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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

[Redacted]

Date: **MAY 04 2012** Office: NEBRASKA SERVICE CENTER FILE: [Redacted]

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:

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

The petitioner is a pre-school. It seeks to employ the beneficiary permanently in the United States as a teacher. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States 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. 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 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 March 15, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on January 24, 2007. The proffered wage as stated on the ETA Form 9089 is \$27,498 per year. The ETA Form 9089 states that the position requires a bachelor's degree and two years of experience in the job offered.<sup>1</sup>

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

On appeal, counsel submits a brief but no new evidence.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1989 and currently to employ 9 workers. On the ETA Form 9089, signed by the beneficiary on June 25, 2007, the beneficiary claimed to have worked for the petitioner since October 1, 2005.

On appeal, counsel asserts that the director neglected to consider all of the evidence submitted as well as the arguments of counsel. Counsel also asserts that the director erred in neglecting to consider the financial statements submitted as evidence even if such statements were not audited. Counsel also asserts that the director erred in not giving the appropriate level of consideration to counsel's arguments which were made in response to the director's request for evidence. Counsel further asserts that the adjusted gross income figures reflected on Form 1040 do not accurately represent the petitioner's income since they take into consideration items such as depreciation, amortization and net operating loss carryover all of which counsel asserts are legal fictions. Further, counsel asserts that the director inappropriately requested that the petitioner supply evidence of her personal expenses and neglected to apply the appropriate standard of proof when analyzing the evidence.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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<sup>1</sup> The educational and experiential requirements will be addressed later in the decision.

<sup>2</sup> 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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary's IRS Forms W-2 for 2007 and 2008 show compensation received from the petitioner, as shown in the table below.

- In 2007, the Form W-2 stated compensation of \$20,538.01.
- In 2008, the Form W-2 stated compensation of \$21,221.47.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2007 onwards. However, the petitioner has demonstrated that it paid the beneficiary a portion of the proffered wage for both 2007 and 2008. Since the petitioner paid the beneficiary a portion of the proffered wage during 2007 and 2008, it must establish the ability to pay the difference between wages already paid and the proffered wage for 2007 and 2008, that difference being \$6,959.99 and \$6,276.33 respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship 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 (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 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 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000

where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor is single with no dependents. The proprietor's tax returns reflect the following information for the following years:

- In 2007, the proprietor's IRS Form 1040, line 37, stated adjusted gross income (loss) of (123,444.00).
- The petitioner provided no tax return for 2008.

In 2007, the sole proprietor reported a loss and therefore has not demonstrated the ability to pay the proffered wage for that year.

For 2008, rather than supply Form 1040, counsel provided an unaudited profit and loss statement. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Therefore, the petitioner has not demonstrated the ability to pay the proffered wage for 2008.

Since the petitioner is a sole proprietor, a business enterprise which is not separable from the individual, USCIS may take into account the sole proprietors wages and personal, unencumbered and liquefiable assets that could reasonably be applied towards paying employee wages. However, counsel provided no evidence of the petitioner's personal assets.

On appeal, counsel asserts that the adjusted gross income figure which is reported on the petitioner's IRS Form 1040 is not an accurate representation of the petitioner's ability to pay because the figure includes such adjustments as "Net Operating Loss Carryover."

If an individual taxpayer's deductions for the year are more than its income for the year, the taxpayer may have a net operating loss (NOL). When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. If a taxpayer is carrying forward an NOL, it shows the carryforward amount as a negative figure on the "Other Income" line of IRS Form 1040. However, because a petitioner's NOL is related to another year's outcome, it is omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year. Therefore, this office rejects counsel's argument regarding the petitioner's NOL carryovers.

Counsel further asserts that the adjusted gross income is an inaccurate representation of the petitioner's ability to pay because the figure includes the depreciation adjustment, an amount which counsel asserts remained in the petitioner's possession.

With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009), noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

On appeal, counsel asserts that there is no legal authority to substantiate the requirement that sole proprietors must be able not only to pay the proffered wage but also to support their own household out of the adjusted gross income, thus requiring the enumeration of all household expenses.

Unlike a corporation, a sole proprietorship 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 (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 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 (7<sup>th</sup> Cir. 1983).

Since a sole proprietor is a business entity which cannot be separated from the individual and the individual must be able to demonstrate that he or she can sustain him- or herself based upon the adjusted gross income, the sole proprietor must provide evidence of his or her recurring, monthly expenses which would be payable from the adjusted gross income. The resultant sum would be available to pay the beneficiary. Such evidence is necessary but was not provided.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

In considering the sole proprietor's personal, household expenses, counsel asserts that all of the petitioner's expenses are covered through the business which she operates. For example, counsel states:

...the petitioner's address on the tax return shows her to be living at the address of her school. In fact, she lives in an apartment above the school premises at that address, the mortgage upon which is paid by the business (see Schedule C, Part II, item 16 of the 2007 tax return). Therefore, her personal income would have no housing costs charged against it.

The petitioner's Schedule C for 2007 does, in fact, include a line item (Part II, Line 16) for Mortgage Interest in the amount of \$36,980. Public records also show that the address identified on both Form I-140 and IRS Form 1040 is the sole proprietor's personal address.

Regarding the sole proprietor's personal, household expenses in 2007, counsel further states:

Second, an examination of the 2008 financial statement submitted, and Statement 1 from the 2007 tax return shows: 1) she is covered by the school's health insurance, the cost of which was deducted from its income; 2) her automobile expenses, including gas, are charged to the school and written off its income; 3) much of her food bill is charged to the school; 4) her credit card bills are paid by the school; 5) her utilities bills are paid by the school; 6) her laundry and cleaning bills are included with those of the school. In fact, the only household expense she has which is paid completely out of her personal income is clothing and \$8,750 per year is a pretty generous clothing allowance.

The sole proprietor's Schedule C does include line items, in Part II, for car and truck expenses, insurance (other than health), office expenses, the rent or lease of vehicles, machinery, equipment and other business property, travel, deductible meals and entertainment, utilities, wages and other expenses. However, Schedule C does not specify the nature of the items included in those deductions. It would be reasonable to conclude that any deductions made on Schedule C would relate to items associated with the operation of the school. Counsel has provided no evidence demonstrating that the petitioner's personal living expenses are included in the school's deductions apart from his own assertions. The Schedule C, while including line items for the deductions

identified does not indicate whether or not the automobile, for example, belongs to the school or the sole proprietor, as an individual or whether there exists more than one automobile. The Schedule C shows insurance paid but does not specify the nature of the insurance being paid. Further, Schedule C, Part II, Line 15 indicates that the insurance is "other than health" and Line 14, "Employee benefit programs," has no entry. Therefore, the petitioner has not demonstrated that all of her personal expenses are covered through her business. Further, the petitioner has not provided her personal IRS Form W-2 or 1099 which might identify her personal income and benefit deductions. Also, counsel refers to the unaudited profit and loss statement for 2007 in which the petitioner itemizes deductions. However, as has already been discussed, since this financial statement has not been audited, it bears the representations of the petitioner and as such is not a reliable source for the petitioner's own financial situation.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Further, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

Having discussed the evidence supplied, counsel asserts that the director utilized an inappropriate standard of proof in assessing the evidence, a standard more rigorous than the preponderance of the evidence.

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). Nothing in the record of proceeding contains any type of notice from the director or any other USCIS representative that would have misled counsel into his assertion that USCIS requires "convincing" or "clear and convincing" beyond what legal authority guides the agency in statute, regulatory interpretation, precedent case law and administrative law and procedure. Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.

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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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 provided her tax return for 2007 only. The petitioner has provided no documentary evidence which established the 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 or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. 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 (9<sup>th</sup> 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).

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in education or English language and literature in addition to two years of experience in the job offered, pre-school teaching, or in an alternate teaching occupation (other than pre-school). In this case, on the labor certification, the beneficiary claims to qualify for the offered position based upon holding the foreign equivalent of a Bachelor of Arts degree in English Language and Literature in addition to experience as a teacher with the petitioner between October 1, 2005 and January 24, 2007; experience as a middle school teacher at [REDACTED] from September 1, 2004 until September 1, 2005; and experience as a middle school teacher at [REDACTED] from September 1, 2001 until September 1, 2003.

With respect to the beneficiary's qualifying education, the petitioner has provided copies of a [REDACTED] all of which were awarded by the [REDACTED]. According to the educational evaluation prepared by [REDACTED] for the petitioner on August 31, 2004, the cumulative record of the beneficiary's degree certificates "is equivalent to the completion of a Bachelor of Arts Degree, with a major in English Literature, from an accredited US college or university."

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, [www.aacrao.org](http://www.aacrao.org), AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." <http://www.aacrao.org/About-AACRAO.aspx> (accessed April 14, 2012). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed April 14, 2012). Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.<sup>3</sup> If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>4</sup>

<sup>3</sup> See *An Author's Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>4</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314

According to EDGE, "The Maîtrise represents attainment of a level of education comparable to a bachelor's degree in the United States." Therefore, the AAO agrees that the petitioner has demonstrated that the beneficiary has the educational qualifications which are required by Form ETA 9089.

However, the beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains only two letters in support of the beneficiary's claimed experience: 1) from [REDACTED] and 2) from [REDACTED].

The letter from [REDACTED] identifies experience which was not included on Form ETA 9089.

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Apart from the letter, the petitioner provided no other independent, objective evidence substantiating the experience gained at [REDACTED]. Therefore, claim of such experience is not found to be credible.

Further, even if we were to consider the experience claimed in this letter, the duration and amount of experience does not satisfy the requirements set forth in Form ETA 9089. In the letter, [REDACTED] states, "[the beneficiary] has been working in my establishment in the capacity of Substitute English teacher since January 12, 2001 for eight hours per week at an hourly rate of 225 F." The letter is undated. Therefore, the duration of the beneficiary's employment would not be demonstrated. According to the Notary Seal at the bottom of the translated document, the letter was translated on August 30, 2004, 36 months after the beneficiary was supposed to have commenced working with this employer. Even if we were to consider 36 months of experience, the beneficiary claims to have worked for only eight hours each week or 1/5 of the average work week. This would amount to approximately 8.4 months of experience. Nevertheless, for the reasons articulated, this experience has not been demonstrated.

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(E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

The second letter is dated August 13, 2004 and is from [REDACTED], School Director of [REDACTED]. According to [REDACTED], “[the beneficiary] worked in our school during school year 2001-2002 and school year 2002-2003 in the capacity of English teacher.” Though the letter seemingly accounts for two years of experience, the author does not indicate whether the beneficiary worked on a full-time basis.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

The petitioner has provided no such independent, objective evidence. Therefore, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

According to Form ETA 9089, the beneficiary currently works for the petitioner, having commenced such employment on October 1, 2005. However, the petitioner provided no letter, attesting to the work which the beneficiary performs for her.

Further, 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.<sup>5</sup> Specifically, the petitioner indicates that question J.19, which asks about experience

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<sup>5</sup> 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).

in an alternate occupation, is 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 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

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(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.

(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.

for the proffered position if the position was not substantially comparable<sup>6</sup> and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that her position with the petitioner was as a teacher, and the job duties are the same duties as the position offered. Further, the petitioner operates a pre-school and has not demonstrated that she provides instruction at other grade levels. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as she was 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.

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.

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<sup>6</sup> 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.