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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 27 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

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 $585. 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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese medicine education and clinic and seeks to employ the beneficiary permanently in the United States as a clinical instructor – traditional Chinese medicine pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence and asserts that the submitted documentation clearly establishes the petitioner's good faith and its bona fides in affirming its intention to pay the prevailing wage.

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

The 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 Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Simply showing the petitioner's intention to pay the proffered wage is not sufficient.

Here, the Form ETA 750 was accepted on March 24, 2005. The proffered wage as stated on the Form ETA 750 is $51,630 per year. On the Form ETA 750B, signed by the beneficiary on March 9, 2005, she claimed to have worked for the petitioner in the proffered position since January 2004. On the petition, the petitioner claimed to be established in1988, to have 39 employees.

The AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *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.[1]

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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 submitted the beneficiary's W-2 forms for 2005 through 2008, which show that the beneficiary was paid [redacted] However, the AAO notes that the beneficiary's W-2 forms for these years clearly indicate that the beneficiary worked for and was paid by [redacted] an entity other than the petitioner in this case with a different federal employer identification number. Wages paid by another entity cannot be used in determining the petitioner's ability to pay the proffered wage. Therefore, the petitioner failed to establish its ability to pay the proffered wage for these relevant years through examination of wages already paid to the beneficiary. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the full proffered wage as of the priority date and continue to the present.

The evidence indicates that the petitioner in the instant case is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than [redacted] where the beneficiary's proposed salary was [redacted] (approximately thirty percent of the petitioner's gross income).

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

Therefore, for a sole proprietorship, USCIS considers net income to be the figure shown on line for adjusted gross income of the sole proprietor's Form 1040 U.S. Individual Income Tax Return. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2005. The 2005 Form 1040 tax return stated adjusted gross income[2] of [redacted] While this figure might be sufficient to pay the instant beneficiary the proffered wage of [redacted] in 2005, the AAO cannot determine whether the sole proprietor's adjusted gross income was sufficient to pay the proffered wage as well as support his family of two because the petitioner did not submit a statement of his family's living expenses for 2005 through 2008 despite the director's request for evidence (RFE) issued on February 4, 2009. The petitioner failed to establish its ability to pay the instant beneficiary the proffered wage for 2005 because it failed to submit a statement of the sole proprietor's family's living expenses.

Furthermore, the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide statements of the sole proprietor's family's living expenses for the four years from the year of the priority date. The statements of living expenses would have demonstrated the balance from the adjusted gross income to be available to pay the proffered wage and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. 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).

On appeal, counsel submits the petitioner's audited financial statements for 2004 and 2005 as evidence to establish the petitioner's ability to pay the proffered wage in 2005. Audited financial statements are among the three types of evidence to establish the petitioner's ability to pay the proffered wage, enumerated in 8 C.F.R. § 204.5(g)(2). However, in the instant case, the petitioner is a sole proprietorship and therefore, USCIS will consider the sole proprietor's adjusted gross income to determine whether that figure is sufficient to pay the proffered wage as well as to cover the family's living expenses. The record already contains the sole proprietor's Form 1040 U.S. Individual Income Tax Return for 2005. The audited financial statements do not provide additional income to the sole proprietor's adjusted gross income reported on the tax form. In fact, the audited financial statements contain inconsistent information with the sole proprietor's tax return. While Form 1040 Line 12, Business income, indicates that the sole proprietor's income from the petitioner were [redacted] in 2005, the audited financial statements state that the petitioner had a net income of [redacted] The record does not contain any evidence or explanation for the inconsistency. Therefore, without statements of the sole proprietor's family's living expenses, the audited financial statements cannot establish the petitioner's ability to pay the proffered wage for 2005.

The record does not contain the sole proprietor's tax returns for 2006 through 2008. The record before the director closed on March 4, 2009 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the sole proprietor's federal tax returns for 2006 and 2007 should have been available. However, the petitioner did not submit the sole proprietor's 2006 and 2007 tax

[2] The line for adjusted gross income on Form 1040 is Line 37 for 2005.

returns, nor did counsel explain why the tax returns were not submitted. The instant appeal was filed on May 18, 2009. As of that date the sole proprietor's federal tax return for 2008 requested in the director's RFE should have been available. However, the petitioner did not submit the sole proprietor's 2009 tax return, nor did counsel explain why the tax return was not submitted on appeal. 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). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish its ability to pay the proffered wage for 2006 through 2008 because it failed to submit the sole proprietor's tax returns and statements of living expenses for these relevant years. In addition, 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).

Therefore, the petitioner did not establish its ability to pay the proffered wage as well as the sole proprietor's household living expenses for 2005 through 2008 with the sole proprietor's adjusted gross income.

USCIS will consider the sole proprietor's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documentary evidence showing that the sole proprietor had extra available funds to pay the proffered wage and personal expenses.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

USCIS records show that the petitioner filed eight I-140 immigrant petitions (including the instant petition) and 21 I-129 nonimmigrant petitions. Of the eight I-140 immigrant petitions, the petitioner was obligated to pay three proffered wages in 2005, three in 2006 and two in 2007 as well as H-1B employees in addition to the instant beneficiary.[3] The record does not contain evidence showing that

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[3]

the petitioner paid the three proffered wages in 2005 and 2006, and two in 2007. Assuming the petitioner offered the proffered wages to those three additional beneficiaries at the same level of the instant beneficiary's, the petitioner would need at least in each of 2005 and 2006 and in 2007. The sole proprietor's adjusted gross income in 2005 would not be sufficient to pay all proffered wages as well as cover his family's living expenses.

As counsel asserts on appeal, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not submit statements for the sole proprietor's family's living expenses despite the director specifically requested in his RFE, and therefore, the AAO cannot determine whether the sole proprietor's adjusted gross income were sufficient to pay the proffered wage as well as to cover his family's living expenses in 2005. The petitioner failed to submit the sole proprietor's tax returns and living expenses statements for 2006 through 2008, and thus, it failed to establish its ability to pay the proffered wage for these three years. The petitioner failed to establish its ability to pay a single proffered wage for any of the four relevant years in this matter. The petitioner failed to establish its ability to pay all proffered wages in 2005 through 2008. Given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Thus, assessing the totality of circumstances in this individual

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approved on July 25, 2007. The beneficiary was adjusted to lawful permanent resident status on September 9, 2007.

case, it is concluded that the petitioner has not proven its financial strength and viability and that it has the ability to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary and all other beneficiaries the proffered wages and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2005 through 2008. Counsel's assertions cannot overcome the ground of the director's denial. The director's decision must be affirmed.

Beyond the director's decision, the AAO has identified additional grounds of ineligibility. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* 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 employer. *See 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 alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Form Eta 750A, Item 14 requires a master's degree in traditional Chinese medicine or acupuncture and two years of experience in the job offered, i.e., instructor- traditional Chinese Medicine in this matter.

The evidence submitted in the record for the beneficiary's educational qualifications includes a copy of the beneficiary's graduate diploma in Chinese, its English translation and notarial certificate for the translation, English translations of transcripts and Master's Degree certificate and their notarial certificates. The translation of the transcripts and Master's Degree certificate did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

> *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The regulation requires any documents in foreign language be accompanied by properly certified English translations. However, the regulation cannot be interpreted as that the regulation allows to submit English translation only as evidence to USCIS. The original language documents must be submitted as primary evidence with properly certified English translations. Therefore, the AAO cannot accept the English translations of the transcripts and master's degree certificate as primary evidence to establish that the beneficiary possessed a U.S. master's degree in traditional Chinese medicine or acupuncture or a foreign degree equivalent to a U.S. master's degree in the required field. While the graduate diploma indicates that the beneficiary completed three years of postgraduate study in internal medicine of traditional [redacted] it cannot be used as evidence for the beneficiary's master's degree itself. As discussed above, the instant petition was filed for classification to members of the professions holding advanced degrees. The regulation at 8 C.F.R. § 204.5(k)(2) specifically requires an advanced degree or a baccalaureate degree followed by at least five years of progressive experience in the specialty for this classification. The underlying labor certification also specifically requires a master's **degree** (emphasis added) instead of three years of postgraduate study for the proffered position. Therefore, without direct evidence of the beneficiary's master's degree in traditional Chinese medicine, the petitioner failed to establish that the beneficiary meets the educational requirements set forth on the Form ETA 750 for the proffered position and further failed to establish the requirements of the second preference classification set forth by the regulations. Therefore, the petition cannot be approved pursuant to section 203(b)(2) of the Act as members of the professions holding advanced degrees.

In addition, the proffered position also requires two years of experience in the job offered. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains a letter submitted as evidence that the beneficiary possessed two years of experience in the job offered in this case, that is instructor – traditional Chinese medicine, prior to the priority date. This letter is dated October 1, 2006 and signed by [redacted] This letter is on the university's letterhead but without the address and contacting information of the writer as required by the regulation. The letter states in pertinent part that:

> This letter is to certify that [the beneficiary] used to work as an instructor in [redacted] December, 1999 to December, 2003. She taught classes of Chinese Medicine and English to the undergraduate students, and also worked in the hospital as a Chinese medicine physician and clinical instructor. Together with another teacher, she wrote a textbook of [redacted] as the chief author. [The beneficiary] was one of the best teachers in our university, who can teach [redacted]

While this letter certifies the beneficiary's experience from December 1999 to December 2003, the beneficiary states on the Form ETA 750B that she worked for the university from January 2000 to December 2003, one month difference. Prof. Sun's letter does not confirm the beneficiary's full-time employment, but the beneficiary indicates on the Form ETA 750B that she worked 20 hours per week. Therefore, the 47 months of part-time employment from January 2000 to December 2003 cannot meet the two years (24 months) of full-time experience requirements. Further, according to the beneficiary's statements on the Form ETA 750B, she declared and signed on March 9, 2005 under penalty of perjury the foregoing is true and correct, she was a full-time student at [redacted] pursuing her bachelor's degree during the period from September 1995 to July 2000 and pursuing her master's degree from September 2000 to July 2003. 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). The inconsistent information between the experience letter and the beneficiary's statements on the Form ETA 750B raises question how the beneficiary managed both full-time study and a part-time job from December 1999 to July 2003. The record does not contain any explanation how the beneficiary as an undergraduate student taught other undergraduate students at a college during the period from December 1999 to July 2000. If she did not work as an instructor of traditional Chinese medicine for any portion of the period from December 1999 to December 2003, her experience cannot be considered as qualifying experience for the proffered position in this matter. 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. *Id.* Therefore, without further proved by independent objective evidence such as the university's personnel records, course category, teaching schedules, and the beneficiary's paystubs from the university for teaching, the AAO cannot accept this letter as primary evidence to establish the beneficiary's qualifying experience and cannot consider that the beneficiary meets the experience requirements for the proffered position.

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.