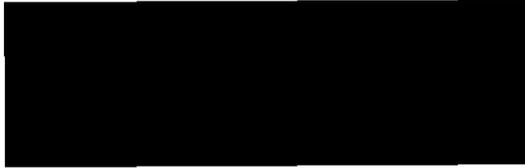




U.S. Citizenship
and Immigration
Services

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BE

Date: JUN 01 2012 Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a painting company. It seeks to permanently employ the beneficiary in the United States as a painter supervisor, SOC/O*Net job code number 47-1011.01 (first-line supervisors and manager/supervisors – construction trades workers). As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that that the petitioner failed to submit a valid ETA Form 9089 (the petitioner, counsel, and the alien beneficiary failed to sign the ETA Form 9089). The director also denied the petition for lack of initial evidence.

At the outset, the AAO notes that the director did not err in dismissing the appeal without requesting further evidence. The regulation at 8 C.F.R. § 103.2(b)(8)(i) clearly states that a petition shall be denied “[i]f there is evidence of ineligibility in the record.” The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. In addition, the director may, pursuant to 8 C.F.R. § 103.2(b)(8)(ii), (without issuing a Request for Evidence) deny the petition for lack of initial evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence.

In the present case, when the director received the petition, the Form ETA 9089 labor certification was not signed. Additionally, the petitioner did not submit any supporting documentation showing that the petitioner has the ability to pay or that the beneficiary qualifies for the position offered. Accordingly, the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding.

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.

As set forth in the director’s denial, the issues in this case are whether the labor certification application is valid, whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the beneficiary was qualified as of the priority date.

On appeal, former counsel for the petitioner¹ cites a Board of Alien Labor Certification Appeals (BALCA) case² and contends that the failure to sign the labor certification is one that could be

¹ The AAO notes that the petitioner initially hired [REDACTED] P.A. to file the preference visa petition, before it hired [REDACTED] P.A. to file an appeal with the AAO. [REDACTED] P.A. will be referred to as former counsel; [REDACTED] P.A. will be referred to as current counsel in this proceeding.

corrected and does not render the application incomplete. In essence, former counsel argues that the lack of signature in Section N of the ETA Form 9089 is a *de minimis* error and not material to the substance of the application. To correct the error, former counsel submitted a copy of the previously filed ETA Form 9089, this time with signatures of the petitioner, the beneficiary, and the preparer in Section N of the ETA Form 9089.³

Current counsel also urges the AAO to find that the petitioner has established the ability to pay and the beneficiary's qualification for the job offered. Current counsel further argues that former counsel's representation in this matter is ineffective.⁴

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵

At the outset, it is noted that this petition was not eligible for approval at filing because it was not accompanied by a valid labor certification. The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process, in pertinent part, provides:

(a) Filing applications.

- (1) . . . Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien,

² The BALCA case is *In the Matter of: Yasmeena Corporation d/b/a Palace of Asia*, BALCA Case No.: 2008-PER-00073.

³ The AAO notes that Mr. [REDACTED] of Alien Labor Certification Consultant was the preparer who helped the petitioner file the ETA Form 9089.

⁴ Although the petitioner claims that its previous counsel was incompetent, in this matter, 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.

⁵ 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). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

However, we agree with current counsel that the failure to sign the labor certification is one that could be cured and does not render the application incomplete. The record now contains a labor certification that has been signed by the beneficiary, the petitioner, and the preparer. The AAO withdraws this portion of the director's decision.

The director also found that the petitioner has not established that it has the ability to pay as of the priority date, and that the beneficiary was not qualified to perform the services of the position as of the priority date.

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 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 ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, 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).

The priority date in this case is December 27, 2005. The proffered wage stated on the ETA Form 9089 is \$15.38 per hour or \$31,990.40 per year. The AAO also notes that the position offered in this case requires all job applicants to have a minimum of two years of work experience in the job offered.

To show that the petitioner has the continuing ability to pay \$15.38 per hour or \$31,990.40 per year from December 27, 2005 until the beneficiary obtains lawful permanent residence, the petitioner submits copies of the following evidence:

- Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2005, 2006, and 2008;
- Income Statements for the years 2007 and 2008;
- Balance sheets for 2009; and
- The beneficiary's Form W-2 for 2007;

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1989 and to currently employ 45 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on an unknown date, the beneficiary claims to have worked for the petitioner from August 20, 2001 to January 7, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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. 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first 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 instant case, the petitioner has established that it paid the beneficiary \$51,608.49 in 2007, in excess of the proffered wage. Thus, the petitioner must establish its ability to pay the beneficiary in 2005, 2006, 2008 and subsequently until such time that the beneficiary obtains permanent residence.

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, without consideration of depreciation or other expenses. *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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage 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 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).

The petitioner's tax returns demonstrate its net income for 2005 - 2008, as shown in the table below.

- In 2005, the Form 1120S stated net income⁶ of \$81,052.
- In 2006, the Form 1120S stated net income of \$708,289.
- The petitioner did not submit a Form 1120S for 2007.
- In 2008, the Form 1120S stated net income of \$212,687.

For the years 2005, 2006, and 2008 the petitioner had sufficient net income to pay the proffered wage. As the petitioner has shown the ability to pay the beneficiary the proffered wage from the priority date through the date the record closed before the director, the AAO will withdraw the director's decision that the petitioner did not establish the ability to pay the proffered wage.⁷

The petition may not be approved however, as the petitioner has not established that the beneficiary met all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating 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. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) and line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, 2008 at <http://www.irs.gov/pub/irs-prior/i1120s--2008.pdf> (last accessed May 24, 2012) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had adjustments shown on its Schedule K for 2005, 2006 and 2008, the petitioner's net income is found on Schedule K of its tax returns for those years.

⁷ As noted below, the petition may not be approved. In any further filings, the petitioner must establish that it has the ability to pay the beneficiary in 2009, 2010, and 2011, with acceptable forms of evidence as defined in 8 C.F.R. §204.5(g)(2) such as tax returns, audited financial statements or annual reports.

employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

[9089]

- H.4. Education: high school.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months (two years).
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on his experience as a painting supervisor in Bogota, Colombia from February 7, 1994 until June 27, 1997. The beneficiary also listed his experience with the petitioner.⁸ The beneficiary signed the

⁸ Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary’s experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position. Specifically, the petitioner indicates that questions J.19 and J.20, which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, “Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?,” the petitioner answered “not applicable.” The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a painter supervisor, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he/she was performing the same job duties more than 50 percent of the time. According to DOL regulations at 20 C.F.R. § 656.17(i), therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and

labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or 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.

The record contains an experience letter from [REDACTED] Administrative Assistant on [REDACTED] letterhead stating that the company employed the beneficiary as a painting supervisor from February 1994 through June 1997. However, the letter does not describe the duties in detail or state if the job was full-time, and thus does not meet the regulatory requirement to establish the beneficiary's qualifications as of the priority date.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A) of the Act.

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 appeal is dismissed.

the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.