



U.S. Citizenship
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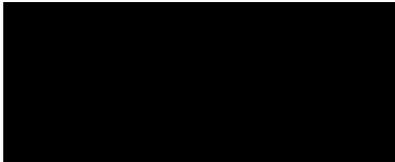
IN RE:

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 June 7, 2004, 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 September 3, 2004. The director of the Texas Service Center (“the director”), however, revoked the approval of the immigrant petition on May 20, 2009, and the petitioner subsequently appealed the director’s decision to revoke the petition’s approval. The appeal will be dismissed.

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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her 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).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook 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 approved Form ETA 750 labor certification. As stated earlier, this petition was approved on September 3, 2004 by the VSC, but that approval was revoked in May 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures and that the documents submitted in response to the director’s Notice of Intent to Revoke (NOIR) were in themselves a willful misstatement of material facts, constituting fraud. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, current counsel for the petitioner – [REDACTED] – contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have any good and sufficient cause as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155 to revoke the approval of the petition. For instance, counsel states that the director only made vague, unsubstantiated allegations of fraud or material misrepresentation relating to other petitions and petitioners, and that neither the Notice of Intent to Revoke (NOIR) nor the Notice of Revocation (NOR) contained specific adverse information relating to the petition or the petitioner in the instant proceeding.

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 Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Previous counsel, [REDACTED], will be referred to as previous or former counsel or by name.

Counsel also states that the finding of fraud or material misrepresentation against the petitioner was not supported by any evidence of record. Counsel indicates that the DOL would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements.

With respect to the director's insistence on documentary proof of recruitment, counsel states that the petitioner, at the time when it filed the Form ETA 750 with the DOL for processing, was not required to retain any documentary evidence relating to its recruitment efforts once the labor certification had been approved. Counsel also states that, over five years after the Form ETA 750 was approved, the petitioner no longer has such evidence.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

Although not raised by counsel, as a procedural matter, the AAO finds that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. 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.

One of the issues raised on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the**

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

petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, 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.

Moreover, *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 Notice of Intent to Revoke (NOIR), the director wrote:

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 generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by previous counsel, the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since ██████████ filed the petition in this case, the director on February 25, 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 while the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in that it did not give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. 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 in the present case. 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). Because of insufficient notice to the petitioner of derogatory information, the director's decision will be withdrawn. Nevertheless, the appeal will be dismissed, and the revocation of approval of the petition will be affirmed, as the petition's approval may not be reinstated for the reasons discussed below.

Another issue raised on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, the petitioner's previous counsel [REDACTED] submitted the following evidence:⁴

- Copies of tear sheets from the [REDACTED] advertisements, published on Sunday, February 9, 2003, and from Tuesday, February 11, 2003 through Sunday, February 16, 2003;⁵ and
- A copy of the advertisement rates from the [REDACTED].

Upon review of the evidence submitted, the director noted several deficiencies in the record regarding the recruitment efforts. First, the director indicated that the petitioner failed to submit a copy of the internal posting. Second, the director indicated that the petitioner could not have declared that it had conducted the recruitment efforts and received no result, when the Form ETA 750 was signed a few days before the petitioner advertised the position in the newspaper.

The AAO disagrees in part with the director's conclusion. First, the director in the NOIR did not notify the petitioner to specifically submit any copies of the results of the recruitment efforts, including the copy of the in-house posting. As noted above, 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, id.*

Additionally, since there was no requirement to keep such records, the director may not make an adverse finding against the petitioner, if, as in this case, the petitioner claims it no longer has the supporting documentation over five years after the labor certification was approved. The AAO

⁴ This evidence was submitted in response to the director's Notice of Intent to Revoke (NOIR).

⁵ All tear sheets show that the petitioner was trying to hire cooks.

acknowledges that at the time the petitioner filed the labor certification application with the DOL for processing in March 2003, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL.⁶ 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 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 DOL at the time the petition was filed accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. See 20 C.F.R. § 656.21 (2003). 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 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) (2003). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: 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) (2003).

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).

Here, the record reflects that the petitioner signed the Form ETA 750 on February 5, 2003. The earliest date of the seven copies of the advertisements is February 9, 2003. The Form ETA 750 was filed with the DOL for processing on March 20, 2003. The DOL subsequently approved the Form ETA 750 on November 24, 2003.

Based on the evidence submitted and the stated facts above, 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. In revoking the approval of the petition, the director stated that the petitioner could not have conducted the recruitment properly,

⁶ As there was no requirement to keep such records, the director may not make an adverse finding against the petitioner if it claims it does not have the documentation. 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. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

because all of the advertising was conducted after the petitioner signed the application on February 5, 2003.⁷ The director determined that by signing the Form ETA 750, the petitioner stated under penalty of perjury that the recruitment was complete. However, based on the evidence submitted, the petitioner began recruiting U.S. workers by placing the first advertisement in the newspaper four days after it signed the Form ETA 750. This suggests that [REDACTED] (the attorney who represented the petitioner in filing the Form I-140 petition) might have been impermissibly involved in the recruiting process, if the petitioner, for instance, merely signed the Form ETA 750 and let [REDACTED] take over the recruitment efforts (for instance, by placing the advertisement and interviewing U.S. candidates).

Counsel argues that unless there was good and sufficient for revocation cause specified in the director's NOIR, that USCIS cannot sustain a revocation of approval of a Form I-140 petition. As noted above, 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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her 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).

In addition, 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). The record reflects good and sufficient cause for revocation of approval of the petition. Moreover, for reasons further discussed below, the revocation of the approval of the petition will be affirmed.

Neither the petitioner nor counsel provided an explanation on appeal for why the advertisement was placed in the newspaper after the Form ETA 750 was signed by the petitioner. The DOL regulation at 20 C.F.R. § 656.21 (2001) required, at the time of recruitment in this case, that the employer clearly document, as a part of every labor certification application, its reasonable, good faith efforts to recruit U.S. workers without success. Such documentation should include the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization. The documentation should also identify each recruitment source by name; give the number of U.S. workers responding to the employer's recruitment; give the number of interviews

⁷ The director stated in the Notice of Revocation:

Additionally, the petitioner signed the labor certificate on February 5, 2003. This signature serves to effectively claim all requirements to recruit a U.S. worker for the proffered position were met by them [sic].

conducted with U.S. workers; specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and specify the wages and working conditions offered to the U.S. workers.

The petitioner should have submitted this report to the DOL with its request for reduction in recruitment, which would have been impossible, as recruitment had not yet started. The petitioner has not provided sufficient evidence to show that it actively participated in the recruitment of U.S. workers. Nor does the evidence submitted demonstrate that the petitioner conducted the recruitment efforts in accordance with the DOL regulations at the time.

Nevertheless, as we are dismissing the appeal on other grounds, we will not send a further RFE or Notice of Derogatory Information (NDI) to the petitioner for an explanation of the petitioner's certification under penalty of perjury that the recruitment was complete (and yielded no result) before it was actually completed, nor will we remand the matter to the director for further development of the facts at this time.⁸ In summary, although there are unresolved inconsistencies in the dates of publication of the advertisements in relation to the current proceeding, the AAO disagrees with the director's finding at this time that the recruitment procedures were not followed.

Although the evidence suggests that recruitment procedures may not have been followed, the director failed to raise the specific issue of the petitioner's attestation on the labor certification application that recruitment had been completed in the Notice of Intent to Revoke. Due to lack of notice and the opportunity to be heard, the AAO will not conclude that the DOL recruitment procedures were not followed. Therefore, the director's conclusion that that the petitioner failed to follow the DOL recruitment procedures is erroneous and is withdrawn.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel contends that the director found fraud or willful misrepresentation against the petitioner and revoked the approval of the petition simply because [REDACTED] filed the petition in the instant proceeding. Counsel further states that the DOL's approval of the labor certification application indicates that there was no fraud or irregularity in the labor certification process.

The AAO disagrees with counsel's contention. If the petitioner or its previous counsel deceived the DOL in the recruitment process, then the labor certification is not valid and should be invalidated. In this case, however, the factual record does not establish that the petitioner failed to follow the DOL recruitment procedures. Similarly, there has been insufficient development of the facts upon which the director can rely to find that the petitioner and/or [REDACTED] engaged in fraud or material misrepresentation.

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

⁸ This issue may be further addressed in any subsequent reopening of the case.

the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. 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 Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, 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.⁹

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

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

⁹ 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.

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."

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 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.

Here, the director did not raise the issue in the NOIR of the petitioner's signing the labor certification prior to recruitment, and thus, the petitioner did not have the opportunity to address this ground for revocation in response to the NOIR. As a consequence, the factual record is insufficiently developed to establish whether the petitioner and former counsel may have participated in the recruitment process. Thus, fraud or willful material misrepresentation has not been established. Nor does the record reflect that the beneficiary engaged in fraud or material misrepresentation in the presentation of his credentials to the petitioner and through the petitioner to USCIS. Thus, the director's finding of fraud or misrepresentation is withdrawn.

In summary, the AAO withdraws the director conclusion that the petitioner failed to follow the DOL recruitment requirements. The AAO also withdraws the director's finding of fraud and/or material misrepresentation against the petitioner.

Nevertheless, we find that the director's decision to revoke the approval of the petition is based on good and sufficient cause, as required by Section 205 of the Act, 8 U.S.C. § 1155. The petition is currently not approvable because the record does not contain sufficient evidence establishing the petitioner's ability to pay the proffered wage from the priority date. 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).

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

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).

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on March 20, 2003. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.65 per hour or \$23,023 per year based on a 35 hour work week.¹⁰

To demonstrate that the petitioner had the continuing ability to pay \$12.65 per hour or \$23,023 annually from March 20, 2003, the petitioner submitted the following document:

- A copy of the beneficiary's Form W-2 for the year 2003.

¹⁰ 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).

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 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:

- \$24,576 in 2003 (exceeds the proffered wage).

The amount paid to the beneficiary above is *prima facie* evidence of the petitioner's ability to pay the beneficiary's proffered wage of \$23,023 per year in 2003. However, 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 annually pay \$23,023 from 2004 henceforth until the beneficiary obtains legal permanent residence. No evidence showing the petitioner's ability to pay from 2004 to 2007 has been submitted, nevertheless.

When the petitioner fails to employ and pay the beneficiary an amount at least equal to the proffered wage during the relevant time frame, USCIS next examines 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the

proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.¹¹ A corporation’s year-end current assets are

¹¹ 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.

shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation'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 no evidence showing the petitioner's net income or net current assets for the years 2004 through 2007. On July 28, 2010 the AAO issued a Request for Evidence (RFE) requesting the petitioner to submit copies of the Forms W-2 issued to the beneficiary for the years 2004 through 2007. The AAO also requested the petitioner to submit copies of the business' federal tax returns, annual reports, or audited financial statements for the years 2004 through 2007.¹²

In response to the AAO's RFE, counsel stated that the AAO's request for additional evidence regarding the petitioner's continuing ability to pay beyond 2003 was improper, especially where the beneficiary has already "ported to new employment." Counsel further cites the passage of the 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), which provides:

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

Counsel further urges the AAO to consider the 2008 USCIS Memo from [REDACTED] Acting Associate Director, Domestic Operations (HQ70/6.2), which states that "a petition is valid for porting purposes if the petition is approvable when filed."

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 [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)).

¹² In a footnote, the AAO acknowledged that the beneficiary had moved to work for a different employer beginning on November 30, 2007. The record contains a letter dated October 2, 2008 from [REDACTED] Director of Operations, stating that the beneficiary began his employment with [REDACTED] as a cook on November 30, 2007, after his employer for the previous eight years passed away. For this reason, the AAO only requested the petitioner to demonstrate its ability to pay from the priority date until the beneficiary ported in November 2007.

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], Legislative Attorney, 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 [REDACTED] *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

Further, the AAO notes that 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 employment-based petition to remain valid with respect to the new job when (1) the application for adjustment of status has not been adjudicated 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-Vargas v. Gonzales*, 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 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.¹³

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. § 245.2(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, but since the petitioner fails to submit additional evidence as requested, the AAO concludes that the petitioner has failed to establish that it has the continuing ability to pay the proffered wage beginning on the priority date and continuing until the day the beneficiary ported to work for another employer in November 2007.

Finally, even though not raised by counsel on appeal, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of ██████████*, 12 I&N Dec. 612. The petitioning entity in ██████████ had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included ██████████. The petitioner's clients had been included in the lists of the best-dressed ██████████. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at ██████████. The Regional Commissioner's determination in ██████████ was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in ██████████, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

¹³ In this case, the immigrant visa petition was approved in September 2003, and the beneficiary seemed to have ported to a similar job in November 2007 (when the petition was still valid). The director did not revoke the approval of the petition until May 20, 2009.

Unlike [REDACTED] the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in [REDACTED] nor has it been established that the petitioner during the qualifying period, especially from 2004 to 2007, had uncharacteristically substantial expenditures.

In summary, the AAO is not 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 another employer in November 2007. The appeal will be dismissed and the petition's approval shall remain revoked for the above stated reason. 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.