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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: **DEC 29 2008**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

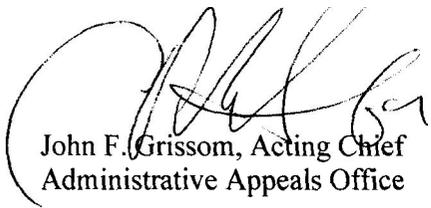
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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


John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is a health spa. It seeks to employ the beneficiary permanently in the United States as an acupuncturist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that as the petitioner only required six months of experience on the labor certification, the beneficiary cannot qualify as a skilled worker. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case has been discussed in these proceedings previously and 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 director determined that as the petitioner only required six months of experience on the Form ETA 750, and a skilled worker petition requires at least two years of experience, therefore, the beneficiary could not be found qualified under this category. The AAO notes that the petitioner in its cover letter submitted with the initial petition described the position as a professional position, and has also described the position as a skilled worker. The instant ETA Form 750 filed by the petitioner requires no college degree, and less than two years of experience. As such, the ETA Form 750 petition cannot qualify for approval under either the professional or the skilled worker category. The AAO will comment on the educational and training of both classifications below.

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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evident of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation

The regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(l)(2) also states that relevant post-secondary education may be considered as training for the purposes of the skilled worker provision.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on February 25, 2003.¹

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of acupuncturist. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School
 - High School
 - College 0 (Zero)
 - College Degree Required None
 - Major Field of Study (Blank)

The applicant must also have six months of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this

¹ The AAO notes that the coversheet of the ETA Form 750 indicates the date of receipt is February 25, 2001; however, this appears to be incorrect. The ETA Form 750, Part A indicates the date of receipt as February 25, 2003.

decision. Item 15 of Form ETA 750A states the following additional special requirements: "New York State Acupuncture License; and fluency in Korean language required." As the petitioner did not require two years of work experience, the petition did not meet the regulations for a skilled worker petition.

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

On appeal, counsel submits a brief and additional evidence. The additional evidence includes the following:

A copy of an interoffice memorandum dated January 11, 2006 and written by [REDACTED], Acting Director, Field Operations, U.S. Citizenship and Immigration Services (USCIS);³

A copy of a memorandum from the USCIS Ombudsman to the Director, USCIS;⁴ and

A copy of an interoffice memorandum written by [REDACTED], Former USCIS Associate Director, Operations, dated February 16, 2005.⁵

With the initial petition, the petitioner submitted a printout of the education requirements for licensure as an acupuncturist, as set forth on the New York State Education Department website as

² 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).

³ Memorandum from [REDACTED] Acting Associate Director, Domestic Operations, *Alternative Definition of "American [F]irm or[C]orporation" for [P]urposes of section 316(b) of the Immigration and National Act, 8 U[.]S[.]C[.] 1427(b), and the [S]tandard of [P]roof [A]pplicable in [M]ost [A]dministrative [I]mmigration[P]roceedings.*, HQ 70/33.1 AD06-12, January 11, 2006.

⁴ Memorandum from [REDACTED], CIS Ombudsman, *Recommendation to USCIS that the Administrative Appeals Office make available to the public through publication of a regulation or otherwise the appellate standard of review, the process under which cases are deemed precedent decision, the criteria under which cases are selected for oral argument and the statistics on decision making by the Administrative Appeals Office (sic)*, December 6, 2005.

⁵ Memorandum from [REDACTED], Associate Director For Operations, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2, February 16, 2005.

of September 13, 2006. The AAO notes that the website⁶ stated the following with regard to licensure as an acupuncturist in the state of New York:

Preprofessional College/University Education

Satisfactory completion of at least 60 semester hours at an accredited college or university, including nine semester hours in the biosciences. Biosciences are defined as biological sciences and do not include chemistry or physics. Coursework completed to satisfy your professional education requirement cannot be used to also satisfy the biosciences requirement.

Professional Acupuncture Education

Satisfactory completion of an approved professional acupuncture program registered by the New York State Education department as licensure qualifying or accredited by the Accreditation Commission or Acupuncture and Oriental Medicine (ACAOM) or another accrediting agency accepted by the Department as a reliable authority, or the equivalent.

To be considered equivalent, a program must consist of a minimum of 4,050 hours of classroom instruction, supervised clinical experience, and out-of-classroom or out-of-clinic study assignments. Each hour of classroom instruction must required two hours of out-of-classroom study assignments and each hour of supervised clinical experience must require one-half hour of clinic study assignments. As part of the 4,050 hours, the program must include:

- [A]t least 200 classroom instructional hours in the biosciences including anatomy, physiology and pathology;
- [A]t least 600 classroom instructional hours in acupuncture including acupuncture principles; acupuncture channel and point theory; acupuncture physiology; acupuncture pathology; acupuncture clinical examination and diagnosis; acupuncture techniques; acupuncture treatment principles; and sterilization and precautions, and
- [A]t least 650 hours of supervised clinical acupuncture experience in general health problems to include acupuncture diagnosis; therapeutic treatment planning; acupuncture needling technique; moxibustion; electroacupuncture; pre and post-treatment instruction; contraindications and precautions; treatment of emergencies; when to refer to appropriate health professionals; and acupuncture hygiene.

The petitioner also submitted the following evidence with its initial petition:

⁶ See <http://www.op.nysed.gov/acupunlic.htm> (accessed as of December 1, 2008).

A copy of the beneficiary's a Certificate of Graduation from Kyungpook National University dated May 13, 1999, signed by [REDACTED], President, Kyungpook National University. This document states the beneficiary received the degree of Doctor of Veterinary Medicine;

A copy of the beneficiary's coursework undertaken at the Kyungpook National University, College of Agriculture, Department of Veterinary Medicine undertaken from March 2, 1984 to February 26, 1988. This two-page document indicates that the beneficiary received total 162 credits for his studies. The transcript did not list any courses taken in acupuncture, although it listed courses in biology, microbiology within the context of veterinary medicine;

A copy of a diploma received by the beneficiary from the University of Nebraska that indicates he received a Master of Science in Veterinary Science in December 19, 1992. The petitioner also submitted the beneficiary's transcripts for studies undertaken during six semesters of study between 1989 and 1992;

A copy of the beneficiary's diploma dated July 2, 1999 that states the beneficiary received the degree of bachelor of medicine in traditional Chinese Medicine from Tianjin College of Traditional Chinese Medicine, based on the beneficiary's studies from September 1, 1994 to July 2, 1999. The petitioner also submitted a copy of the beneficiary's academic transcript that indicates in his second semester of studies he attended a course in medical biology and that in his fifth semester of studies, he attended a course in acupuncture and moxibustion. The beneficiary also studied medical microbiology, medical parasitology, physiology, among other courses; and

A copy of the beneficiary's license to practice acupuncture in the state of New York from the University of the State of New York Education Department, dated March 14, 2001, along with the beneficiary's registration certificate that indicates he is registered to practice in New York State through September 30, 2009 as an acupuncturist.

The record contains no other evidence with regard to the beneficiary's qualifications.

On appeal, counsel states that the director erred in not issuing a Request for Further Evidence prior to denying the instant petition. Counsel also states that director erroneously denied the petition based on the director's inadequate analysis of the ETA Form 750 and based on his ignoring the requirements of the New York State acupuncturist licensing process. Counsel states that in New York, the minimum education requirement for an acupuncturist license is five years of schooling, which consists of sixty pre-professional semesters hours at an accredited college or university, and either a three year acupuncture bachelor's degree program, or 4,050 hours of post-secondary classroom instruction/training. Thus, counsel asserts that pursuant to INA section 203(B)(3)(A) and 8 C.F.R. § 204.5, the proffered position of acupuncturist meets both the bachelor's degree requirement for a professional occupation, as well as the two years of training requirement of the skilled worker classification. Counsel states that the instant petition, with its special requirements listed in section 15, is

analogous to a scenario in which an employer's proffered position of lawyer requires only a state license to practice law since the state license incorporates a Juris Doctor degree. Counsel states that if the petitioner had included an additional Bachelor's degree requirement in section 14 of the ETA 750, this would have had a duplicative effect on the proffered position's educational requirements. Counsel concludes that because the New York state license for acupuncturist included a bachelor's degree, the proffered position meets the statutory definition of professional occupation.

With regard to the proffered position also being considered a skilled worker occupation, counsel reiterates that the Form ETA 750 stated minimum requirements that included six months of experience in the proffered position, and a New York State acupuncturist license. Counsel notes that a skilled worker is defined as an alien who is capable at the time of petitioning for the classification of performing skilled labor requiring at least two years training or experience, and further cites to 8 C.F.R. § 204.5(i)(2), that relevant post-secondary education may be considered as training. Counsel also notes that the 4,050 hours of classroom instruction required for a New York State Acupuncturist license is greater than the minimum two years of training required for a skilled worker classification. Therefore, he asserts that the petition would qualify under the skilled worker category.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In the instant matter, the petitioner's stated requirements do not list a bachelor's degree, but rather only six months of required experience.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. With regard to academic credentials, the beneficiary indicated that he attended Kyungpook National University, Taegu, Korea, studying veterinary medicine, from March 1984 to February 1988, and received a bachelor's degree in veterinary medicine. The beneficiary also indicated that he attended the University of Nebraska, studying veterinary science, from January 1990 to December 1992, and received a master's degree in veterinary science. The beneficiary finally indicated that he had attended Tianjin College of Traditional Chinese Medicine, People's Republic of China, studying traditional Chinese medicine, from September 1994 to July 1999, and received a bachelor's degree in traditional Chinese medicine. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has worked with the petitioner from September 2002 to the date he signed the ETA Form 750, Part B, namely February 19, 2003, and that he also worked full-time with [REDACTED], Daegu, Korea, as an acupuncturist from August 1999 to April 2000.⁷ He does not provide any additional information concerning his employment background on that form.

⁷ The record contains a letter of work verification from [REDACTED], Dr. Aesthetic

Counsel's assertion that Section 15's requirement for a New York acupuncture license could form the basis of the petitioner's classification of the beneficiary as a professional is not persuasive. The minimum educational requirements on the Form ETA 750 listed in section 14 is none. The special requirements listed in Section 15 are not interchangeable with Section 14.

The AAO further notes that the New York State requirements for licensure do not support counsel's assertions that filling in the education requirements in Section 14 on the Form ETA 750 would be duplicative. The New York licensure requires sixty semester hours at an accredited college, with no stipulation as to any area of studies. The state requirement then combines the 60 semester hours, which is considerably less than the semester hours of a four-year baccalaureate program with the completion of an approved professional acupuncture program either registered by the New York State Education Department or accredited by the ACAOM or another accrediting agency accepted by the Department as a reliable, or the equivalent. The equivalent, as outlined on the New York State Education Department website, includes 4050 hours of classroom instruction, supervised clinical experience, and out of classroom or out of clinic study assignments in specific areas **involving acupuncture. In no manner, does the New York State website state that these requirements are the equivalent of a four-year baccalaureate degree in acupuncture, pursuant to the guidance provided in 8 C.F.R. § 204.5(l)(3)(ii)(C). As previously indicated, 8 C.F.R. §204.5(l)(3)(ii)(C) states:**

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evident of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation

In the instant petition, the petitioner does not list on the Form ETA 750, or submit evidence that a minimum of a baccalaureate degree is required for entry into the occupation, but rather that licensure is required to perform the duties of the position, in addition to Korean language proficiency.

The petitioner clearly delineated zero years as the required number of years of study and that no "college degree" was required on the Form ETA 750A in Section 14.⁸

Clinic, Daegu, Korea, that stated the beneficiary was employed full-time as an acupuncturist by Dr. from August 1999 to April 2000.

° Further, the petitioner's claims that the New York State Education Department's requirements for an acupuncturist license should be interpreted the same as a baccalaureate degree is wrong. A bachelor's degree is generally found to require four years of education, not a combination of semester hours of study and clinical instruction and practice. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

The AAO would also suggest that any studies toward the four-year baccalaureate degree in the instant petition would include considerable academic coursework in the primary work field of an acupuncturist, namely, acupuncture. The regulations define a third preference category “professional” as a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” See 8 C.F.R. § 204.5(1)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes. The beneficiary does not have a singular foreign equivalent degree in acupuncture. To accept less than a four-year year bachelor’s degree, the petitioner would have needed to state a bachelor’s degree or the equivalent in education, training and/or experience was required in Form ETA 750, Section 14. It did not.

Additionally, had the petitioner stated an equivalent education requirement on Form ETA 750, Section 14, the petitioner would then need to establish the equivalency of the beneficiary’s education. It did not. To establish any such equivalency between the beneficiary’s previous undergraduate and graduate studies in veterinary medicine and subsequent studies in traditional Chinese medicine and a four-year baccalaureate degree in acupuncture, the petitioner would also have to provide a credential evaluation to establish any such equivalency. Guiding the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: “[USCIS] uses an evaluation by a credentials evaluation organization of a person’s foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.” In the instant petition, the petitioner submitted no academic equivalency report to explain how the beneficiary’s studies in traditional Chinese medicine would be considered as equivalent to studies in acupuncture.

Further, if the petitioner wished to establish that the beneficiary’s post secondary studies could be considered as training or experience as an acupuncturist under the skilled worker classification, which we do not accept, the petitioner must establish the relationship between the beneficiary’s studies in veterinary science and traditional Chinese medicine, and the field of acupuncture.

The petitioner failed to list that the position required two years of experience necessary to meet classification as a skilled worker. Similar to the educational requirements, such requirements cannot be inferred from any separately listed Section 15 licensing requirement. Nothing in the foregoing footnote should be read to accept the petitioner’s assertion that the instant labor certification includes an educational requirement in Section 14 or an experience requirement that would satisfy the two years requirement for a skilled worker petition.

With regard to the skilled worker classification, the petitioner cannot establish that the beneficiary is qualified to perform the duties of the proffered position as a skilled worker. The petitioner only required six months of work experience on the ETA Form 750, and, thus, the petition would not qualify for classification under the skilled worker category, since, as previously stated, pursuant to 8 C.F.R. § 204.5(l)(3) (ii)(B), the minimum requirement for the classification of skilled worker is at least two years of training or experience.

With regard to actual training or experience in the field of acupuncture prior to the 2003 priority date, the petitioner has only established that the beneficiary worked as an acupuncturist in Korea from August 1999 to April 2000, a period of approximately nine months, and for the petitioner from September 2002 to February 19, 2003, a period of approximately six months. Thus, the beneficiary has approximately 15 months of relevant work experience prior to the 2003 priority date, and would not qualify as a skilled worker even if the petitioner had required two years of work experience, which it did not.

The AAO thus affirms the director's decision that the petitioner has not established that the petition qualifies under the skilled worker category. Further, as the petitioner requires less than two years of experience, the beneficiary cannot be classified as a skilled worker.

ORDER: The appeal is dismissed.