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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



BE

Date:

JUL 12 2011

Office: TEXAS SERVICE CENTER FILE:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On August 16, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an immigrant petition for alien worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on July 14, 2003. The director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on April 27, 2009, and the petitioner subsequently appealed the director's decision to revoke approval of the visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual who owns a cleaning business. It seeks to employ the beneficiary permanently in the United States as a cleaning supervisor, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an Application for Alien Employment Certification (Form ETA 750) approved by the U.S. Department of Labor (DOL). As stated earlier, this petition was approved on July 14, 2003 by the VSC, but that approval was revoked in April 2009 by the TSC director ("the director"). The director determined that the petitioner failed to comply with the DOL recruitment requirements and had obtained the approval of the Form ETA 750 by fraud or by material misrepresentation. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, counsel for the petitioner contends that the director's finding of fraud or material misrepresentation against the petitioner is not supported by the evidence of record.² Counsel states that the petitioner, contrary to the director's conclusion, obtained the approval of the Form ETA 750 labor certification by following and complying with the DOL recruitment procedures and requirements. The director's Notice of Intent to Revoke (NOIR), according to counsel, contains no specific evidence that would have warranted a revocation; it contains only vague allegations of fraud in other petitions filed by [REDACTED] and similarities in the description regarding recruitment efforts present in the petitioner's labor certification application and other unrelated applications filed by [REDACTED].

Further, counsel states that the NOIR includes no specific evidence or information relating to the petitioner, petition, or documents in the present case, nor does it include the investigative report conducted by the Office of Inspector General, Office of Labor Racketeering and Fraud Investigations (OLRFI) in connection with those other unrelated cases that [REDACTED] filed.³

¹ Section 203(b)(3)(A)(i) of 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.

² The petitioner's current counsel, [REDACTED] will be referred to throughout this decision as counsel. Previous counsel, [REDACTED] will be referred to as previous or former counsel.

³ In the Notice of Revocation (NOR) the director revealed that an investigation conducted by the

Citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988), counsel states that where a notice of intent to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the director cannot revoke the approval of the visa petition. For these reasons, counsel concludes that the director's decision to revoke the previously approved petition was erroneous, as it was not based on good and sufficient cause, as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As a procedural matter, the AAO finds that the director erroneously cited 8 C.F.R. § 205.1 as the authority upon which he revoked the approval of the petition. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

The first issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

Section 205 of the Immigration and Nationality Act (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. Such revocation shall be effective as of the date of approval of any such petition.

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).

The regulation at 8 C.F.R. § 205.2 states:

Office of Inspector General, Office of Labor Racketeering and Fraud Investigations (OLRFI) uncovered fraud in numerous other immigrant visa petitions that the beneficiary's former attorney of record, [REDACTED] filed.

(a) *General.* Any Service [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on **any ground** other than those specified in § 205.1 **when the necessity for the revocation comes to the attention of this Service [USCIS]**. (emphasis added).

The regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [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, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the NOIR, the director wrote the following:

The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files [referring to the petitioner's previous counsel – ██████████]

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by ██████████ who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. The director questioned the beneficiary's qualifications and the reliability of the documentation in support of the petition. Because of the findings in other cases and since ██████████ filed the petition in this case, the director on February 6, 2009 issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two

years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR. However, the director's NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and the petitioner's compliance with the DOL's advertising and recruitment procedures. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications. The director also did not specifically state that the petitioner needed to submit copies of the recruitment results following the published advertisements or other evidence to show that the petitioner complied with the DOL recruitment procedures. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995).

The AAO finds that the director insufficiently notified the petitioner of derogatory information with respect to its failure to follow recruitment procedures. However, the director's decision to revoke the approval of the petition will be affirmed on other grounds, as will be discussed below.

The next issue on appeal is whether the director properly concluded that the petitioner did not follow and comply with the recruitment procedures of the DOL.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, previous counsel submitted, in response to the director's NOIR, copies of the newspaper advertisements that the petitioner posted in *Cape Cod Times* on Sunday, February 11, February 18, and February 25, 2001.⁴

Based on the evidence submitted, the director stated in the Notice of Revocation (NOR), "Nothing was submitted that clearly proves the employer has complied with DOL advertising and recruiting requirements and has established that there no [sic] able, qualified, and available U.S. workers for the position and has rejected any U.S. job applicants for valid job-related reasons."

Before 2005, the DOL regulations provided for two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process an Employment Service job

⁴ Previous counsel submitted the copies of the advertisements with a disclaimer, stating that he obtained the copies of the advertisements from the archives of the public library, and that the advertisements appeared to relate to the instant proceeding.

order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2004). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local DOL office, should: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2004).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k).

The AAO finds that the director erred in faulting the petitioner for failing to submit the recruitment results following its publication of the advertisements. Before 2005, employers filing a Form ETA 750 were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five (5) years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

The Form ETA 750 in this case was filed in April 2001. As noted above, employers filing a Form ETA 750 before 2005 were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. As there was no requirement to keep such records, USCIS may not make an adverse finding against the petitioner because it claims it no longer has the documentation.⁵

Additionally, based on the evidence in the record, the petitioner placed the advertisements prior to submitting the labor certification application, consistent with the reduction in recruitment process which was allowed at the time.

The AAO notes, however, that the petitioner signed the labor certification application in January 2001, before conducting the recruitment beginning with the placement of the advertisements in February 2001. The petitioner on the Form ETA 750A states to the DOL under a penalty of perjury attestation clause that the recruitment effort is complete and yielded no qualified United States workers. The petitioner cannot make the statement that no qualified workers are available without first advertising for the position. Similarly, the petitioner cannot attest through his or her signature on the Form ETA 750 that recruitment is complete without first conducting the

⁵ However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation.

recruitment. The AAO is troubled that the labor certification application was signed by the petitioner prior to any recruitment efforts, raising questions about whether the petitioner, through its premature signature on the Form ETA 750A, was actively involved in the recruiting process and whether previous counsel was actively involved in the interviewing and consideration of job applicants.⁶

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592.

While the petitioner's premature signature on the Form ETA 750A is troubling, the AAO will not remand the petition to the director for further development of the facts relating to the petitioner's recruitment efforts since the appeal will be dismissed on other grounds. The director's conclusion that the petitioner did not comply with the DOL recruitment requirements, based on the current facts of record, is erroneous, and will be withdrawn.

The AAO will next review whether approval of the petition should remain revoked based on the beneficiary's qualifications. In response to the NOIR, the petitioner's previous counsel submitted:

- A signed statement from the beneficiary dated February 24, 2009 confirming that he worked as a cleaning supervisor at [REDACTED] from April 1993 to September 1999 and that the business is closed today; and
- A sworn statement dated February 19, 2009 from [REDACTED] stating that the beneficiary worked as a cleaning supervisor from 04/1993 to 09/1999.

Because of the director's insufficient notice to the petitioner of derogatory information, the AAO, on June 29, 2010, issued its own Notice of Derogatory Information and Request for Evidence (NDI/RFE) to the petitioner, in accordance with 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.2(b)(16)(i).

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, 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 – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

⁶ The regulation at 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) in place at the time of recruitment in this case specifically prohibited agents or legal representatives of the beneficiaries and the petitioners from participating in interviewing or considering applicants for the job offered. If [REDACTED] participated in this process either with or without the employers' participation, it would have violated this DOL regulation.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 30, 2001. The name of the job title or the position for which the petitioner sought to hire is "cleaning supervisor." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote the following:

Under complete direction of owner, assist in supervising cleaning staff. Inspect work performed, confer with owner to assign workers, resolve problems and complaints and assist in training new workers.

The DOL classified this job description as a janitorial supervisor consistent with [REDACTED]. Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the beneficiary is, in fact, qualified for the certified job. In 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, Madany*, 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 set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, signed by the beneficiary on January 12, 2001, he represented that he worked as a cleaning supervisor at a cleaning company in Brazil called [REDACTED] from April 1993 to September 1999. Submitted along with the approved Form ETA 750 and the petition was an affidavit dated January 16, 2001 from [REDACTED] stating that the beneficiary worked as a cleaning supervisor from "04/1993 to 09/1999" (April 1993 to September 1999).

In adjudicating the appeal, the AAO found several inconsistencies in the record pertaining to the beneficiary's past work experience as a cleaning supervisor in Brazil. In the NDI/RFE, the AAO noted that the beneficiary claimed he worked as a cleaning supervisor for a cleaning company called [REDACTED] from April 1993 to September 1999 on the Form ETA 750, part B. However, the beneficiary failed to list this employment on his Biographic Information, Form G-325, under a section eliciting information about his work experience abroad. Further, the beneficiary stated in his signed statement dated February 24, 2009 that the business where he

⁷ The DOT number can be accessed on the website at the following website address: <http://www.occupationalinfo.org>

used to work in Brazil had closed; however, the letter dated February 24, 2009 from the former employer of the beneficiary implicitly indicates that the company is still active.⁸

Further, the AAO noted that the signatures of [REDACTED] on the two affidavits, one dated January 16, 2001 and the second dated February 19, 2009, appeared different, undermining the credibility of the beneficiary's evidence to establish his work experience.

In addition, none of the documents submitted by the beneficiary's former employer contains the author's title/position, and specific job description of the beneficiary, as required by the regulation at 8 C.F.R. § 204.5(g)(1). Due to these problems in the record, the AAO specifically advised the petitioner to submit independent objective evidence such as pay stubs, tax documents, financial statements, or other evidence of payments made to the beneficiary by his previous employer in Brazil.

On July 6, 2010, the AAO received a brief from the petitioner's counsel and additional evidence pertaining to the beneficiary's work experience in Brazil. In her brief, counsel contends that the beneficiary has submitted and provided sufficient evidence to demonstrate that he worked as a cleaning supervisor in Brazil for at least two years, before he came to the United States. In his affidavit submitted in response to the AAO's NDI/RFE, the beneficiary states that it is impossible to produce other tangible evidence such as copies of paystubs, payroll records, or other evidence to demonstrate his employment in Brazil because he only received cash during his employment and because it has been too long ago since he left the company. The beneficiary also claims that no company in Brazil is obligated to keep records of employment more than five years, and it has been more than five years since he left the company. No other evidence, such as copies of paystubs or accounting records, was submitted to show and corroborate the petitioner's claim that the beneficiary worked as a cleaning supervisor at Prim-Mus Industrial Ltda. from April 1993 to September 1999.⁹ The petitioner also did not address the signature differences in the two affidavits from [REDACTED]

Counsel contends that the beneficiary's failure to list his employment abroad on his Biographic Information by itself is not material and does not make other statements unreliable in this case. Nevertheless, USCIS relies upon completed forms, petitions, and applications for evidence of consistency and credibility when considering a petitioner's or a beneficiary's eligibility for the benefit. The failure of the beneficiary to provide his last employer abroad does not support the

⁸ The author stated nothing about the status of the company – whether the business was closed or still active. The business registration of [REDACTED] printout of the beneficiary's former employer in Brazil shows that the business is still active as of November 3, 2005; counsel in her appellate brief states that the beneficiary's former employer is still active as of June 8, 2007 (page 14).

⁹ Other examples of evidence that might have been submitted include: a copy of the beneficiary's work and social security book from the Brazilian government, or copies of [REDACTED] [REDACTED] social security withholdings or deposits to the Security Fund for Duration of Employment that covers the beneficiary's employment with that firm.

petitioner's claim that the beneficiary obtained his work experience at [REDACTED] from April 1993 to September 1999. USCIS requires objective, independent evidence to resolve any inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (stating that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and that any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies); *also see Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)) (stating that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings). Here, as stated earlier, the beneficiary stated that his prior employer in Brazil – [REDACTED] – was no longer active¹⁰, and implicitly that he could not obtain documentation. Other evidence of record, including a statement by the beneficiary's counsel and the CPNJ printout, reflect that [REDACTED] is still active, creating a material inconsistency in the record that the petitioner has failed to resolve with independent, objective evidence such as any of the documentation listed above.¹¹

Based on the evidence submitted and the response from counsel, the AAO determines that the beneficiary did not have the requisite two years experience in the job offered before the petitioner filed the labor certification application. Although the passage of time may hinder the beneficiary in obtaining evidence of his previous work experience; in this case, the record establishes that the beneficiary's former employer in Brazil is still in operation, which is inconsistent with the beneficiary's statement of February 24, 2010. No further evidence has been submitted to further illustrate his job duties or to corroborate the fact of the beneficiary's employment from April 1993 to September 1999. Moreover, the petitioner failed to address the differences in the two signatures of [REDACTED] thus casting further doubt on the authenticity of the evidence to establish the beneficiary's work experience.

Further, none of the documents submitted by the beneficiary's former employer in Brazil complies with the regulation at 8 C.F.R. § 204.5(g)(1), in that none contains the author's title, his or her company's address/location, and specific description of the beneficiary's duties. For these reasons, the AAO finds that the petitioner has failed to show that the beneficiary had the

¹⁰ Implicit in this representation is that the beneficiary cannot get documentation proving his employment if the entity is closed. In his statement dated June 24, 2010 the beneficiary states that tax records are kept in Brazil for five years only, but submits nothing to support that assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

¹¹ As noted by the director, the Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

requisite two years work experience in the job offered before the priority date and that the beneficiary is not qualified to perform the duties of the position.

The AAO will next review the director's finding of fraud or willful misrepresentation against the petitioner.¹²

Before finding fraud or material misrepresentation, the director must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. In this case, the director found that the petitioner had engaged in fraud or misrepresentation during the labor certification and petition processes involving the petitioner's non-compliance with recruitment policies of the DOL and the presentation of questionable beneficiary qualifications. As noted above, however, the facts involving recruitment are insufficiently developed and do not currently establish that the petitioner failed to comply with DOL's recruitment policies. Thus, the factual record also does not support a finding of fraud and material misrepresentation against the petitioner.

As noted above, the record contains a major inconsistency about whether the Brazilian employer is still in business, raising the question about whether the beneficiary misrepresented whether he could obtain further documentation, and casting doubt on the credibility of the petitioner's documentation of the beneficiary's work experience. Further, the affidavits do not comply with 8 C.F.R. § 204.5(g)(1), in that neither contains the title of the author, the address/location of the business, and the full description of the job duties of the beneficiary or the training that he received while he worked there.

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. *See, Matter of Ho*, 19 I&N Dec. at 591-592. No evidence of record resolves this inconsistency. Thus, the petitioner has not established the beneficiary's two years' work experience as a cleaning supervisor as of the priority date. Nevertheless, the record does not establish that either the beneficiary or the petitioner knowingly and intentionally misrepresented the beneficiary's claimed employment experience or submitted falsified documents. The fact that the business in Brazil was open when the beneficiary said it was closed, without further evidence of intentional and knowing misrepresentation, is not sufficient for the director to conclude that the petitioner obtained the approval of the Form ETA 750 labor certification application or the Form I-140 immigrant visa petition by fraud or material misrepresentation.

Section 204(b) of the Act states, in pertinent part, that:

¹² As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. See sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

After an investigation of the facts in each case . . . the [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 an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any 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."

Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.¹³

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either: (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is

¹³ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

In this case, the factual record does not disclose that the petitioner and/or previous counsel intentionally and knowingly failed to comply with the recruitment process or misrepresented the beneficiary's qualifications to the DOL or USCIS. As such, the facts also do not support a finding of fraud and/or material misrepresentation with respect to the recruitment process or beneficiary qualifications.¹⁴ The director's finding to the contrary is withdrawn.

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The 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).

¹⁴ The current record also does not indicate that the beneficiary engaged in fraud or material misrepresentation in the presentation of his credentials to the petitioner and through the petitioner, to USCIS.

As noted above, the petitioner filed the labor certification application (Form ETA 750) for the beneficiary with the DOL on June 22, 2001. The rate of pay or the proffered wage set forth by the DOL is \$12 per hour or \$21,840 per year (based on a 35-hour work per week).¹⁵

In response to the AAO's NDI/RFE, counsel for the petitioner submits copies of the following evidence to demonstrate that the petitioner has the ability to pay \$12 per hour or \$21,840 per year beginning on April 30, 2001:

- The beneficiary's Forms W-2 and 1099-MISC for 2001-2005 issued by the petitioner;
- The beneficiary's Forms W-2 for 2006 and for the years 2008 and 2009 issued by [REDACTED];
- The beneficiary's individual tax returns filed on Forms 1040, U.S. Individual Income Tax, for the years 2002 through 2009;
- The beneficiary's most recent social security statement; and
- John Chapman's individual tax returns filed on Forms 1040 for the years 2001 through 2007.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. [REDACTED] is the sole proprietor. On the Form I-140 petition, [REDACTED] the petitioner, claimed to have started his business in 1987 and to currently employ four workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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. 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

¹⁵ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

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.

Based on the evidence submitted, we find that the beneficiary received the following wages from the petitioner:

- \$17,600 in 2001 (\$4,240 less than the proffered wage);
- \$26,400 in 2002 (exceeds the proffered wage);
- \$41,600 in 2003 (exceeds the proffered wage);
- \$41,600 in 2004 (exceeds the proffered wage); and
- \$29,200 in 2005 (exceeds the proffered wage).¹⁶

The Forms W-2 and the 1099-MISC submitted are *prima facie* evidence of the petitioner's ability to pay the beneficiary's proffered wage of \$21,840 per year from 2002 through 2005. In order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must also be able to pay the difference between the actual wage and the proffered wage in 2001, which is \$4,240.

The petitioner can either pay this amount (\$4,240) through either his personal income or his current assets. If the petitioner chooses to use his personal income, USCIS will 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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).

The petitioner, as noted above, is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents.

¹⁶ The beneficiary received one Form W-2 for 2005 for \$3,200 and one Form 1099-MISC for \$26,000 from the petitioner for a total of \$29,200.

Ubeda v. Palmer, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, the petitioner is married and lists no dependent children on his tax return. In 2001, [REDACTED] adjusted gross income (AGI) was \$78,254 (line 33 of the Form 1040). However, the record contains no information regarding [REDACTED] monthly household expenses; [REDACTED] has never been requested to produce such information, either. Considering that \$4,240 – the difference between the actual wage and the proffered wage – is minimal compared to the petitioner's adjusted gross income (about 5.4% of \$78,254), it is, therefore, reasonable to conclude that the petitioner is more likely than not able to pay the remainder of the beneficiary's wage in 2001.

In response to the director's NOIR, [REDACTED] provided a letter dated February 23, 2009 from the beneficiary who states that he no longer worked for the petitioner since December 2006, and that he is now self-employed with his own cleaning business. In his letter, the beneficiary states that he left the petitioner to work for himself, because [REDACTED] had some medical and personal issues.

Citing the USCIS Interoffice Memorandum dated December 27, 2005 from Michael Aytes, the Acting Director of Domestic Operations, counsel states in response to the AAO's NDI/RFE that since the beneficiary no longer works for the petitioner and has ported to a new employer doing a similar job, the new employer is not required to demonstrate its ability to pay the proffered wage.¹⁷

Counsel's argument citing the USCIS Interoffice Memorandum is not persuasive. USCIS memoranda merely articulate internal guidelines for USCIS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon

¹⁷ Counsel specifically refers to Question 7 and Answer, which state:

Should service centers or district offices request proof of "ability to pay" from successor employers in I-140 portability cases, in other words, from the new company/employer to which someone has ported?

No. The relevant inquiry is whether the new position is in the same or similar occupational classification as the alien's I-140 employment. It may be appropriate to confirm the legitimacy of a new employer and the job offer through an RFE to the adjustment application for relevant information about these issues. In an adjustment setting, public charge is also a relevant inquiry.

(The Interoffice Memorandum dated December 27, 2005 is accessible on the internet at <http://www.uscis.gov> under "Law" section).

[plaintiffs] substantive rights nor provide procedures upon which [they] may rely.” *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O’Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”) See also [redacted] Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding “Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service,” dated February 3, 2006. The memorandum addresses, “the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices.” The memo states that, “policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to ‘inform rather than control.’” CRS at p.3 citing to *American Trucking Ass’n v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981). See also *Pacific Gas & Electric Co. v. Federal Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974), “A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy.” The memo notes that “policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power.” *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

The specific question to be resolved is whether the new employer is required to demonstrate its ability to pay the proffered wage, after the beneficiary changed employment doing a similar job.

To address this issue, it is important to analyze section 106(c) of AC21 and determine the interpretation of the statute as intended by Congress. Specifically, section 106(c) of AC21 added the following to section 204(j) to the Act:

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.

American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

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.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to 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) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

Section 204(j) of the Act generally provides relief to the alien beneficiary who changes jobs after his visa petition has been approved. More specifically, this section permits an application for adjustment of status to remain pending when (1) it has remained unadjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved. *See Perez-Fargas v. Gonzalez*, 478 F.3d 191, 193 (4th Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007).

It is important to note here, however, that section 204(j) does not apply to an immigrant visa petition process but to an application for adjustment of status. Neither AC21 nor section 204(j) addresses the specific question as to who should continue to demonstrate the ability to pay the proffered wage in the context of the Form I-140 adjudication once the beneficiary successfully ports to another employer. This question, which arises as a consequence of the statutory provisions at AC21 and

section 204(j) of the Act, is appropriately deferred to the Form I-485 adjustment of status adjudication.¹⁸

The AAO has no jurisdiction to adjudicate an adjustment of status application; only USCIS has the exclusive jurisdiction over adjustment of status issue along with the immigration judge, when the immigration judge adjudicates the application under 8 C.F.R. § 1245.2(a)(1). *See* 8 C.F.R. § 245.2(a). The AAO, for example, does not address issues relating to the beneficiary's new employment – whether the new employment is in the same or similar occupational classification as the employment for which the visa petition was approved. Similarly, the AAO will not address issues pertaining to the petitioner's ability to pay after the beneficiary changes jobs to work for another employer. Those issues will be left open until such time when the beneficiary may be eligible to adjust his status. Thus, in the context of the instant adjudication, the petitioner is not required to demonstrate its ability to pay the proffered wage after the beneficiary ported to a new employer.

In summary, the AAO is persuaded that the petitioner had the ability to pay the proffered wage from the priority date and continuing until the beneficiary ported to work for himself and for another employer. Nevertheless, the petition must remain revoked as the beneficiary is not qualified to perform the services of the position as of the priority date.

Additionally, since the petition remains revoked, the petitioner must intend to employ the beneficiary. The record establishes that the beneficiary no longer intends to work for the petitioner.¹⁹ As such, the petition is moot.²⁰ For this additional reason, the petition must remain revoked.

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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

¹⁸ In this case, the immigrant visa petition was approved in 2003; the beneficiary ported to a similar job in 2006; and the petition's approval was revoked in 2009.

¹⁹ In his letter dated February 23, 2009, the beneficiary stated that he left the petitioner in December 2006 to work for himself, because [REDACTED] (the owner of the petitioning business) had some medical and personal issues.

²⁰ The petition will also be moot if the petitioner is unable to continue to employ the beneficiary because the business is no longer operational. In the case where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

The appeal is dismissed, and the petition may not be approved, because the petitioner has failed to demonstrate that it intends to employ the beneficiary under the petition and that the beneficiary had the requisite work experience as of the priority date. The appeal will be dismissed and the petition's approval shall remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation of the approval of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The director's decision to revoke the approval of the petition is affirmed.