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Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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File:

[REDACTED]  
SRC-07-010-51679

Office: TEXAS SERVICE CENTER

Date:

JAN 09 2009

In re:

Petitioner:  
Beneficiary:

[REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

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

The petitioner is a retail store, and seeks to employ the beneficiary permanently in the United States as a manager of retail sales workers (“Manager”). As required by statute, the petition filed was submitted with Form ETA 9089,<sup>1</sup> Application for Permanent Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s January 4, 2007 decision, the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<sup>2</sup>

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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2).

The petitioner must establish that its ETA 9089 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 the respective Department of Labor national processing center. *See* 8 C.F.R. § 204.5(d). Therefore, the

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<sup>1</sup> 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 9089. 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).

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petitioner 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:

*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 case at hand, the petitioner filed Form ETA 9089 with DOL on June 29, 2006. The proffered wage as stated on Form ETA 9089 is \$16.14 per hour, which is equivalent to an annual salary of \$33,571.20 per year based on a 40 hour work week. The labor certification was approved on July 5, 2006,<sup>3</sup> and the petitioner filed the I-140 Petition on the beneficiary's behalf on October 16, 2006. On the Form I-140, the petitioner listed the following information: date established: 2004; gross annual income: \$204,710; net annual income: \$22,000; current number of employees: fifteen.

On November 3, 2006, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit evidence of its ability to pay from the priority date onward, including: for 2005, evidence of the beneficiary's wages paid, if the petitioner employed the beneficiary; for 2006, Forms 941 to show if the petitioner paid wages to the beneficiary, as well as an audited financial statement, if available for the part year.

After considering the petitioner's response to the RFE, the director determined that the petitioner failed to establish its ability to pay the proffered wage from the time of the priority date onward. The petitioner appealed and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship & Immigration Services ("USCIS") 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. In the case at hand, the beneficiary did not list on Form ETA 9089, signed on October 5, 2006, that he was employed with the petitioner. The

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<sup>3</sup> The petitioner did not include the DOL coversheet, which lists the processing acceptance date, as well as the approval date. However, we have taken this information from Form ETA 9089, page 9.

petitioner did not claim that it employed the beneficiary, or provide any evidence that it paid the beneficiary.

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, USCIS 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 USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record demonstrates that the petitioner is a C corporation. For a C corporation, USCIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Year</u>	<u>Net income or (loss)</u>
2005	\$21,700

As the priority date in this matter is June 2006, the petitioner's 2005 tax return would not evidence the petitioner's ability to pay the proffered wage in 2006. Considering the petitioner's 2005 net income generally, the net income reflected would not allow for payment of the beneficiary's proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Year</u>	<u>Net current assets</u>
2005	\$16,898

Similarly, as we only have the petitioner's 2005 tax return, this would not exhibit the petitioner's ability to pay from the priority date onward. Further, considering the evidence generally, the petitioner's tax return does not exhibit sufficient net current assets through which it could pay the proffered wage.

The petitioner additionally submitted a statement signed by its accountant for the calendar year 2006 entitled, "Trading Account," which contained a "profit & loss account." The statement, however, is unaudited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's statement is unaudited. The statement is, therefore, not persuasive or reliable evidence, and is insufficient to demonstrate the ability to pay the proffered wage.

The petitioner also provided quarterly wage statements, Forms 941, for the first three quarters of 2006, and for all four quarters of 2005. While the Forms 941 do exhibit wage payments, payments made to other workers generally cannot be considered to demonstrate the petitioner's ability to pay the proffered wage. The Forms 941 do not show that the petitioner has employed or paid the beneficiary. The Forms 941 list that the petitioner has employed either two or three workers during this time period, including the petitioner's president, and an individual with the same surname as the president [REDACTED] and therefore likely related to the president. The Forms 941 also show that [REDACTED] earns the same amount as the president. The Forms 941 also exhibit that the petitioner employs a third individual, and based the wages paid, the third employee may only be employed on a part-time basis.<sup>4</sup>

On appeal, counsel asserts that the petitioner will replace [REDACTED] with the beneficiary, and, therefore, the wages paid to that individual will be used to pay the beneficiary.

In support, the petitioner's president submits an affidavit. He asserts that the petitioner's business can pay the proffered wage and cites to the 2005 federal tax return, which exhibits gross receipts of \$477,157. He notes that the accountant's statement shows a 2006 increase to \$490,697 in gross receipts.

As noted above, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Additionally, the 2006 accountant's statement is unaudited.

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<sup>4</sup> The petitioner lists on Form I-140 that it employs 15 individuals. Forms 941 do not evidence this. 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).

More specifically, the president's affidavit seeks to address [REDACTED]'s job duties, as the director in her decision negated the theory of accepting the beneficiary as [REDACTED] replacement since the petitioner failed to identify [REDACTED]'s job duties. The president states:

I had previously explained that another reason supporting the fact that [the petitioner] is able to pay [the beneficiary's] salary was the planned departure of [REDACTED], whose salary has been \$26,000 per annum. I had previously indicated that salary would be applied to [the beneficiary's] salary upon [REDACTED] departure. The Service's decision expressed concern that the duties of [REDACTED] were unexplained, and that further there would be a shortfall in the differences between the salary for that position and that of the beneficiary . . . of approximately \$7,500.

The duties of [REDACTED] and those for the beneficiary . . . overlap substantially. The difference is that [the beneficiary's] duties will encompass more than [sic] we required of [REDACTED]. We are requiring that the beneficiary . . . take on additional duties. Those new duties for [the beneficiary's] position include purchasing, accounting and managing inventory all of which were not part of the position of [REDACTED].

He continues:

Although there will be an increase in wages of approximately \$7,500, we will be able to pay for that increase on the basis of our increased sales as evidenced by the attached statement from our accountant . . . Please notice that there was a net profit that amply could cover the increase salary costs.

To establish that a beneficiary will replace a specific worker, the petitioner would need to identify the individual worker, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Additionally, the petitioner must show that the position of the other worker involves the same duties as those set forth in the Form ETA 9089. If the other employee performed other kinds of work, then the beneficiary could not replace him or her.

Here, the petitioner has failed to identify [REDACTED] exact position title, and exact job duties. The petitioner's president offers only a vague statement that their duties "overlap substantially." While the petitioner indicates that the beneficiary's duties will encompass additional duties, and those factors account for the difference between the two positions, the petitioner does not account for what percentage of time those additional duties will take the beneficiary to complete. A more specific definition of duties and percent time allocation would be required in order to determine whether the duties are in fact "substantially similar."

Additionally, the petitioner asserts that [REDACTED] will “switch to work for [a] subsidiary company.” The petitioner does not identify that company and whether that entity would be considered under a separate federal tax identification number, or if the wages would be drawn from the same petitioning entity, covered by the tax return that the petitioner submitted, and, thus, not result in a replacement of wages.

As an additional factor to consider, Form 941 exhibit that the petitioner paid its president \$26,000 in 2006. The petitioner would have us believe that the beneficiary, as a store manager would receive greater wages than the petitioning entity’s president. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Regarding the \$7,500 shortfall in wage between the replacement worker and the beneficiary’s proffered wage, the petitioner cites to the accountant’s 2006 statement. As noted above, the accountant’s statement is unaudited, and, therefore, not reliable evidence.

Counsel asserts that the, “petitioner has demonstrated that as a matter of business judgment and necessity the position proffered with the additional duties over and above those performed by Jyoti R. Lillaney [sic]. Thus the proffered position is in accord with the decision of *Matter of Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972).”

Counsel’s citation to *Matter of Treasure Craft* does not seem applicable to the instant matter. Counsel does not elaborate on how *Matter of Treasure Craft* supports his position. *Matter of Treasure Craft* considered a petitioner’s proposal to train beneficiaries in various phases of pottery manufacturing for eighteen months. The Regional Commission determined that the District Director properly denied the petition as the petitioner failed to establish the need for the beneficiaries in question to be trained in this country. The case reiterated the standard in *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966) that the burden remains with the petitioner to establish eligibility for the benefit sought. The petitioner in this matter has not satisfied that burden.

Counsel next asserts that in, “determining the scope of ‘business necessity’ the appropriate focus is in the job requirements themselves.” In support, he cites to a Board of Alien Labor Certification Appeals (BALCA) case, *Matter of Information Industries, Inc.*, 88-INA-82 (BALCA 1989).

While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Further, the case cited is entirely inapplicable to the present matter. *Matter of Information Industries, Inc.* considered a denied labor certification in the context of “business necessity.”

Business necessity is a DOL consideration regarding whether the position's job requirements are unduly restrictive. *Matter of Information Industries, Inc.* states that:

In formulating a standard, it must be kept in mind that the regulation we are considering, §656.21(b)(2)(i), concerns the business necessity of abnormal job requirements. It does not deal with job duties.

Therefore, it would be inconsistent for a 'business necessity' test being applied to § 656.21(b)(2)(i) to set standards both for job requirements and job duties. Accordingly, the test we adopt sets standards only in regard to the reasonableness of the job requirements. Questions regarding the reasonableness of the job duties listed on the application must be addressed under other sections of the regulations.

Job requirements relate to the minimum education, and experience listed on Form ETA 750, which the employer sets for the position. What counsel refers to is an addition of "job duties" for the beneficiary, and not a change in job requirements. Therefore, while BALCA cases are not precedent, counsel's argument is inapplicable as "business necessity" is a DOL determination related to the fairness of job requirements, and is unrelated to a petitioner adding or changing job duties in order to establish ability to pay for a replacement worker.

Counsel additionally cites to *Matter of Alwya Computer Co.*, 88-INA-218 (BALCA 1989), and asserts that, "the exercise of business judgment and the resulting business necessity are well respected guideposts in determining the parameters of a particular position."

As noted above, BALCA cases are not precedent. 8 C.F.R. § 103.9(a). Further, the BALCA case cited considered whether the labor certification applicant's combination of job duties for two separate position titles, and foreign language requirement were unduly restrictive. Such a determination is within the purview of DOL, and inapplicable in the instant matter.

Based on the foregoing, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage from the priority date onward.

Further, although not raised in the director's denial, the petitioner has failed to show that the beneficiary meets the requirements of the certified ETA 9089. 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. USCIS 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 9089 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).

On the Form ETA 9089A, the "job offer" description for a Manager states the job duties as:

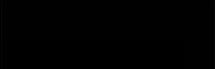
Directly supervise sales workers in the grocery store. Duties include purchasing, budgeting, accounting, managing inventory, and personnel work, in addition to supervisory duties.

Further, the job offered listed that the position required:

Education: none.  
Major Field Study: none.

Experience: 6 months in the job offered, Manager (of Retail Sales Workers).

Other special requirements: none.

On the Form ETA 9089, Section K, the beneficiary listed his relevant experience as:  Beirut, Lebanon, from May 16, 2002 to December 19, 1997, position: Manager. The beneficiary did not list any other prior experience. The beneficiary signed Form ETA 9089 on October 5, 2006, certifying the accuracy of the experience listed.<sup>5</sup>

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which provides:

(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

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<sup>5</sup> Specifically, Form ETA 9089 states above the signature block:

I declare under penalty of perjury that Sections J and K are true and correct. I understand that to knowingly furnish false information in preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both under 18 U.S.C. §§ 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. §§ 1546 and 1621.

employers 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.

To document the beneficiary's experience, the petitioner submitted the following letter:

Letter from [REDACTED], Beirut, Lebanon, dated October 4, 2006;  
Position title: not specifically listed, refers to the beneficiary and states he, "worked for us in our business;"  
Dates of employment: May 16, 1992 to December 19, 1997;  
Description of duties: "His duties were that of Purchasing, Budgeting, Accounting and Managing Inventory."

However, in contrast to the experience above, we note that the record of proceeding contains a prior Form I-140 that a different petitioner filed on the beneficiary's behalf for the position of a cook. In that filing, on Form ETA 750, the beneficiary specifically listed that he was employed as a cook in Beirut, Lebanon from May 1988 to May 1998 for an entity other than [REDACTED]. In support of that filing, the petitioner submitted a letter on the beneficiary's behalf that confirmed the beneficiary had worked as "Chief in Kitchen" for more than ten years. Accordingly, the beneficiary's listed experience on Form 9089, and letter to verify that experience conflict with the prior documentation in the record and his experience listed on the prior Form ETA 750.

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 591-592.

Therefore, we would not conclude that the petitioner has sufficiently demonstrated that the beneficiary has the experience required for the position offered.

Additionally, the petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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. *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 petitioner seeks to employ the beneficiary as a manager. Form I-140 lists that the petitioner employs 15 people. Forms 941 show that the petitioner employs the company President, the individual [REDACTED] who the petitioner asserts the beneficiary will replace, and one other worker, who appears to be part-time.

As the job duties specifically list, “directly supervise sales workers in grocery store,” we would not conclude that the job offer was realistic from the time of filing. There appears to be only one other part-time worker. The petitioner has not identified that it plans to hire other workers. The beneficiary will likely not supervise the petitioner’s president. Therefore, as the petitioner does not employ other workers for the beneficiary to supervise, the petitioner’s job offer is not realistic and the petition should have been denied on this basis as well.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 9089. Accordingly, the petition will be denied 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 appeal is dismissed.