described on the Form ETA 750 for the proffered position. In addition, the experience letter was dated May 16, 1999, however, the beneficiary did not provide his former employer's address on the Form ETA 750B while he signed the form on January 10, 2001. On his Form G-325A, Biographic Information, signed on March 8, 2002, the beneficiary even indicated that he worked for [REDACTED] until March 2000 instead of March 1999. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." The record does not contain any documentary evidence to resolve the inconsistency. The petitioner failed to resolve the inconsistency in the record by independent objective evidence. The record does not contain the original copy for the experience letter. Without any documentary supporting evidence such as corporate establishment documents, payroll records of the business and the beneficiary's personal tax or income information, a photocopy of a computer-created format in the instant case raises a question on the authenticity of the employment verification letter. 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. 582, 591 (BIA 1988). Therefore, USCIS cannot give a full evidentiary weight to these verification letters in this proceeding. The petitioner failed to establish the beneficiary's requisite two years of experience as a Mediterranean Cook prior to the priority date with regulatory-prescribed documentary evidence. The director approved the petition in error on this ground.

The petitioner must also establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, 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. In the instant case, the petitioner offered a permanent position of Mediterranean Cook to the beneficiary working 40 hours per week on permanent basis and being paid at the rate of \$20.90 per hour beginning on the date the beneficiary is able to legally perform the duties. To establish that job offer is *bona fide*, the petitioner must demonstrate that it will hire and pay the beneficiary under the terms described on the Form ETA 750.

The beneficiary claimed that he had worked for the petitioner in the proffered position since March 1999, however, the petitioner did not submit any documentary evidence showing that it employed and paid the beneficiary any compensation for 1999 and any subsequent years. Counsel claimed that the beneficiary initially obtained his employment authorization document (EAD) in June 2002 and from that point the petitioner employed and paid the beneficiary the proffered wage. USCIS record shows that USCIS has been continuously granting the beneficiary with EAD since 2002. However, the taxation documents the beneficiary submitted for his I-485 adjustment of status application show that the petitioner paid the beneficiary compensation of \$29,260 in 2002, \$18,860 in 2003 and \$15,215 in 2004, much less than the proffered wage of \$43,472 per year set up for the proffered position on the Form ETA 750. This casts doubt on whether the petitioner had the ability to pay the proffered wage in these years and whether the job offer to the beneficiary was and has continuously been a *bona fide* one. The record does not contain any documentary evidence to establish that the petitioner's job offer is realistic one. Without further supporting evidence, the petition is not approvable. The approval of the petition must be revoked.

In addition, the record shows that [REDACTED] who is a 50% ownership foreign partner of the petitioner, signed all related documents for the petition the petitioner filed on behalf of the beneficiary. The record contains three signatures of [REDACTED] one is on the Form ETA 750A on January 10, 2001, another is on the Form I-140 on October 29, 2001 and the other one is without sign date on the Form G-28, Notice of Entry of Appearance as Attorney or Representative, dated October 29, 2001. However, the signatures on the Form I-140 and Form G-28 appear to be imitated from the one on the Form ETA 750. During adjudicating the instant appeal, this office requested counsel to submit a properly executed Form G-28 signed by the petitioner, however, in response to the request, counsel did not submit an original properly executed Form G-28 signed by the petitioner's representative but submitted one signed by the beneficiary. This raises questions on the authenticity of the I-140 petition filed by the petitioner, and probably fraudulent filing of the petition. Without further verification, the petition is not approvable and therefore, the director erred in approving the petition on 21, 2001.

In view of the foregoing, the previous decision of the director dated May 4, 2007 will be withdrawn, and the AAO finds that the director has good and sufficient cause to issue a NOIR on the above discussed issues for the approval of the instant petition. However, the regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his /her own behalf before the decision is rendered, ...

Therefore, the petition is remanded to the director. The director may issue another NOIR to provide the petitioner an opportunity to rebut the additional grounds of revocation identified and discussed in this decision above. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's May 4, 2007 decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.