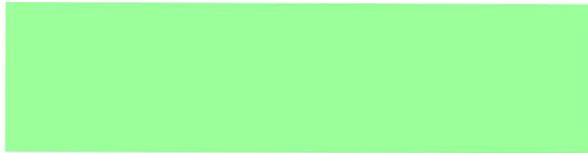




U.S. Citizenship
and Immigration
Services

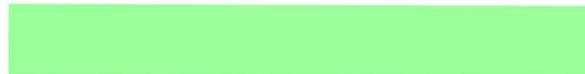
(b)(6)



DATE: **MAR 29 2013** 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 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 May 16, 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 April 20, 2004. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on September 28, 2010 with a finding of fraud. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The director's decision is affirmed. The appeal will be dismissed.

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).

The petitioner is a cleaning company. It seeks to employ the beneficiary permanently in the United States as a crew supervisor pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).² 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 April 20, 2004 by the VSC, but that approval was revoked in September 2010. The director determined that the petitioner failed to demonstrate that the beneficiary had the experience required by the terms of the labor certification as of the priority date. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.³

¹ Current counsel of record, [REDACTED], will be referred to as counsel throughout this decision. Previous counsel, [REDACTED], will be referred to by name. The AAO notes that Mr. [REDACTED] was suspended from the practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015.

² 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.

³ On appeal, counsel argues that USCIS had no grounds upon which to revoke the petition because the labor certification has not been invalidated. Counsel cites 8 C.F.R. § 205.1(a) in support of this position. 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. The AAO agrees that 8 C.F.R. § 205.1 does not apply to the instant case. The director does, however, have revocation

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.⁴

A threshold 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 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 regulation at 8 C.F.R. § 205.2 states:

(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.

authority under 8 C.F.R. § 205.2, which provides that the director “may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in [8 C.F.R. §] 205.1 when the necessity for the revocation comes to the attention of this Service.”

⁴ 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).

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); and *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.

The director advised the petitioner in the two Notices of Intent to Revoke (NOIR) dated March 9, 2009 (2009 NOIR) and July 30, 2010 (2010 NOIR) that the instant case might involve fraud and identified numerous problems including fraud and willful misrepresentation in other I-140 petitions and labor certification applications filed by the petitioner's former attorney of record, [REDACTED]. In the 2009 NOIR, the director noted that the petitioner must demonstrate that the beneficiary had at least two years of employment experience in the job offered prior to the filing of the labor certification application on September 4, 2002. In addition, the director noted that the petitioner must have complied with all of the Department of Labor (DOL) recruitment requirements.

In the 2010 NOIR, the director acknowledged the petitioner's response to the 2009 NOIR, but reiterated the problems with other petitions submitted by Mr. [REDACTED] and noted that the letter submitted to verify the beneficiary's experience at [REDACTED] did not include a title for the author so that it was impossible to determine whether the letter had been written by the previous employer. The director noted a discrepancy between the date of the business's creation as stated in the CNPJ⁵ database and the dates that the beneficiary claimed to have worked for that establishment. The director also indicated that the documents submitted by the beneficiary in support of his religious worker petition stated that he attended classes during the same time that he claimed to be working for [REDACTED]. Specifically, the director stated that [REDACTED] job title was not indicated on the letter and that the CNPJ statement indicated that [REDACTED] was formed in 1994, which was after the beneficiary claimed to have worked at the establishment. The director acknowledged Ms. [REDACTED] statements that [REDACTED] operated informally prior to its registration date, but noted that no independent, objective evidence

⁵ Businesses that are officially registered with the Brazilian government are given a unique CNPJ Cadastro Nacional de Pessoa Juridica (CNPJ) number. The CNPJ is similar to the federal tax identification number or employer identification number in the United States. The U.S. 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 company's registered creation date.

had been submitted to support these assertions. In addition, the director noted that the beneficiary previously filed a Form I-360 to be classified as a religious worker and that the evidence submitted with that application concerning religious education conflicted with the evidence submitted with the current application concerning previous experience. Specifically, the director cited the beneficiary's diploma and transcript for a theology course completed in September 1993 at the [REDACTED] [REDACTED] and a reference letter dated March 15, 1996 from Pastor-President [REDACTED] concerning the beneficiary's services as a teen counselor, Bible school teacher, leader of a sub-congregation, and member of an evangelism team at the [REDACTED] as activities occurring at the same time as his claimed employment from March 1989 to October 1992 with [REDACTED]

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. at 590.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIRs, and that the director's 2010 NOIR gave the petitioner notice of the derogatory information specific to the current proceeding with respect to the beneficiary's qualifications. As noted earlier, the AAO finds that the director's 2010 NOIR would warrant a revocation of the approval of the petition if unexplained and unrebutted by the petitioner and thus, that the director had good and sufficient cause to issue the NOIRs. See, *Matter of Arias*, 19 I&N Dec. at 568; *Matter of Estime*, 19 I&N Dec. at 450.

In response to the director's 2009 NOIR, counsel for the petitioner submitted:

- A letter from [REDACTED] the petitioner's president, verifying the petitioner's continuing employment and the petitioner's recruitment efforts;
- Copies of advertisements placed in the *Boston Herald* on May 27, May 28, May 29, May 30, and May 31, 2002;
- A letter from [REDACTED] dated March 31, 2009 to verify the beneficiary's previous employment with [REDACTED] from March 1, 1989 to October 1, 1992 as a cleaning supervisor. Ms. [REDACTED] also stated that [REDACTED] was not registered with the Brazilian government until January 16, 1994 even though it began operations on January 17, 1994 and continued until July 17, 2007;
- CNPJ information for [REDACTED] stating that the "opening date" was January 17, 1994 and that the registration was terminated on July 17, 2006;

⁶ The director also noted that the beneficiary completed a personal evangelism course with [REDACTED] [REDACTED] on November 23, 1986 and an Interpersonal Relationship course with the [REDACTED] [REDACTED] on January 8, 1987.

- A memorandum from [REDACTED] Administrator for Regional Management for the U.S. Department of Labor titled "Measures for Increasing Efficiency in the Permanent Labor Certification Process;"
- DOL/State Employee Security Agency (SESA) Liaison Meeting notes from September 3, 1997 concerning processing times for labor certifications;
- DOL Liaison report of September 2001 concerning processing times for labor certifications; and
- AILA minutes for a meeting held September 12, 2001 concerning Reduction in Recruitment.

In response to the director's 2010 NOIR, counsel for the petitioner submitted:

- A statement from the beneficiary dated August 18, 2010 indicating that he did not have any independent evidence to verify his employment with [REDACTED] because the company did not use identification badges and he did not bring his work card from Brazil. He also stated that [REDACTED] had since gone out of business and that Ms. [REDACTED], a person he believed to be "high up in the business," wrote the letter to help verify his experience. The beneficiary verified his religious education and involvement, including Bible school and leader of a sub-congregation, but stated that these activities were completed at night or on the weekends and did not interfere with his full-time employment with [REDACTED];
- Photographs of the beneficiary speaking before a group of people;
- A letter co-signed by Senior Pastor [REDACTED] and Church Secretary [REDACTED] of the [REDACTED] dated August 23, 2010 stating that the beneficiary "is the co-pastor of [the] church" and that the beneficiary "serv[es] the church as: a counselor; counseling couples as well as individual member, as a coordinator; he is the head coordinator of the mission department, and as a teacher; he lectures the minister's class;"
- A transcript of an interview conducted with [REDACTED] dated August 24, 2010 stating that [REDACTED] began operations at the beginning of 1988 and that the beneficiary worked at the establishment from January 3, 1989 to January 10, 1992. She states that it was common for businesses to operate without being registered with the government and that the business has now closed and the premises are occupied by an unrelated company. She states that she worked as a secretary for [REDACTED] and had personal knowledge of the beneficiary's employment; and
- An article written by [REDACTED] concerning the Brazilian Economy and usual registration practices with the CNPJ of small businesses.

The director in the Notice of Revocation (NOR) dated September 28, 2010 acknowledged that the petitioner's response to the 2009 NOIR established that the petitioner conducted the required advertising and recruitment for the position, but that the evidence submitted did not establish that the beneficiary had the experience claimed with [REDACTED]. The director analyzed the documents submitted in response to the 2010 NOIR and noted that the transcript submitted did not identify either the person posing the questions to Ms. [REDACTED] or the person who prepared the written copy of that interview. The director noted that it was improbable that Ms. [REDACTED] remembered the exact dates of the beneficiary's employment with the company after so many years

and that neither the interview nor any letters submitted establish that Ms. [REDACTED] oversaw the beneficiary's work or training for the position. Because the interview transcript was not in the form of an affidavit or sworn statement, the director noted that it did not meet the requirements of 8 C.F.R. § 103.2(b)(2)(i) and, therefore, could not be accorded sufficient weight to establish the beneficiary's employment with [REDACTED]. The director thus held that the petitioner failed to establish that the beneficiary had the experience required for the position as of the priority date.

On appeal to the AAO, counsel asserts that the director improperly revoked the petition's approval. The revocation, according to counsel, is not supported by any evidence in the record with respect to the beneficiary's experience in Brazil. Counsel indicates that both of the director's NOIRs contain only vague allegations of fraud in other petitions filed by Mr. [REDACTED]. Specific to this case, counsel states that the director failed to consider evidence that the beneficiary's Brazilian employer did not register with the CNPJ until after the date that the beneficiary claimed to have worked there as proof of the beneficiary's employment and that the beneficiary worked at [REDACTED] full-time while pursuing religious education and activities after working hours. In addition, counsel claims that the director discounted evidence from Ms. [REDACTED] because it was submitted was in conversation form other than a letter. Counsel states that where a notice of intention 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, citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988).

Counsel asserts that the responses submitted to both of the NOIRs consisted of the documents reasonably available, which did not include additional evidence of employment with [REDACTED]; as the employment concluded 17 years prior and the company ceased operations a number of years prior to the NOIR. Moreover, counsel states that because neither of the NOIRs provided a clear explanation of how to resolve the problem with the petition nor requested that the petitioner to produce specific evidence to overcome the grounds of revocation, the director's decision to revoke the approval was not based on good and sufficient cause, as required by section 205 of the Act. The AAO disagrees. As stated above, the AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIRs, and that the director's 2010 NOIR gave the petitioner notice of the derogatory information specific to the current proceeding with respect to the beneficiary's qualifications. As noted earlier, the AAO finds that the director's 2010 NOIR would warrant a revocation of the approval of the petition if unexplained and un rebutted by the petitioner and thus, that the director had good and sufficient cause to issue the NOIRs. See, *Matter of Arias*, 19 I&N Dec. at 568; *Matter of Estime*, 19 I&N Dec. at 450.

Concerning the beneficiary's qualifications for the position, the AAO finds that the record does not support the petitioner's contention that the beneficiary had the requisite work experience in the job offered before the priority date. 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, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on September 4, 2002. The name of the job title or the position for which the petitioner seeks to hire is "crew supervisor." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Under direction of General Partner, assist with the supervision of cleaning crew. Implement daily schedule created by Genral [sic] Partner; assist in training." 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.

On the Form ETA 750, part B, signed by the beneficiary on August 22, 2002, he represented that he worked 40 hours a week at [REDACTED] in Brazil as a cleaning supervisor from March 1989 to October 1992.

Ms. [REDACTED] letters state that the beneficiary worked there as a cleaning supervisor from March 1, 1989 until October 1, 1992. The March 30, 2009 letter from Ms. [REDACTED] indicated that she currently works as an administrative manager at [REDACTED]. The October 26, 2010 letter from Ms. [REDACTED] stated that [REDACTED] began operating in 1988 and has ceased operations. She stated that she worked "not only [as] a secretary, but always did a lot in the business . . ." She stated that her current employer, [REDACTED], is located in the same building with the same telephone and facsimile numbers as [REDACTED]. This letter was not submitted by an employer as required by 8 C.F.R. § 204.5(l)(3)(iii)(A) and was instead written by a co-worker.

The director also cited the beneficiary's religious studies and work as facts casting doubt on the beneficiary's claimed work experience, because Ms. [REDACTED] letter dated April 2, 2009 stated that the beneficiary worked upwards of 50 hours a week at [REDACTED] during the same time that the beneficiary claimed to have been studying towards the Diploma from the [REDACTED] through September 1993. The beneficiary states in his August 2010 statement that he attended classes at night or during weekends while working full time. In conjunction with his Form I-360 Petition for Special Immigrant Religious Worker, the beneficiary submitted a diploma from [REDACTED] dated September 10, 1993 with an accompanying transcript stating that the beneficiary took 32 classes in pursuit of this diploma and that each class "has a[sic] hourly load of 45 hours." This evidence conflicts with the beneficiary's claim to have been working full-time for [REDACTED] during this same time period. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

In the 2010 NOIR, the director specifically requested independent, objective evidence to corroborate Ms. de Moraes's letter because she was not an employer under 8 C.F.R. § 204.5(l)(3)(iii)(A) and to resolve the discrepancy between the beneficiary's claim to have worked full-time for [REDACTED] while also working towards his Diploma from [REDACTED]. In his 2010 statement, the beneficiary stated that he did not have his work card and must have left it behind when he left Brazil but that he did not think that his work with [REDACTED] would have appeared on the work card as it was not registered when he worked for the business. He also stated that he was unable to obtain any other documents from the company as the company had gone out of

business. Regardless of the date that [REDACTED] registered the CNPJ number, the petitioner did not submit evidence identified in 8 C.F.R. § 204.5 to verify the beneficiary's claimed employment with that company.⁷ The petitioner also failed to submit evidence to reconcile the discrepancies in the record by submitting independent, objective evidence to demonstrate that the beneficiary could have pursued his Diploma while working in a full-time position at [REDACTED]. Therefore, the AAO is not persuaded that the beneficiary possessed the minimum two years of experience in the proffered job as of 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). Beyond the decision of the director, 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.

In the instant case, as stated above, the ETA 750 labor certification was accepted for processing on September 4, 2002. The rate of pay or the proffered wage specified on the ETA 750 is \$12.00 per hour or \$21,840.00 per year based on the indicated 35 hour work week.⁸ The record contains a 2002

⁷ Counsel argues on appeal that the director ignored the statements of [REDACTED], a Brazilian attorney, erroneously based on format. On the contrary, Ms. [REDACTED] statement cannot be used as verification of the beneficiary's previous employment because she is not an employer pursuant to 8 C.F.R. § 204.5(l)(3)(iii)(A); the format of her statement is not an issue. Ms. [REDACTED] statement concerns the interplay between small businesses in Brazil and the CNPJ system. As stated above, as no evidence was submitted under 8 C.F.R. § 204.5(l)(3)(iii)(A) to verify the beneficiary's experience, the date that [REDACTED] registered in the CNPJ system is not the issue.

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).

Internal Revenue Service (IRS) Form W-2 stating that the petitioner paid the beneficiary \$12,128.⁹ As this amount is less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which is \$9,712. The petitioner submitted its 2002 Form 1120 reflecting net income of \$2,277 and net current assets of \$47,141. The petitioner did not submit any additional financial documents to demonstrate its ability to pay the proffered wage in 2002 onward.

In addition, we note that according to USCIS records, the petitioner has filed three Form I-140 petitions on behalf of other beneficiaries. The petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). Although the petitioner's net current assets would be sufficient to demonstrate its ability to pay the difference between the actual wage paid and the proffered wage to the beneficiary in 2002, it must demonstrate its ability to pay full proffered wage to each sponsored worker from their respective priority dates onwards. As stated above, the record does not contain any other evidence of the petitioner's ability to pay the proffered wage. Therefore, the AAO finds that the petitioner has failed to establish the ability to pay the proffered wage from 2002 onwards.

The petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The appeal is dismissed and the approval of the petition remains revoked.

⁹ The petitioner also submitted its 2001 Form W-2 for the beneficiary demonstrating that it paid in excess of the proffered wage in that year, but as 2001 predates the priority date, the Form will be considered only generally.