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U.S. Citizenship and Immigration Services

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FILE: WAC 08 043 50080 Office: CALIFORNIA SERVICE CENTER Date: SEP 21 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further action.

The petitioner is a retail jeweler with ten employees that seeks to employ the beneficiary as a market research analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner had failed to establish that it had complied with the terms and conditions of the beneficiary's employment; that it had engaged in "aberrant filing practices"; and that it had committed "misrepresentation of the wages stated on each I-129 petition versus those actually paid."

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner filed the instant petition on November 27, 2007, and stated on the Form I-129 that it had seven employees and a gross annual income of \$2,500,000. In her December 7, 2007 request for additional evidence the director requested, among other items, a copy of the petitioner's 2006 federal income tax return; copies of its Forms 941, Quarterly Wage Reports for all employees for the previous four quarters; and copies of the petitioner's payroll summaries and Forms W-2 and W-3.

The petitioner responded to the director's request on January 15, 2008. With regard to the petitioner's 2006 federal tax return, the petitioner submitted a December 20, 2007 letter from [REDACTED]. In his letter, [REDACTED] stated that the individual responsible for filing the petitioner's 2006 tax return had failed to file it, but that he had not been concerned with the oversight because, since no tax payment would be due, there would be no penalty for a late filing. The petitioner also submitted copies of "Wage & Tax Register Company Totals" prepared by Automatic Data Processing, Inc. (ADP), which were broken down, by quarter, and contained, among other items, the petitioner's gross earnings and taxes withheld.

The director denied the petition on January 24, 2008. As noted previously, the director found that the petitioner had failed to establish that it had complied with the terms and conditions of the beneficiary's employment; that it had engaged in "aberrant filing practices"; and that it had committed "misrepresentation of the wages stated on each I-129 petition versus those actually paid."

The AAO withdraws the director's finding that the petitioner "has already violated the terms and conditions of employment." As the beneficiary had not yet entered into employment with the

petitioner, it could not yet have violated such terms and conditions of the beneficiary's employment. Furthermore, the AAO notes that the director's determination that the petitioner had violated the terms and conditions of its employment with the beneficiary were premised on her findings of two discrepancies in the testimony of the petitioner, which the AAO will discuss in further detail below. Even if the AAO shared the director's concerns regarding these two discrepancies, they would not constitute violations of the terms and conditions of the beneficiary's employment.

The director also stated the following:

Given the petitioner's aberrant filing practices and its misrepresentation of the wages stated on each I-129 petition verses [sic] those actually paid, all evidence provided by the petitioner is considered incredible and insufficient to establish that the petitioner has been, and will be actually employing, the beneficiary in the described position and pursuant to the terms and conditions stated in the I-129 petition.

The director's December 7, 2007 request for additional evidence made no mention of the petitioner's past filing practices, and made no allegation that the petitioner had misrepresented the wages it intended to pay on any of its previous H-1B petitions. The director, therefore, erred in denying the petition on the basis of evidence not contained in the record of proceeding, and without giving the petitioner an opportunity to address the reasons for denial. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, U.S. Citizenship and Immigration Services (USCIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if a decision will be averse to the...petitioner and is based on derogatory information considered by the Service and of which the...petitioner is unaware," and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." The director's December 7, 2007 request for additional evidence did not give the petitioner adequate notice of the director's intention to deny the petition on the basis of the petitioner's "aberrant filing practices" or "misrepresentations of the wages stated on each I-129 petition." Although the petitioner has elected not to respond to this portion of the director's denial on appeal, it must nonetheless be afforded, on technical grounds alone, the opportunity to respond to these allegations.

Finally, the AAO turns to the two discrepancies between the petitioner's testimony on the Form I-129 and the materials submitted in response to her request for additional evidence that the director noted in her decision: (1) discrepancies between the numbers of employees claimed on the Form I-129 and the information submitted in response to the request for additional evidence; and (2) discrepancies between the petitioner's gross annual income as reported on the Form I-129 and the information submitted in response to the director's request for additional evidence.

As noted by the director, although the petitioner stated on the Form I-129 that it had seven employees, the ADP "Wage & Tax Register Company Totals" indicated that the petitioner had, variously, between eleven and eighteen employees. On appeal, the petitioner states that it has

“experienced a high turn-over in employees” since it commenced operations in 2006. With regard to the numbers of employees the petitioner employed at the time the petition was filed on November 27, 2007, the petitioner states the following:

Attached, you will find a payroll register from November 9, 2007 (Schedule 1), which is the payroll register used to determine the number of employees when responding to the H-1B. In it, you will note that ten employees were paid for that period. At the time I completed the [Form I-129], three of those employees, specifically [J-C, J-D-, and H-K-¹] had given resignation notices. Therefore, I reduced the number of employees by three, giving an employee count of seven. The numbers on the I-129 were correct.

The testimony of the petitioner’s chief financial officer with regard to the discrepancy between the number of employees claimed on the Form I-129 and the materials submitted in response to the director’s request for additional evidence supports the petitioner’s explanation of the discrepancy, and the AAO withdraws the director’s finding with regard to that discrepancy.

The second discrepancy noted by the director in her decision pertains to the petitioner’s gross annual income. As noted by the director, although the petitioner did not submit a 2006 federal income tax return, the information contained in the ADP “Wage & Tax Register Company Totals” indicated that the petitioner had grossed far less than the amount claimed on the Form I-129: as noted previously, the petitioner claimed on the Form I-129 to have had a gross annual income of \$2,500,000. However, the director calculated that, based upon the information contained in the aforementioned wage and tax registers, the petitioner’s true gross income was closer to \$809,759.

On appeal, the petitioner states the following:

[O]ur interpretation of the [Form I-129] when responding to the inquiry of gross income was that our response should include our estimated gross income, or revenue, for the 2007 year, which would be our first full year of operations. From the Notice of Decision, it appears that the gross income figure you reported to us [the \$809,759 figure calculated by the director] was derived from a review of the Wage and Tax Register provided at the time of the [filing of] the original petition. However, as ADP files our payroll taxes on our behalf, and has no access to our records pertaining to income, there would be no correlation between anything included in ADP’s Wage and Tax Register for [the petitioner] and estimated revenues.

The preliminary numbers for the year 2007 report that [the petitioner] had sales in the range of \$1,900,000 and \$2,000,000. The primary reason for the shortfall from the estimate provided on the original [Form I-129] is that it is common in the jewelry industry to receive 25% of your total sales in the month of December.

¹ Names withheld to protect individuals’ privacy.

Unfortunately, the sales for December did not meet our projections and as a result, we fell short of the original \$2,500,000 estimate. However, the difference was not a result of malicious intent, but a result of operations not meeting projections.

The AAO finds the petitioner's explanation of the discrepancies highlighted by the director with regard to the gross income reported on the Form I-129 versus those contained in the evidence submitted in response to the director's request for additional evidence reasonable. While the petitioner did complete the Form I-129 incorrectly, the record in this particular case does not indicate that it did so in an attempt to defraud or mislead USCIS.

Accordingly, the AAO withdraws the director's decision regarding the two discrepancies highlighted by the director. As indicated previously, the petition will be remanded to the service center for further action, as the director must provide the petitioner the opportunity to rebut her findings regarding the petitioner's "aberrant filing practices" and its "misrepresentation of the wages stated on each I-129 petition versus those actually paid." On remand, the director shall address two additional issues not raised in her earlier decision: (1) whether the proposed position qualifies for classification as a specialty occupation; and (2) whether the beneficiary qualifies to perform the duties of the proposed position.

The current record of proceeding does not establish that the proposed position qualifies for classification as a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the

minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In its November 20, 2007 letter of support, the petitioner stated that the duties of the proposed position would include the following:

- Developing, planning, executing, and leading all market research and analysis for domestic and international markets;
- Collecting and analyzing data to evaluate existing and potential markets;
- Gathering data on competitors and jewelry development trends;
- Providing marketing reports and analysis; and
- Measuring and assessing customer satisfaction in order to assure customer referrals.

The petitioner stated that, due to the technical nature of the proposed position, it required an individual with a bachelor's degree in business "with some background in marketing," or its equivalent.

The AAO notes that the petitioner's November 20, 2007 letter neither explains nor is accompanied by documentary evidence showing the particular methodologies and analytical tools that the beneficiary will employ or are usually associated with at least a bachelor's degree in a specific specialty. The AAO also finds that the beneficiary's duties are stated so abstractly in this letter that they fail to convey the specific nature of the work that he would actually perform and, therefore, do not indicate the nature and level of education that the work requires. Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In determining whether a proposed position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

Even if the generic statements that comprise the information about the proposed position and its duties were sufficient to align the position with the broad occupational category of Market Research Analysts as discussed in the *Handbook*, this position has not been established as a specialty occupation, as employers of market research analysts do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty. As was noted previously, USCIS interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a

proposed position. The 2008-2009 edition of the *Handbook*, which states the following, indicates that a major or concentration in a specific specialty is not a normal aspect of the baccalaureate threshold for entry into the market-research-analyst occupation:

Training, Other Qualifications, and Advancement

A bachelor's degree is usually sufficient for entry-level market and survey research positions. Higher degrees may be required for some positions, however. Continuing education and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also is important for advancement.

Education and training. A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree may be required, especially for technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take other liberal arts and social science courses, including economics, psychology, English, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

While in college, aspiring market and survey researchers should gain experience gathering and analyzing data, conducting interviews or surveys, and writing reports on their findings. This experience can prove invaluable later in obtaining a fulltime position in the field, because much of the initial work may center on these duties. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

As the *Handbook* indicates that entry into the market-research-analyst occupation may occur with a degree with coursework in the listed subjects but without a specific course of study leading to a specific degree in the field, market research analyst positions do not categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation. This information from the *Handbook* does not by itself preclude a particular market-research-analyst position from qualifying as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). However, it is incumbent on the petitioner to establish that its particular position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. The petitioner has failed to make such a demonstration.

The AAO finds that the evidence of record does not indicate that the particular position proposed here is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO notes that the record lacks evidence sufficiently concrete and informative to demonstrate that the proposed position requires a specialty occupation's level of knowledge in a specific specialty. The record's evidence is not sufficiently specific and concrete to distinguish the proposed position from positions in the market-research-analyst occupational category that do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty.

Nor does the AAO find convincing counsel's citation to the Department of Labor's *Occupational Information Network (O*NET™ Online)*, as *O*NET™ Online* is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as it makes no mention of any particular field of study that a candidate must pursue in order to enter into this field. Again, USCIS interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. As such, the *O*NET™ Online* excerpt submitted by counsel at the time the petitioner was filed is of little evidentiary value to this issue.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations. In determining whether there is such a common degree requirement, factors often considered by USCIS include whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific

specialty. Accordingly, the petitioner's submission does not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for market-research-analyst positions, including degrees not in a specific specialty related to market research analysis. As evident in the earlier discussion about the generalized descriptions of the proposed position and its duties, the record lacks sufficiently detailed information to distinguish the proposed position as unique from or more complex than market research analyst positions that can be performed by persons without a specialty degree or its equivalent.

As the petitioner has not established a prior history of hiring for its proposed position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in the earlier discussion of the limited information about the proposed duties, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with a degree in a specific specialty.

The current record fails to establish that its proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the issue of whether the proposed position qualifies for classification as a specialty occupation was not addressed by the director, she should address the matter on remand.

Nor does the current record of proceeding establish that the beneficiary qualifies to perform the duties of the proposed position. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be

immediately engaged in that specialty in the state of intended employment; or

- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding contains a copy of the beneficiary's bachelor's degree in criminal justice, which was issued by Sam Houston State University in 2004. However, the *Handbook* makes no mention of a degree in criminal justice as one that qualifies individuals to perform the duties of the proposed position.

In a document entitled "Doc proving marketing research is specialty occupation [sic]" that she submitted at the time the petition was filed, counsel stated that the American Evaluation and Translation Service (AETS) has determined that the beneficiary's combination of education and work experience is equivalent to a bachelor's degree in marketing from a regionally accredited college or university in the United States. However, AETS's evaluation was not submitted.²

Accordingly, the current record of proceeding does not establish that the beneficiary qualifies to perform the duties of the proposed position. For this additional reason, the petition may not be approved.

In accordance with the previous discussion, the director's January 24, 2008 decision will be withdrawn, and the matter remanded for further action. The director must afford the petitioner the opportunity to address her concerns regarding the petitioner's alleged "aberrant filing practices" and "misrepresentations of the wages stated on each I-129 petition," as her December 7, 2007 request for additional evidence did not give the petitioner adequate notice of the director's intention to deny the petition on those grounds. As the current record of proceeding also fails to establish that the proposed position qualifies for classification as a specialty occupation or that the beneficiary is qualified to perform the duties of the proposed position, the director may afford the petitioner reasonable time to submit evidence relevant to those criteria as well. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

² Several pages of the evaluation appear to have been submitted by the petitioner. For example, the record includes several documents, on AETS letterhead, which discuss the credentials of AETS's evaluators to perform evaluations. The actual evaluation of the beneficiary's credentials, however, was not submitted.

ORDER: The director's January 24, 2008 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.