



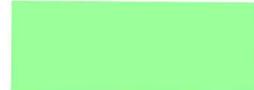
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: OFFICE: TEXAS SERVICE CENTER
JUN 13 2013

FILE:

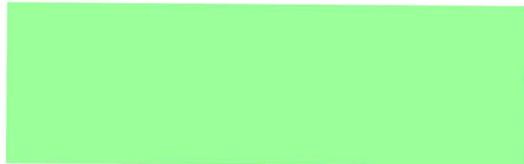


IN RE: Petitioner:
Beneficiary:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On April 25, 2003, 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 June 12, 2003; but on July 30, 2010, the director of the Texas Service Center (the director), revoked the approval of the immigrant petition. The petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO), but on September 28, 2010, the director rejected the appeal as untimely filed per 8 C.F.R. § 103.3(a)(2)(v)(B). Following the director's decision to reject the appeal, the petitioner filed a motion to reopen, but on December 6, 2010, the director dismissed the motion. On December 29, 2010, the petitioner directly appealed the director's decision to reject the appeal and to dismiss the motion to reopen to the AAO. The matter is now before the AAO for review.

Upon review, the AAO finds that the director's decision to reject the appeal as untimely filed is erroneous, and consequently, the director's decision to dismiss the motion is also erroneous. Based on the evidence submitted, the appeal was not untimely, as the director concluded.¹ Further, the AAO finds that even if the appeal was untimely, the director should have adjudicated the appeal on its merits as motion to reopen/reconsider per 8 C.F.R. § 103.3(a)(2)(v)(B)(2). More importantly, the AAO pursuant to 8 C.F.R. § 103.3(a)(2)(iv) shall have the jurisdiction over a properly filed appeal.² Hence, the director's decisions to reject the appeal and to dismiss the motion will be withdrawn. The AAO will consolidate the petitioner's appeal and motion to reopen and reconsider and review both as one appeal.

The AAO conducts this 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 in this proceeding.³ Upon *de novo* review, the director's finding of

¹ The director concluded that the appeal was untimely filed, because it was received on August 19, 2010, or 20 days after the Notice of Revocation (NOR) was issued on July 30, 2010. The regulation at 8 C.F.R. § 205.2(d) allows the petitioner to file an appeal within 15 days (or 18 days if NOR is mailed) after the NOR is issued. On appeal and on the subsequent motion to reopen, the petitioner produced proof that the appeal was mailed on August 16, 2010 by using U.S. Postal Service (U.S.P.S.) Express Mail one-next-business-day guaranteed delivery service. However, the mail was not delivered until August 18, 2010; and it was not picked up and received by the director until August 19, 2010. Counsel for the petitioner also stated in his appellate brief that the NOR, even though it was dated July 30, 2010, was not mailed by the director until August 2, 2010; thus, the deadline for the appeal should have been extended until August 20, 2010. In addition, counsel claimed that the appeal was timely filed, as the AAO granted his request to extend the deadline to submit the appellate brief until January 15, 2010.

² The regulation at 8 C.F.R. § 103.3(2)(iv) specifically states, "If the reviewing official will not be taking favorable action or decides favorable is not warranted, that official shall promptly forward the appeal and the relating record of proceeding to the AAO in Washington, DC."

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-

fraud involving the beneficiary's qualifications will be withdrawn; nevertheless, the appeal will be dismissed.

The petitioner is an individual who owns a painting business. It seeks to employ the beneficiary permanently in the United States as a painter pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).⁴ 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 June 12, 2003, but that approval was revoked on July 30, 2010. The director determined that the beneficiary did not have the requisite work experience in the job offered by the priority date. The director also found fraud involving the beneficiary's qualifications.

On appeal and throughout these administrative proceedings, counsel for the petitioner maintains that the beneficiary has the requisite work experience in the job offered and qualifies to be classified as a skilled worker. Counsel further claims that the director's finding of fraud involving the beneficiary's qualifications is not supported by the evidence of record.

With respect to the director's decision to revoke the approval of the petition, counsel contends that United States Citizenship and Immigration Services (USCIS) lacks good and sufficient cause as required by section 205 of the Act to revoke the approval of the petition. Specifically, counsel states that the director's Notice of Intent to Revoke (NOIR) did not contain specific adverse information relating to the petition or the petitioner in the instant proceeding, nor did it request the petitioner to present specific evidence.

As a threshold matter, it is important to address whether the director adequately advised the petitioner of the basis for revocation of approval of the petition and whether the director's decision to revoke the approval of the petition was based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155.

Section 205 of the Immigration and Nationality Act (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).

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).

⁴ 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.

This means that the director must provide notice before revoking the approval of any petition. Specifically, 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 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 [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 un rebutted, 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.

Both *Matter of Arias* and *Matter of Estime*, as noted above, held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

Here, the director issued a NOIR on September 3, 2008, indicating that the beneficiary could not have worked for [REDACTED] from March 8, 1994 to April 3, 1997, and thus, could not have the requisite work experience in the job offered by the priority date, because the company was not registered with the Brazilian government until November 18, 1997. The director stated that the letter of employment verification that the petitioner submitted to qualify the beneficiary as a skilled worker contained a CNPJ number, which revealed the information about the company's registration.⁵

⁵ CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The director stated in the NOR that the U.S.

Based on the stated facts above, the AAO finds that while the CNPJ number in and of itself is not determinative of the beneficiary's qualifications for the job offered in this case, the NOIR contains specific derogatory information relating to the current proceeding with respect to the beneficiary's qualifications, and therefore, the director has adequately provided the petitioner with specific derogatory information to revoke the approval of the petition that if unexplained would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

With respect to the beneficiary's qualifications for the job offered, the petitioner must demonstrate that the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by DOL and submitted with the petition as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, the priority date is July 17, 2001, which is the date when the Form ETA 750 was filed and accepted for processing by DOL. The name of the job title or the position for which the petitioner seeks to hire is "painter." The job description listed on the Form ETA 750 part A item 13 states, "Prep, prime, paint, stain, varnish interior/exterior structures." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

We note that the beneficiary listed on the Form ETA 750B the following relevant work experience under item 15 of the Form ETA 750, part B:

Name and address of employer:

Name of Job:

Date started:

Date left:

Kind of business:

Painter.

March 1994.

April 1997.

Painting Company.

Submitted along with the approved Form ETA 750 and the Form I-140 petition was a letter of employment verification dated February 15, 2001 from [REDACTED] who stated that the beneficiary worked at [REDACTED] from March 8, 1994 until April 3, 1997, "exercising the function of a painter."

In response to the NOIR, the petitioner submitted the following evidence to show that the beneficiary possessed the minimum requirements for the position offered:

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. The CNPJ database can be accessed online at <http://www.receita.fazenda.gov.br/> (last accessed June 4, 2013).

- A signed statement dated September 17, 2008 from the beneficiary affirming that he worked as a professional painter at [REDACTED] from March 8, 1994 to April 3, 1997 and further stating that the company was not registered with the Brazilian authorities at the time he worked there; and
- A statement dated September 10, 2008 from [REDACTED] stating that the beneficiary worked at [REDACTED] as a painter from March 8, 1994 to April 3, 1997, when the company was not registered yet with the Brazilian authorities; and that [REDACTED] is currently inactive.

In the NOR, in addition to the CNPJ issue posed earlier as noted above, the director identified two additional inconsistencies in the record pertaining to the beneficiary's claim that he worked as a painter from March 1994 to April 1997. First, the director noted that the beneficiary claimed to have lived in Curitiba, Parana from 1996 to May 1998.⁶ This, according to the director, contradicted the claim that the beneficiary worked at [REDACTED] from March 1994 to April 1997, because [REDACTED] was located in Montes Claros, Minas Gerais, which is over 700 miles away from Curitiba, Parana. Moreover, the director observed that according to the CNPJ printout, [REDACTED] business was in the area of translation and interpretation, not painting as stated by the beneficiary.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. In his appellate brief dated December 27, 2010, counsel indicated that the information provided on the Form G-325 was wrong. Counsel stated that the beneficiary temporarily lived in Curitiba, Parana, from August 1996 to February 1997 before returning to Montes Claros, MG, and his work at [REDACTED]. However, no independent objective evidence was submitted to support counsel's assertions, or to demonstrate that the beneficiary worked at [REDACTED] as a painter from March 1994 to April 1997. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, we note that none of the employment verification letters from [REDACTED] meets the minimum requirements as prescribed by the regulations, in that none includes the title of the author and a specific description of the training received or duties performed by the beneficiary. See 8 C.F.R. §§ 204.5(g)(1) and (1)(3)(ii)(A). Simply stating that the beneficiary worked as a painter does not establish the credibility and reliability of the assertion. Considering all of the above, we agree with the director's finding that the beneficiary did not have the requisite work experience in the job offered as of the priority date.

However, the AAO will withdraw the director's finding of fraud involving the beneficiary's qualifications, because we do not find that the record contains sufficient evidence to support the director's finding of fraud. Nor has the record been adequately developed to support the

⁶ The information above is from the Form G-325 (Biographic Information) that the beneficiary filed in 2003 in conjunction with his Application to Register Permanent Residence or Adjust Status (Form I-485) and the Form I-140 petition.

director's conclusion that the documentation submitted to show the beneficiary's qualifications was fraudulent.⁷

Where the petitioner is not eligible for the classification sought, the director may seek to revoke the approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Accordingly, the AAO finds that the petitioner has failed to establish that the beneficiary possessed the minimum experience requirements for the proffered position.

Beyond the decision of the director, we also find that the petitioner has failed to establish the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 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).

⁷ Willful misrepresentation of a material fact or fraud in these proceedings, if established, may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c). USCIS may also invalidate the labor certification based on fraud or willful misrepresentation. *See* 20 C.F.R. § 656.30(d). The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

Concerning the 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.

As noted above, the priority date here is July 17, 2001. The rate of pay or the proffered wage specified on the ETA 750 is \$16.85 per hour or \$30,667 per year based on a 35 hour work week.⁸ The beneficiary claimed on his Form G-325 that he had been working for the petitioner since 2000.⁹ The record, however, only contains an Internal Revenue Service (IRS) Form W-2 Tax and Wage Statement evidencing that the beneficiary was employed and paid by the petitioner in 2001 and 2004. Based on the evidence submitted, the beneficiary received the following amount in 2001 and 2004 from the petitioner:

<i>Tax Year</i>	<i>Actual wage (AW) (Box 1, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2001	\$11,371	\$30,677	(\$19,306)
2004	\$720	\$30,677	(\$29,957)

Therefore, the petitioner has not established the ability to pay from the priority date and continuing until the beneficiary obtains his lawful permanent residence. 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 be able to demonstrate that it can pay the difference between the proffered wage and the actual wage in 2001 and 2004, which is \$19,306 and \$29,957, respectively, and the full proffered wage of \$30,677 in 2002 and 2003 and from 2005 onwards.

To demonstrate the ability to pay, the petitioner also submitted a letter dated October 11, 2005 from [REDACTED], proprietor, stating that the beneficiary is a full-time painter with [REDACTED] and that his salary is approximately \$1,080 per week. Along with the

⁸ 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).

⁹ The Form G-325 above was signed and dated by the beneficiary on March 18, 2003.

letter, the petitioner submitted a copy of IRS Form 1099-MISC Miscellaneous Income for 2004 and several paystubs issued in September and October 2005 issued by [REDACTED] to the beneficiary.

The AAO cannot consider the wages that the beneficiary received from [REDACTED] in 2004 and 2005. [REDACTED] is not the petitioner in this case. It has no obligation to pay the beneficiary's proffered wage. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The record finally contains a copy of the petitioner's IRS Schedule C (Form 1040), Profit or Loss from Business, for the year 2001. Based on the evidence submitted above, the petitioner is structured as a sole proprietorship. Sole proprietorship is 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. *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 the instant case, we acknowledge that the petitioner recorded \$77,280 in net profit in 2001. However, we cannot conclude that the net profit shown above is sufficient to pay the remainder of the beneficiary's wage in 2001, because we do not have any information about the sole proprietor's family, i.e. how many people he supported, and/or regarding his recurring monthly or yearly expenses, i.e. mortgage, car payments, utilities, food, insurance, clothing, credit card payments, and so forth. Additionally, the record does not contain the petitioner's federal tax returns for the years 2002 onwards.

Without these documents, i.e. tax returns and statement showing the petitioner's recurring monthly or annual household expenses, the AAO cannot determine whether the petitioner has sufficient income to pay the proffered wage of the beneficiary and personal and household expenses during the qualifying period, from the priority date. In summary, we find that the director had good and sufficient cause to reopen the matter and to revoke the approval of the

petition, consistent with section 205 of the Act, 8 U.S.C § 1155, since the petitioner failed to establish that the beneficiary possessed the requisite work experience in the job offered before the priority date. The AAO also determines that the petitioner has failed to establish that it has the continuing ability to pay the proffered wage from the priority date.

Where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). The petition will remain revoked for the above stated reasons, with each considered as an independent and alternate basis for revocation. 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.