identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

U.S. Citizenship and Immigration Services

**PUBLIC COPY**

B6

[redacted]

Date: JAN 13 2012

Office: NEBRASKA SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

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

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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a medical office owned and operated by . The petitioner seeks to employ the beneficiary permanently in the United States as a medical and health services manager and to classify him as a professional under section 203(b)(3)(A)(ii) of the Immigration and Naturalization Act (the Act), 8 U.S.C. § 1153(b)(A)(ii). As required by statute, the petition is accompanied by a labor certification application, ETA Form 9089, approved by the United States Department of Labor (DOL).

The Director denied the petition on the grounds that the petitioner failed to establish (1) its ability to pay the proffered wage and (2) that the beneficiary meets the work experience requirements of the labor certification.

On appeal the petitioner has submitted two briefs from counsel and additional documentation in support of its contentions that it has the ability to pay the proffered wage and that the beneficiary meets the work experience requirements of the labor certification. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

**Petitioner's Ability to Pay the Proffered Wage**

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application (ETA Form 9089) was accepted by the DOL on April 20, 2007. As stated in Part G on the form, the "offered wage" for the proffered position is $61,734 per year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also*

8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As previously noted, the petitioner is a sole proprietorship. This type of business does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual federal tax return (Form 1040) 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 out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record indicates that the beneficiary has been employed by the petitioner since May 2003. The petitioner has submitted documentation of the beneficiary's compensation for the years 2007-2009 (Forms W-2, Wage and Tax Statements, issued to the beneficiary for 2007 and 2009, and the petitioner's payroll journal for 2008).[1] These documents show that the beneficiary's pay from the petitioner in those three years was as follows:

| | |
|---|---|
| 2007 | $58,590 |
| 2008 | $58,590 |
| 2009 | $66,290 |

Thus, the beneficiary's pay was $3,144 below the proffered wage in 2007 and 2008, and $4,556 above the proffered wage in 2009. Accordingly, the evidence of record does not establish the petitioner's continuing ability to pay the proffered wage from the priority date (April 20, 2007) up to the present by means of its actual compensation to the beneficiary over the years. The evidence of record does show, however, that the petitioner paid a little more than the proffered wage in 2009 and came close to paying it in 2007 and 2008.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns, without

[1] This documentation was submitted in three stages – on April 3, 2009 in response to the Director's Request for Evidence, on August 3, 2009 with an Appeal Brief, and on September 14, 2010 with some other supplemental exhibits.

consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record includes copies of the petitioner's federal income tax returns – Forms 1040 – for 2005 and 2006 (before the priority date) as well as for 2007 and 2009. The petitioner's adjusted gross income (recorded on page 1, line 37, of the forms) was $389,606 in 2005, $504,837 in 2006, $478,297 in 2007, and $753,985 in 2009. As pointed out by counsel and reflected in the tax returns, the adjusted gross income represents net profit to the sole proprietor after the subtraction of employee salaries (including the beneficiary's) and other business expenses from gross income, as entered in Schedule C. The record also includes a list prepared by the petitioner's accountant on July 20, 2009, of [redacted] personal monthly expenses, which consist of real estate mortgage payments, automobile leases, house insurance, life insurance, child support, condo maintenance, and utilities adding up to $35,102.29 per month. On a yearly basis these expenses amount to $421,227.48. This figure is approximately $57,000 below the petitioner's adjusted gross income in 2007 and more than $330,000 below the petitioner's adjusted gross income in 2009. The petitioner's former counsel also indicated that the petitioner could have reduced the salary he paid himself ($45,000 in 2007 and $46,800 in 2009, as recorded on line 7 of his federal income tax returns for those years) or his charitable contributions (cash contributions of $60,000 in 2007 and $25,000 in 2009 are recorded on Schedule A, line 16, of his federal income tax returns for those years) if necessary to pay the proffered wage in full.

Based on the foregoing evidence of the petitioner's income and expenses, the fact that the shortfall between the proffered wage and the amount actually paid to the beneficiary in 2007 and 2008 was a modest $3,144, and the fact that the amount actually paid to the beneficiary exceeded the proffered wage in 2009, the AAO is persuaded, considering the totality of the circumstances, that the petitioner has established its continuing ability to pay the proffered wage to the beneficiary from the priority date up to the present. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Accordingly, the Director's finding that the petitioner failed to establish its ability to pay the proffered wage will be withdrawn.

**Beneficiary's Qualifications for the Job**

Section 203(b)(3)(A)(ii) of 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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). As previously discussed,

the labor certification application in this case was accepted on April 20, 2007. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

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

On the ETA Form 9089 (at H.11) the job duties of the proffered position – Medical and Health Services Manager – are described as follows:

> Plan, direct, coordinate medical and health services in a medical office setting.

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

| | | |
|---|---|---|
| 4. | Education: Minimum level required: | Bachelor's degree |
| 4-B. | Major field of study: | Medical |
| 6. | Is experience in the job offered required? | Yes |
| 6-A. | If Yes, number of months of experience required? | 24 months |
| 8. | Is there an alternate combination of education and experience that is acceptable? | No |
| 9. | Is a foreign educational equivalent acceptable? | Yes |
| 10. | Is experience in an alternate occupation acceptable? | No |

As set forth in the labor certification, therefore, the proffered position requires at least a bachelor's degree in a medical field and two years of experience in the "job offered" – *i.e.* as a Medical and Health Services Manager.

The documentation of record includes a Russian language diploma and English translation showing that the beneficiary entered graduated with the specialty of "medical treatment" in 1975, and by decision of the State Examination Board on June 27, 1975 was qualified to work as a "general practitioner." Based on information in the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) – which indicates that a Diploma of specialist (Diplom spetsialista) in medicine awarded by an institute or a university in conjunction with the State Attestation Commission following five to six years of education is comparable to a first professional degree in medicine in the United States – the AAO concludes that the beneficiary's diploma is equivalent to at least a bachelor's degree in the United States. Accordingly, the beneficiary meets the educational requirement of the labor certification.

As for the experience requirement of the labor certification, in Part K of the ETA Form 9089 – "Alien Work Experience" – the beneficiary listed one job prior to commencing work with the petitioner on May 1, 2003.[2] It was with the where he stated that he worked as a Medical Unit Manager from March 1, 1993 to April 30, 2003. In Part K, Box 9 of the ETA Form 9089 the beneficiary described the duties of this job as follows:

> Managed staff, managed patients, performed surgical treatments.

As evidence of the beneficiary's work experience with the the petitioner submitted the following documentation with its Form I-140 petition:

- An English translation of a letter in Hebrew from dated March 19, 2007, stating that the beneficiary was employed at the Medical Center from March 1, 1999 to August 31, 2003, during which "[h]is last position was a doctor in [the] urological department and a head of lithotripsy unit." Prior to that, according to the beneficiary had two other stints at the Medical Center from August 2, 1992 to January 31, 1993, and from March 1, 1993 to March 31, 1998.

In denying the petition on May 26, 2009, the Director noted that the letter from did not describe the specific duties the beneficiary performed or how long he held his "last position" as a doctor and head of the lithotripsy unit. Nor did the letter indicate in what capacity the beneficiary was employed in the years 1992-1998. The Director concluded that the letter was insufficient to establish that the beneficiary's experience at the qualified him to perform the duties of the Medical and Health Services Manager described in the labor certification.

---

[2] According to the labor certification, the petitioner's first stint with the petitioner ran from May 1, 2003 to April 30, 2006. After a five-month interruption, the beneficiary began his second stint with the petitioner on September 25, 2006.

On appeal the petitioner has submitted the following additional documentation of the beneficiary's employment during the years 1992 to 2003:

- The beneficiary's Curriculum Vitae, which lists the following postdoctoral training and work experience during those years –
  - August 1992 to January 1993 –
  - March 1993 to September 1996 –
  - October 1996 to January 1998 –
  - February 1998 to February 1999 –
  - March 1999 to August 2003 –
- An English translation of a letter in Hebrew from , dated July 6, 2009, stating that she worked at the as a nurse from 1990 to 2008, during which time the beneficiary was in charge of the In that capacity he "ordered equipment, dealt with suppliers, divided assignments among staff members and . . . manage[d] his patients' appointment schedule."
- An English translation of a letter in Hebrew from , a urology specialist at the , dated July 13, 2009, stating that he had known the beneficiary since starting his specialization training at the Medical Center in 1998. According to , the beneficiary was in charge of the Endourology and Lithotripsy Unit from "the beginning of 1999 till his departure for the USA in August 2003," at which time took over as head of the Unit. describes the position as requiring "not only medical abilities and knowledge but also many administrative capabilities . . . related to the use of medical equipment, its availability, the availability of the operating room, the management of the staff and the division of assignments among the staff . . . . He developed a direct rapport with medical companies and suppliers, and patients as well."

It is clear from the brief job descriptions in the beneficiary's Curriculum Vitae that none of the positions he held from August 1992 to February 1999 involved any significant management component. Therefore, none of these positions can be considered "experience in the job offered" as contemplated in Part H, line 6 of the labor certification. The crucial question in this appeal,

therefore, is whether the evidence of record establishes that the beneficiary's last phase of employment at the from March 1999 to August 2003 qualifies as experience in the job offered.

The answer to this question hinges on the probative value of the three letters in the record from employees of the attesting to the beneficiary's prior employment. In this regard, the regulation at 8 C.F.R. § 204.5(g)(1) specifies that letters from current or former employers must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See also* 8 C.F.R. § 204.5(l)(3)(2)(A). None of the three letters satisfies all of these requirements.

The letter from in 2007 is the only one of the three that appears to be written on letterhead of the The letterhead contains no address below the name of the institution, however, and the letter submitted to the AAO is a photocopy, not an original, which raises a question as to its authenticity. The letter from in 2009 is written in longhand with no address at all. The letter from in 2009, while it appears to bear a stamp of the also lacks an address. Like the letter from , the letters from are photocopies, not originals. The best evidence of a document's authenticity is always the original. The petitioner has provided no explanation as to why three photocopied letters were submitted, rather than the originals.

Furthermore, each of the three letters has other substantive shortcomings. The AAO agrees with the Director's assessment of letter that it neither describes the duties the beneficiary performed as head of the nor specifies how long he served in that capacity. Thus, the letter fails to demonstrate that the beneficiary's employment at the included two years of "experience in the job offered," as required in the labor certification to qualify for the proffered position with the petitioner.

The letter from is also deficient. While it provides some general information about the duties the beneficiary performed as head of the , it provides no information about when and how long the beneficiary served in that capacity. Like the letter, therefore, the letter fails to demonstrate that the beneficiary's employment at the included two years of "experience in the job offered," as required in the labor certification to qualify for the proffered position with the petitioner.

The letter from is hardly more substantive than the other two. It describes the beneficiary's duties at the in broad brush terms such as administering the use of medical equipment and the availability of the operating room, managing and assigning tasks among the staff, dealing with medical companies and suppliers, and organizing appointments for patients, but offers no further details about specific medical functions and managerial tasks he performed as head of the In contrast to letter, the AAO notes that letter dated March 29, 2008 (actually 2009), submitted in response to the Director's RFE, listed 13 specific duties he claims the beneficiary performed at the While s letter is useful insofar as it sets forth the petitioner's claim as

to what duties the beneficiary performed at his job in Israel, it does not in and of itself constitute evidence that the beneficiary actually performed those tasks. 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*, 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)). The letter from is far too vague to support the claims in s letter regarding the job duties the beneficiary performed in Israel. Like the letters from , therefore, the letter fails to demonstrate that the beneficiary's employment at the included two years of "experience in the job offered," as required in the labor certification to qualify for the proffered position with the petitioner.

It appears more likely than not that the beneficiary was employed as a physician in Israel and not in the "job offered" by the petitioner. Any administrative functions performed by the beneficiary in Israel were likely incidental to his primary work and not full-time employment as a medical and health services manager.

While the petitioner indicates that he began employing the beneficiary as a Medical and Health Services Manager before the priority date (April 20, 2007), none of this employment experience can be counted toward meeting the labor certification's requirement of two years "experience in the job offered." 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.[3] Specifically, the petitioner indicates that questions J.19 and J.20, which ask about

---

[3] 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).

experience in an alternate occupation, are not applicable. In response to question J.21 – "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 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

---

(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 cannot 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.

(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.

comparable[4] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. In this case, however, the beneficiary states in response to question K.5 that his position with the petitioner was as a Medical and Health Services Manager, and the job duties described in the box at K.9 ("Direct, supervise, evaluate work activities of medical staff. Establish work schedules and assignments.") are essentially the same duties as those described in the immigrant visa petition (Form I-140) for the proffered position.

According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Moreover, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, the experience may not be used to qualify the beneficiary for the proffered position.

For all of the reasons discussed in the foregoing analysis, the AAO concludes that the petitioner has failed to establish that the beneficiary had the requisite two years of "experience in the job offered" to qualify for the proffered position under the terms of the ETA Form 9089. Accordingly, the petition cannot be approved.

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

**ORDER:** The AAO withdraws the Director's finding in his decision dated May 26, 2009, that the petitioner has not established its ability to pay the proffered wage. The AAO affirms the Director's finding that the petitioner has failed to establish that the beneficiary satisfies the experience requirement for the proffered position in accordance with the labor certification. On this latter ground, therefore, the appeal is dismissed.

---

[4] 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.