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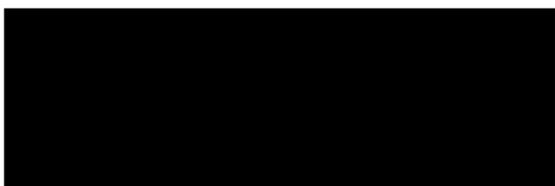
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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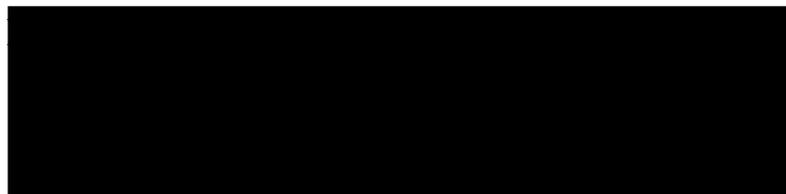
Petitioner:

Beneficiary:



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:



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The petition is now before the AAO on a motion to reopen or reconsider. The motion will be granted, and the petition will be denied again on the merits.

The petitioner is a supermarket. It seeks to employ the beneficiary permanently in the United States as a first-line supervisor/manager of retail store workers. As required by statute, the petition is accompanied by a labor certification application, ETA Form 9089, approved by the United States Department of Labor (DOL).

The Director denied the petition on the grounds that the petitioner failed to establish (1) its ability to pay the proffered wage and (2) that the beneficiary is qualified to perform the duties of the proffered position. The AAO dismissed the appeal on the same grounds.

In its motion to reopen and reconsider the petitioner asserts that prior counsel failed to provide adequate representation, and submits evidence that prior counsel has been disciplined by the Attorney General's office in New York State. The petitioner submits additional evidence in support of its claims that it has the ability to pay the proffered wage and that the beneficiary is qualified for the proffered position.

Based on the entire record, the AAO hereby grants the petitioner's motion and will review the petition on the merits. The AAO conducts its review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Petitioner's Ability to Pay the Proffered Wage

The regulation at 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application (ETA Form 9089) was accepted by the DOL on February 25, 2008. As indicated in Part G on the form, the "offered wage" for the proffered position is \$17.47 per hour. (The visa petition, Form I-140, states that the weekly wages are \$611.45 – which indicates that the position is a 35-hour/week job and would pay \$31,795.40 per year.)

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, 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). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines 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 this case, there is no evidence that the petitioner has employed or paid the beneficiary. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (February 25, 2008) up to the present by means of its actual compensation to the beneficiary over the years.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010). 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. *See 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). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner’s net income. The petitioner’s federal income tax returns for the years 2008 and 2009 show the following figures for net income (Form 1120, line 30).¹

2008:	\$ 59,267
2009:	\$313,261

For each of these years the petitioner’s net income was well above the annualized proffered wage of \$31,795.40, with a much greater spread in 2009 than in 2008. Based on the net income figures in the record, the AAO determines that the petitioner has established its ability to pay the proffered wage from the priority date (February 25, 2008) up to the present. Since this ground for denial has been overcome by the petitioner, the AAO will withdraw this part of its previous decision.

Beneficiary’s Qualifications for the Job

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 qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing

¹ The petitioner’s federal income tax return for 2010 has not been requested by USCIS, and is not in the record.

unskilled labor, not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). As previously discussed, the labor certification application in this case was accepted on February 25, 2008. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the 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'r 1986). See also, *Madany 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).

The requirements of the proffered position are found in ETA Form 9089 Part H. This section of the labor certification application – “Job Opportunity Information” – describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089 (at H.11) the job duties of the proffered position – First-Line Supervisor/Manager of Retail Sales Workers – are described as follows:

Directly supervise sales workers in a retail establishment or department. Duties may include management functions, such as purchasing, budgeting, accounting, and personnel work, in addition to supervisory duties.

Regarding the minimum level of education and experience required for the proffered position, the petitioner specified the following requirements in Part H of the labor certification:

- | | | | |
|------|---|--------------------------------|-------------|
| 4. | <u>Education:</u> | <u>Minimum level required:</u> | “None” |
| 6. | <u>Is experience in the job offered required?</u> | | “Yes” |
| 6-A. | <u>If Yes, number of months of experience required?</u> | | “12 months” |
| 10. | <u>Is experience in an alternate occupation acceptable?</u> | | “No” |

As set forth in the labor certification, the proffered position requires one year of experience in the “job offered” – *i.e.* First-Line Supervisor/Manager of Retail Sales Workers.

In Part K of the labor certification – “Alien Work Experience” – the beneficiary listed one previous job as a “manager” at the [REDACTED] from October 5, 2004 to November 14, 2006. According to the beneficiary, who signed the ETA Form 9089 and declared under penalty of perjury that the contents of Part K were true and correct, the duties of her supermarket job were identical to those of the proffered position in this petition.

As evidence of the beneficiary’s work experience, the petitioner submitted the following document with the immigrant visa petition (Form I-140) filed in August 2008:

- A letter from [REDACTED] at [REDACTED], dated October 19, 2007, who stated that the applicant was an employee at the store from the fall of 2004 to the fall of 2006, where “[s]he served as a cashier and was later promoted to head cashier where she assumed more managerial duties.”

Following the Director’s denial of the petition in February 2009 – in which the Director found that the beneficiary’s job as described in the foregoing letter did not qualify as experience in the “job offered” on the labor certification – the petitioner submitted the following document with its appeal (Form I-290B) in March 2009:

- An affidavit by the same [REDACTED] at the above address in Brooklyn, dated February 25, 2009, stating that the applicant was employed from “February 2002 until November 2004” as a “First-Line Supervisor/Manager of Retail Sales Worker[s] . . . directly supervis[ing] sales workers [with] duties includ[ing] management functions, such as purchasing, budgeting, accounting, and personnel work, in addition to supervisory duties.”

In its decision dismissing the appeal on April 7, 2011, the AAO noted that the job duties described in the second [REDACTED] letter tracked the job description in the labor certification, were inconsistent with the contents of the first [REDACTED] letter, and could not have been submitted to the DOL during the labor certification process that was completed, with the certification of the ETA Form 9089, in April 2008. The AAO concluded that the second letter from [REDACTED] in February 2009 was not credible, and therefore failed to establish that the beneficiary qualified for the proffered position under the terms of the labor certification.

The petitioner’s motion to reopen and reconsider, filed on May 9, 2011, was accompanied by additional evidence of the beneficiary’s work experience, including the following documents:

- An affidavit by [REDACTED] (his third statement), dated May 6, 2011, declaring that the beneficiary was employed at his store, the [REDACTED] from December 2003 to November 2006, that she was initially hired as a cashier, and that she moved into a managerial position by October 2004, “supervising the sales workers and managing

general managerial functions such as purchasing, budgeting, accounting, and personnel work.”

- An affidavit by [REDACTED] dated May 6, 2011, attesting that she worked with the beneficiary at the [REDACTED] from 2003 to 2005, that the beneficiary initially worked as a cashier, and that she was later promoted to “sales manager.”
- Two virtually identical affidavits dated May 6, 2011 by [REDACTED] manager and accountant, respectively, of [REDACTED] [REDACTED], attesting that the beneficiary was employed from 2003 to November 2006, initially as a cashier and later assumed “managerial functions such as supervising, purchasing, accounting, etc.”
- An affidavit by [REDACTED] dated May 6, 2011, stating that he and the beneficiary have been friends since they met at a community college in January 2005, and that he was aware that the beneficiary worked in a managerial position at the [REDACTED] in Brooklyn, NY.

As previously noted, the ETA Form 9089 in this case is certified by the DOL. Accordingly, it is useful to discuss the DOL’s role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS [Immigration and Naturalization Service, forerunner organization to USCIS]. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority

to make the two determinations listed in section 212(a)(14).² *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

² Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS to determine if the petition and the alien beneficiary are eligible for the classification sought.

The documentation of record concerning the beneficiary's work experience at the [REDACTED] is completely inconsistent. The three letters/affidavits from the store owner tell three different stories about the beneficiary's job. The first states that she was hired as a cashier and promoted to head cashier; the second states that she was a first-line supervisor/manager of retail sales workers; and the third states that she was hired as a cashier and moved into a managerial position. Moreover, the letters tell three different stories about the dates of her employment. The first states that she was employed from the fall of 2004 to the fall of 2006; the second states that she was employed from February 2002 to November 2004; and the third states that she was employed from December 2003 to November 2006. [REDACTED] asserts in his third statement, the affidavit in May 2011, that the first two letters were prepared by another legal organization and that he did not read them over carefully before signing them. This claim is not credible. His first two letters were very short, and even if they were not prepared by [REDACTED] their contents were easily verifiable by him. In fact, the second letter was a sworn affidavit.³

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without

³ While the petitioner claims that its former counsel was incompetent in this proceeding, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In this case, the petitioner has completely failed to resolve the glaring inconsistencies in the letters/affidavits from [REDACTED]. Accordingly, these documents have no probative value as evidence of the beneficiary's work experience.

Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence, including the other affidavits submitted with the brief in support of the motion to reopen and reconsider in May 2011. *See id.* Though the affidavits are roughly consistent with each other regarding the nature and general time frame of the beneficiary's employment at the [REDACTED] in Brooklyn, they do not provide the exact time frame she served in a managerial function, as opposed to a cashier, and are vague about the details of her managerial job duties. The regulations at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A) specify that letters from current or former employers must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. The affidavits from the individuals claiming to have been the beneficiary's colleagues at the [REDACTED] do not meet these requirements with respect to a specific description of the duties she performed. Nor do they provide any basis to conclude that the beneficiary served at least one year in her alleged position as a manager at the [REDACTED], as required by the terms of the labor certification to qualify for the proffered position with the petitioner.

Based on the foregoing analysis, the AAO concludes that the petitioner has failed to establish that the beneficiary had the requisite one year of experience in the "job offered" to qualify for the proffered position under the terms of the ETA Form 9089. Accordingly, the petition cannot be approved.

On this ground the AAO affirms its previous decision to dismiss the appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The AAO withdraws the finding in its previous decision, dated April 7, 2011, that the petitioner has not established its ability to pay the proffered wage. The AAO affirms the finding in its previous decision of April 7, 2011, that the petitioner has failed to establish the beneficiary's qualification for the proffered position in accordance with the labor certification. On this latter ground, therefore, the AAO affirms its dismissal of the appeal.