

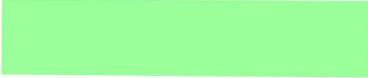


U.S. Citizenship
and Immigration
Services

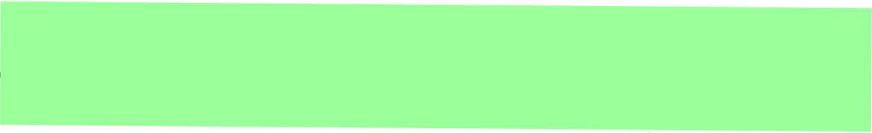
(b)(6)



DATE: **APR 03 2014** OFFICE: NEBRASKA SERVICE CENTER



IN RE: Petitioner:
Beneficiary



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied, and the labor certification invalidated, by the Director, Nebraska Service Center (Director). The Director's decision is now on appeal before the Chief, Administrative Appeals Office (AAO). The invalidation of the labor certification will be rescinded, and the decision denying the petition withdrawn. The petition will be remanded to the Director for a new decision.

The petitioner is a provider of healthcare services. It seeks to permanently employ the beneficiary in the United States as an accountant pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to "[q]ualified immigrants who hold baccalaureate degrees and are members of the professions."

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on August 16, 2010. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which was filed with the Department of Labor (DOL) on February 8, 2010, and certified by the DOL on May 25, 2010.

In a decision dated September 15, 2011, the Director found that the petitioner misrepresented the beneficiary's employment history on the ETA Form 9089 – specifically, by omitting information that the beneficiary had been working for the petitioner since October 4, 2007, in what appeared to be a substantially comparable position to the job offer at issue in this proceeding. The Director found this omission to be a willful misrepresentation of a material fact, and invalidated the labor certification in accordance with his regulatory authority under 20 C.F.R. § 656.30(d). Absent a valid labor certification, as required under 8 C.F.R. § 204.5(a)(2), the Director concluded that the immigrant petition must be denied.

The petitioner filed a timely appeal and supporting documentation, asserting that no misrepresentation was intended on the ETA Form 9089, that the invalidation of the labor certification should be rescinded, and that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On the issue of misrepresentation, counsel asserted that the petitioner did not disclose on the ETA Form 9089 the fact that it had employed the beneficiary in a substantially comparable position since October 4, 2007 because it was "inadvertent and not material." The ETA Form 9089 requires a bachelor's degree in accountancy, or a foreign educational equivalent, and two years of experience in the job offered to qualify for the proffered position of accountant. The petitioner must demonstrate that the beneficiary fulfilled the requirements of the labor certification as of the priority date, which is the date the labor certification application was received for processing by the DOL.¹ In this case, the priority date is February 8, 2010, and the ETA Form 9089

¹ *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

states that the beneficiary met the education and experience requirements well before then. Specifically, it states in Parts J and K that the beneficiary received a bachelor's degree in accountancy from [REDACTED] on October 10, 1998, and had experience as an accountant at three different jobs, totaling three years and nine months of work, between October 2000 and July 2007 – before the beneficiary's employment with the petitioner began. Counsel acknowledged that the instructions to Part K of the ETA Form 9089 begin with "[I]ist all jobs the alien has held during the past three years" and that the failure to list the beneficiary's employment with the petitioner in Part K – which counsel termed an "inadvertent error" – did not comply with the instructions. However, because this employment with the petitioner occurred after the qualifying employment claimed by the beneficiary with three other employers, counsel contends that the omission was not a material fact that would have impacted the DOL's decision regarding certification of the ETA Form 9089. Moreover, as pointed out by counsel on appeal, the petitioner did not conceal its employment of the beneficiary since it acknowledged on the ETA Form 9089 (Part J, Line 23) that it was currently (in February 2010) employing the beneficiary. Nor did the petitioner claim that the beneficiary's work since October 2007 constituted qualifying employment since the ETA Form 9089 specifically indicates (Part J, line 21) that the beneficiary did not gain any of her qualifying experience while working for the employer in a substantially comparable position.

On November 26, 2012 the AAO issued a notice to the petitioner advising that the proceedings would be held in abeyance while the AAO referred the case to the DOL for its review of the labor certification to determine whether the employer misrepresented any material fact and whether certification was justified. Upon consultation with the DOL, the AAO concludes that the petitioner did not willfully misrepresent a material fact on its ETA Form 9089 that would warrant invalidation of the labor certification. While the failure to list the beneficiary's experience with the petitioner constitutes an omission, the petitioner did check "yes" to the question at J.23 of whether the beneficiary was currently employed by the petitioner. Therefore, the Director's invalidation of the labor certification will be rescinded. The denial of the petition on the ground that it is not accompanied by a valid labor certification will be withdrawn.

The petition will be remanded to the Director for further adjudication. In particular, the Director must determine whether the evidence of record establishes the petitioner's ability to pay the proffered wage and the beneficiary's qualifying employment.

On December 1, 2010, the Director issued a Request for Evidence (RFE) advising the petitioner to submit evidence of the beneficiary's qualifying experience as an accountant. The petitioner responded with a letter from its president, dated December 7, 2010, stating that the beneficiary had been employed by the petitioner as an accountant since October 4, 2007. This letter did not satisfy the experience requirement of the labor certification since it did not come from any of the beneficiary's prior employers, with whom she claimed to have gained her qualifying experience, but rather from her current employer, from whom she specifically indicated on the labor certification that no qualifying experience was gained. The letter from the petitioner was the basis for the Director's invalidation of the labor certification and denial of the petition.

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.² Specifically, the petitioner indicates at questions J.19 and J.20, which ask about

² 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....
(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

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 "no." 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 comparable³ and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. In this case, the beneficiary's position with the petitioner is an accountant, and the job duties, as indicated in the petitioner's letter of December 7, 2010 (though not on the ETA Form 9089) are essentially the same as the duties of the position offered. Therefore, the experience gained with the petitioner has been in the position offered and is substantially comparable to the job opportunity requested since she has been performing the same job duties more than 50 percent of the time. According to DOL regulations, 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 I-140 petition do not permit

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

³ A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

...
(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner has been in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

In its initial submission on appeal the petitioner submitted a two-page "certification" from one of the three businesses the beneficiary claims to have worked for as an accountant before her current employment with the petitioner began. No letters were submitted from the other two businesses that allegedly employed the beneficiary. The Director must weigh the credibility and sufficiency of this evidence, in accordance with the requirements of 8 C.F.R. § 204.5(g)(1), to determine whether the beneficiary has the requisite two years of qualifying experience, as specified in the labor certification. Letters from former employers must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

On September 12, 2012, prior to issuing its abeyance notice, the AAO issued an RFE requesting additional evidence of the petitioner's ability to pay the proffered wage from the priority date (February 8, 2010) up to the present.

The regulation at 8 C.F.R. § 204.5(g)(2) states as follows:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

For the accountant position at issue in this proceeding, the proffered wage, as stated in Box G of the ETA Form 9089, is \$22.00 per hour. That amounts to \$45,760.00 per year (based on a work year of 2,080 hours).

The only evidence submitted with the Form I-140 in August 2010 of the petitioner's ability to pay the proffered wage was its federal income tax return (Form 1065) for the year 2008, which is of limited evidentiary value because it preceded the priority date (February 8, 2010). Therefore, the AAO requested the petitioner to submit copies of its federal income tax returns for the years

2010 and 2011, as well as copies of the Form W-2 (or Form 1099-MISC) it issued to the beneficiary for each of the years 2010 and 2011.

The AAO also noted, after a review of U.S. Citizenship and Immigration Services (USCIS) records, that the petitioner had filed many other employment-based petitions for alien workers over the years, some for permanent employees (Form I-140) and some for temporary workers (Form I-129). The AAO indicated that the petitioner must demonstrate its ability to pay the proffered wage of all the other beneficiaries of pending Form I-140 petitions from the priority date of the instant petition until the dates the other beneficiaries obtained permanent residence. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). Furthermore, the AAO indicated that the petitioner must pay each beneficiary of a Form I-129 petition the prevailing wage in accordance with DOL regulations and the labor condition application certified with each petition. *See* 20 C.F.R. § 655.715.

Accordingly, the petitioner was requested to advise the AAO as to the status of all other I-140 and I-129 petitions it had pending or approved from the priority date of the instant petition up to the present – including the offered wage, the priority date of each I-140 beneficiary, if and when each beneficiary (both I-140s and I-129s) began working for the petitioner, if and when these employees ceased working for the petitioner, and the current immigration status of each I-140 beneficiary (*i.e.*, whether or not he or she obtained legal permanent residence in the United States and the date legal residence was established). For any of these beneficiaries who was already employed by the petitioner, the AAO requested copies of the Forms W-2 or 1099-MISC issued to them in previous years and their last three pay statements in 2012. The petitioner must demonstrate that it has been able to pay all of its sponsored workers from the priority date of the instant petition – February 8, 2010 – onward.

In response to the RFE the petitioner submitted a letter from counsel and additional documentation including a statement from the petitioner's owner and secretary, copies of the petitioner's federal income tax returns (Form 1120S) for 2010 and 2011, copies of the Form W-2, Wage and Tax Statement, issued to the beneficiary for 2010 and 2011, a partial list of other beneficiaries for whom employment-based petitions (Form I-129 and Form I-140) have been filed, as well as Forms W-2 for 2011 and recent pay stubs from 2012 issued to each of those beneficiaries.

Counsel offers the letter from the [REDACTED], the petitioner's co-owner and secretary, dated October 8, 2010, as evidence of the petitioner's ability to pay the proffered wage. In that letter [REDACTED] states that "I would like to confirm that our company has over 100 employees and we have sufficient financial ability to pay the I-140 wage of [the beneficiary] of \$45,760." This letter does conform with a substantive requirement of 8 C.F.R. § 204.5(g)(2) because it is not "from a financial officer of the organization." Moreover, [REDACTED] assertion that the petitioner had over 100 employees (as of December 2010) conflicts with the information provided earlier that year on the petitioner's ETA Form 9089, which stated that the petitioner had 70 employees as of February 2010, and on the petitioner's Form I-140, which stated that the

petitioner had 65 employees in the summer of 2010. [REDACTED] provided no corroborating evidence that the petitioner's employee roll increased from 65 to over 100 in the short time period of July-August 2010 to October 2010. Going on record without supporting documentation is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

As stated above, the petitioner must establish that its job offer to the beneficiary is realistic. 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. at 144-145, and 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner employed and paid the beneficiary during the period in question. 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, the record shows that the beneficiary was employed by the petitioner in 2010 and 2011 and her W-2 forms for those years show that her total compensation in those years was \$38,117.92 in 2010 and \$40,972.21 in 2011. These amounts were both below the proffered wage of \$45,760.00 per year – by \$7,642.08 in 2010 and \$4,787.79 in 2011.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS examines 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) *aff'd*, No. 10-1517 (6th Cir. File 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. *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).

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 2010 and 2011 (Form 1120S) show the following figures for net income: \$338,027 (2010) and \$460,138 (2011).⁴ While these figures are

⁴ 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 there are relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K for the years 2010 and 2011. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

both well above the proffered wage of the instant beneficiary, the petitioner must establish its ability to pay the proffered wages of all of its sponsored workers, as previously discussed.

As another alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets as reflected on its federal income tax return. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's federal income tax return for 2010 has no entries for current assets or current liabilities. Since there are categories of current assets and current liabilities listed on the 2011 Schedule L for the beginning of that tax year (yielding net current assets of \$216,033), it is unclear why the 2010 Schedule L is blank in the "end of the tax year" column(s). It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.* For 2011, the federal income tax return shows end-of-year net current assets of \$620,901 – well above the proffered wage of the instant beneficiary. Once again, while this latter figure is well above the proffered wage of the instant beneficiary, the petitioner must establish its ability to pay the proffered wages of all of its sponsored workers.

If the instant beneficiary were the only one at issue, the petitioner's ability to pay the proffered wage would easily be established based on its net income and/or net current assets in 2010 and 2011. However, USCIS records show that the petitioner filed numerous Form I-140 petitions for other beneficiaries in the years 2007-2012. The information provided by the petitioner about its other Form I-140 filings – which number around two dozen – is incomplete. While the dates the beneficiaries began working for the petitioner are indicated, the dates that several of the beneficiaries ceased working for the petitioner are not. While the amount of compensation paid to each beneficiary in 2011 and 2012 is provided, in only two cases have the proffered wages figures been provided. Thus, it is impossible to determine whether the proffered wages have been paid in full to most of the beneficiaries over the years, as well as the shortfall, both individually and collectively, between the proffered wage(s) and actual compensation paid over

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the years. Considering there are approximately two dozen other beneficiaries in question, both the total wages to be paid and the shortfall in wages actually paid could be substantial. Without further evidence the petitioner's ability to pay the beneficiary's proffered wage cannot be determined.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*. Moreover, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petition will be remanded to the Director for further adjudication on the merits. The Director may request any additional evidence considered pertinent. The petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

ORDER: The invalidation of the labor certification based on misrepresentation of a material fact is rescinded. The denial of the petition by the Director on September 15, 2011 is withdrawn. The petition is remanded to the Director for further action in accordance with the foregoing discussion and the entry of a new decision.