U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 0 1 2004

IN RE: Petitioner: [redacted]
Beneficiary

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:
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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded for additional evidence and entry of a new decision.

The petitioner is a preschool childcare and education facility. It seeks to employ the beneficiary permanently in the United States as a Chinese-bilingual tutor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary had the requisite two years work experience required by the offered position.

On appeal, counsel submits additional evidence and asserts that it establishes the beneficiary's eligibility for the position offered.

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 or seasonal nature, for which qualified workers are not available in the United States.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is March 27, 2001. The visa petition indicates that the petitioner was established in 2000 and had, at the time of filing, one employee.

As noted on Part A, item 14 of the approved labor certification (ETA-750), the beneficiary must have two years of experience in the job offered of Chinese-bilingual tutor. Part 13 provides a description of the job to be performed. It states that the a Chinese-bilingual tutor must "[t]each pre-school children Chinese language (e.g. reading, speaking, writing and calligraphy) and Chinese cultures; oversee their recreation and extracurricular activities, and personal habits; arranges parties, outings, and picnics for children; confer with parents on child developments."

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

(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.
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> (B) *Skilled worker.* 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.

As evidence of the beneficiary's qualifying experience, the petitioner initially submitted a letter, dated February 15, 2001, from , Headmistress of the in Hong Kong states that the beneficiary was kindergarten teacher at that school from September 1, 1988 to August 31, 2000 and verifies her good character.

Because the record did not initially contain sufficient documentation in support of the petitioner's continuing ability to pay the proffered wage, as well as evidence to establish that the beneficiary possesses the employment experience specified on the labor certification, the director requested additional evidence on January 16, 2003.[1] He requested that the petitioner submit letters, contracts, and pay statements to verify the alien beneficiary's foreign employment history.

In response, the petitioner, through counsel, submitted a letter, dated January 28, 2003, from Principal of the School in Hong Kong confirms that the beneficiary began working at the school in September 1988 as a kindergarten teacher and left on August 31, 2000. The petitioner also submitted various copies of letters of appointment and Inland Revenue documents indicating that the beneficiary had served for more than two years as a teacher at this school.

In denying the petition, the director found that the beneficiary's prior position of "kindergarten teacher" or "teacher" was not the same as l tutor.

On appeal, counsel asserts that the director erroneously focused on the title of the beneficiary's position at the School in Hong Kong and maintains that the beneficiary's employment as a teacher at that school qualifies her for the job offered of Chinese-bilingual tutor. Counsel also points out that the DOL also accorded the proffered position of Chinese-bilingual tutor the occupational title of "preschool teacher" on the labor certification.

Counsel submits another letter, dated September 11, 2003, fron of the Primary School. In this letter aborates that the beneficiary's job as a full-time kindergarten teacher included tutoring and teaching the pre-school children. confirms that the beneficiary taught such subjects as Chinese language (including reading, speaking and writing), Chinese cultures and painting. Her duties included supervising the children's recreation and extracurricular activities and arranging parties and picnics.

In reviewing an alien's eligibility for a visa classification, CIS must look to the labor certification to determine the qualifications for the position. It 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,*

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[1] The director subsequently requested additional evidence from the petitioner relating to the petitioner's ability to pay the proffered salary.

699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey,* 661 F.2d 1 (1st Cir. 1981).

In this case, the AAO finds that September 11th, 2003, letter sufficiently overcomes the director's concern about the beneficiary's qualifying experience for the position offered. According to the letter, the alien's duties at the Kiangsu and Chekiang Primary School were virtually identical to those required by the terms of the labor certification for a Chinese-bilingual tutor and to those described by the beneficiary herself on Part B of the ETA 750, which requires the alien to list all jobs held for the past three years and all employment for the past three years that is relevant to the occupation to be certified. Although the actual job titles of the teaching position held by the beneficiary in Hong Kong and the job offered on the ETA 750A are slightly different, the nature of the duties performed by the beneficiary at the Kiangsu and Chekiang Primary School sufficiently qualifies her for the visa classification sought. As suggested by counsel, the director's denial appears to be based on the contrast between the job titles of "teacher" or "Chinese-bilingual tutor." In *Denver Tofu v. INS,* 525 F. Supp. 254, 259 (D. Colo. 1981), the court found the INS (now CIS) should not have taken a "mechanical" approach to considering the alien's qualifications. The court reversed the agency's decision, finding that it had erroneously focused on a technical requirement of "management training" when the job involved the supervision of only three employees. A similar rationale applies in this case, where the evidence credibly shows that the duties performed by the alien beneficiary in a previous full-time position qualifies her for the proffered position. She may not have held the same exact job title, but she performed the same duties necessary to satisfy the terms of the labor certification.

In this case, the record establishes that the beneficiary had at least two years of qualifying employment experience as required by the terms of the labor certification as of the priority date established by the labor certification. *See Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner has established that the beneficiary meets the requirements of the labor certification, the petition may be approved.

The petition will be remanded, however for the director to consider the petitioner's ability to pay the proffered wage. It is noted that while the record indicates that the petitioner has substantial savings, the petitioner's statement of household expenses was somewhat problematic as it contained significant levels of expense that seem to include figures relating to business income and expenses, not just household living expenses, as well as totals that were difficult to correlate to the petitioner's reports of income on the tax returns. In any event, the petitioner should be allowed an opportunity to clarify this issue and substantiate the ability to pay the beneficiary's proposed wage offer of $24,000 per year.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional updated financial evidence from the petitioner as may be deemed necessary pursuant to the requirements of 8 C.F.R. § 204.5(g)(2) relating to a petitioner's ability to pay the proffered salary. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.