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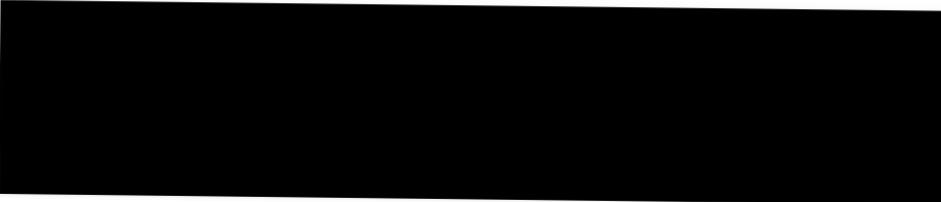
File: [Redacted]
SRC-05-248-51397

Office: TEXAS SERVICE CENTER Date: JUN 08 2007

In re: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner is a chiropractic office, and seeks to employ the beneficiary permanently in the United States as an administrative supervisor. As required by statute, the petition filed was submitted with Form ETA 9089, Application for Permanent Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s December 20, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence, as well as the petitioner’s failure to demonstrate that the beneficiary met the qualifications as set forth in the certified Form ETA 9089.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (“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.

The petitioner must establish that its ETA 9089² job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 9089. The priority date is the date that Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

¹ 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).

² On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 9089 with the relevant state workforce agency on July 15, 2005. The proffered wage as stated on Form ETA 9089 for the position of an administrative supervisor is \$16.76 per hour for an annual salary of \$34,860.80 per year. The labor certification was approved on July 20, 2005, and the petitioner filed the I-140 Petition on the beneficiary's behalf on September 12, 2005. The petitioner represented the following information on the I-140 Petition related to the petitioning entity: established: January 29, 2004; gross annual income: estimated \$100,000; net annual income: not listed; and current number of employees: 5.

On September 21, 2005, the director issued a Request for Evidence ("RFE"). The director requested that the petitioner submit: evidence related to the petitioner's ability to pay the proffered wage, including the petitioner's 2004 federal tax return, and W-2 Forms for the beneficiary if applicable. Additionally, the RFE noted that the experience letter provided for the beneficiary shows that the beneficiary would have gained the experience as an administrative supervisor at the age of sixteen. The RFE requested an explanation of how the beneficiary acquired the experience at that age, as well as to provide W-2 Forms to document the beneficiary's experience with the employer that provided the letter of experience. The petitioner responded to the RFE. Following review, the director determined that the evidence submitted in response to the RFE was insufficient to demonstrate the petitioner's ability to pay the proffered wage, or to demonstrate that the beneficiary met the requirements of the position and denied the petition on December 20, 2005. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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. On Form ETA 9089, signed by the beneficiary on August 23, 2005, the beneficiary did not list that she has been employed with the petitioner.

The petitioner did not submit any W-2 Forms to document any wages that the petitioner paid to the beneficiary. On appeal, the petitioner submitted several recent paychecks to the beneficiary: one check dated January 14, 2006 in the amount of \$746.00; a check dated January 7, 2006 in the amount of \$700; a check dated December 31, 2005 in the amount of \$750.50; and a check dated December 24, 2005 in the amount of \$700.³

³ The checks were issued by _____ of Deerfield, with an address of: _____, Deerfield Beach, FL. We note that the petitioner on the labor certification lists an address of: 9804 South Military Trail, Boynton Beach, Florida. The same address is listed on the I-140 Petition. The petitioner did not provide any official evidence that the petitioner operates _____s, such as incorporation documents, although we note that the bank statements list _____ with an

Form W-2 statements submitted show payments to the beneficiary in the following amounts:

<u>Year</u>	<u>Employer</u>	<u>W-2 Wages</u>
2004		\$38,071.54
2003		\$34,257.41
2002		\$30,709.09
2001		\$13,542.91
2000		\$8,802.05
1999		\$6,994.00

Based on the foregoing, the petitioner cannot establish its ability to pay the beneficiary based on prior wage payment to the beneficiary. The petitioner did not provide evidence that it paid the beneficiary from July 15, 2005 to the present. Further, the petitioner did not document clearly that [REDACTED] is the same entity and operates under the same tax identification number as the petitioner. If [REDACTED] was the same entity as the employer, then the wages paid to the beneficiary would be counted in determining the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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 the Service should have considered income before expenses were paid rather than net income.

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The petitioner is structured as an S corporation.⁴ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1

address of: [REDACTED], Deerfield Beach, FL.

⁴ The petitioner's tax return shows that it incorporated as an S Corporation on January 29, 2004, and lists an address of [REDACTED], Deerfield Beach, Florida 33442.

through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). Line 21 shows the following income:*

<u>Tax year</u>	<u>Net income or (loss)</u>
2005	\$44,387 ⁵

The petitioner's net income would allow for payment of the beneficiary's proffered wage in 2005. Accordingly, the evidence provided on appeal overcomes the deficiencies raised in the director's denial related to the petitioner's ability to pay.

A second issue raised in the director's denial was that the beneficiary did not meet the qualifications as set forth in the certified ETA 9089. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d).

On the Form ETA 9089, the "job offer" states that the position requires two years of experience in the job offered, as an administrative supervisor, with job duties including: "Administer and control payments, budgets, contracts, equipment and supplies; monitor inventory, coordinate work schedules and patient care." The petitioner listed no educational requirements, and listed no other special requirements for the position in Section 14.

On the Form ETA 9089 signed by the beneficiary on August 23, 2005, the beneficiary listed her prior experience as: [REDACTED] Deerfield, Florida 33442, Administrative Supervisor, December 16, 1998 to November 21, 2001, 40 hours per week.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers

⁵ The petitioner submitted its 2005 federal tax return on appeal, which based on the date of filing the I-140 would not have been available at that time. The petitioner had requested an extension of time to file its 2004 federal tax return, which was also unavailable at the time of filing the I-140.

giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As evidence to document the beneficiary's qualifications, the petitioner initially submitted the following letter:

1. Letter from [REDACTED], Deerfield Beach, FL, dated July 11, 2005;
Dates of employment: December 16, 1998 to November 21, 2001;
Title: administrative supervisor;
Job Duties: "in charge of controlling payments, creating budget, overseeing contracts, monitoring equipment, supplies, and inventory, as well as staffing scheduling and needs and patient care."

The director questioned that the beneficiary would have begun the position above with the petitioner when she was sixteen years of age, and requested that the petitioner provide an explanation regarding how the beneficiary could handle the job duties at that age. Counsel provided in the petitioner's RFE response that, as provided in the employment letter, the beneficiary maintained a "very professional demeanor with patients and staff" despite her age. Counsel provided that although her title was administrative supervisor, that she:

does not supervise staff nor manage the office. Her responsibilities are not overly difficult. She receives co-payments, orders supplies within a working budget developed with the owners, and assures the patients sign the necessary contracts and paperwork. Finally she assures that the necessary therapists are scheduled to treat the patients. Her duties are not complex. The position does not require a degree to receive co-payments, schedule staff or have patients sign off on intake paperwork. The petitioner and Flamingo Chiropractic obviously feel that the beneficiary is mature and professional beyond her years.

We note that the letter counsel references provides that the beneficiary had an "excellent rapport" with patients, and others, however, the letter provided does not describe the nature of the beneficiary's responsibilities, but is counsel's summary. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director's decision noted that the beneficiary would have been between sixteen and nineteen years old at the time of the verified job duties. Based on the W-2 wages submitted showing earnings of 2000: \$6,602 and 2001: \$13,542, the director concluded that the 2000 wages likely reflected part-time employment and would only document one year of experience and not the required two years.

On appeal, the petitioner submitted an additional letter, and references the W-2 statements submitted as evidence of the beneficiary's continued employment:

- 2. Letter from [REDACTED], Deerfield Beach, FL, dated January 19, 2006;
 Dates of employment: December 16, 1998 to present;
 Title: administrative supervisor;
 Job Duties: "in charge of controlling payments, creating budget, overseeing contracts, monitoring equipment, supplies, and inventory, as well as staffing scheduling and needs and patient care."

The letter that [REDACTED] signed on July 11, 2005 clearly states that the beneficiary's employment ended on November 21, 2001. The beneficiary listed on Form ETA 9089 (signed on August 23, 2005) that her employment with Flamingo Chiropractic ended on November 21, 2001. It is unclear why, both [REDACTED] and the beneficiary would list that her employment ended on November 21, 2001, if the beneficiary remained employed with Flamingo Chiropractic. If she were employed in a separate position with Flamingo Chiropractic after that date, such position might also had been listed on the Form ETA 9089, or indicated in the letter of experience. In the absence of such explanation, it appears curious on appeal that the letter now provides that the beneficiary remained working for Flamingo Chiropractic when the prior letter states to the contrary. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Further, we note the following addresses, and entities listed on various documents filed with the petition. It is likely that Flamingo Chiropractic is related, or shares the same principal as the petitioner, or that Flamingo Chiropractic reincorporated as an S Corporation and became the petitioner.

<u>Document</u>	<u>name/address</u>	<u>Dates</u>
I-140	[REDACTED] Identification Number (FEIN): [REDACTED]	August 19, 2005
ETA 9089	[REDACTED]	July 15, 2005
Bank statements	[REDACTED]	November 1, 2004 - July 31, 2005
W-2 Statements	[REDACTED] FEIN: [REDACTED]	1999-2004

Paycheck

January 7, and 14, 2006
December 24, and 31, 2005

2005 tax return

signed and dated January 17, 2006

FEIN: [REDACTED]
(listing shareholders as [REDACTED] and [REDACTED])

2004 tax extension request

undated

Letters of Experience

dated July 11, 2005, January 19, 2006

Identified as "my chiropractic center" by [REDACTED]

We find that there are conflicts in the evidence regarding the beneficiary's experience, specifically her dates of prior employment, which raises questions regarding both the validity of the job offer, and regarding the credibility of the beneficiary. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Therefore, the petitioner cannot demonstrate that the beneficiary meets the experience requirements of the certified labor certification.

Based on the foregoing, the petitioner has demonstrated its ability to pay the beneficiary the required wage from the priority date onward. However, the conflicting evidence in the record demonstrates a significant credibility issue and the petition will remain denied related to the beneficiary's qualifications. 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 appeal is dismissed.