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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 10 2009

LIN 06 155 52467

IN RE: Petitioner:
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:

SELF-REPRESENTED

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is an independent day school. The petitioner seeks to employ the beneficiary permanently in the United States as an elementary teacher. As required by statute, the petition filed was submitted with Form ETA 9089, Application for Permanent Employment Certification,[1] approved by the Department of Labor ("DOL"). The Nebraska Service Center director denied the petition because the director found that there was no evidence that the beneficiary met the required 60 months of training listed on the labor certification.

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).[2]

The record shows that the appeal is properly filed, 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.

The petitioner has filed to classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is 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." The term "profession" is defined by example in Section 101(a)(32) of the Immigration and Nationality Act (the Act). That section states:

> The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and *teachers in elementary* or secondary *schools*, colleges, academies, or seminaries [emphasis added].

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[1] As a preface to the following discussion, new U.S. Department of Labor (DOL) labor certification regulations "PERM" became effective as of March 28, 2005. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). PERM applies to labor certification applications for the permanent employment of aliens filed on or after that date. The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. After March 28, 2005, the DOL Form ETA 750 was replaced by the ETA Form 9089, Application for Permanent Employment Certification. As the I-140 was filed on May 1, 2006, PERM regulations apply to this case.

[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). 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).

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

Here, the Form ETA 9089 was accepted for processing by the relevant office within the DOL employment system on January 9, 2006. DOL certified the Form ETA 9089 on March 29, 2006. The petitioner filed the Form I-140 on May 1, 2006.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

According to the labor certification, the proffered position requires a bachelor's degree in the major field of study of education with *60 months of training in Montessori Elementary I required in the job opportunity*, and additionally, 60 months of experience required in the job offered. Because of those requirements, the proffered position is for a professional classification.[3]

DOL assigned the code of 25-2021.00 to the occupation of elementary teacher. According to DOL's public online database, O*Net, and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7 - <8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See http://online.onetcenter.org/link/summary/25-2021.00* (accessed October 13, 2008).[4] Additionally, DOL states the following concerning the training and overall experience required for these occupations:

> A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

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[3] According to the labor certification, no alternate level of education, or experience in an alternative occupation is acceptable.

[4] DOL previously used the Dictionary of Occupational Titles ("DOT") to determine the skill level required for a position. The DOT was replaced by O*Net. Under the DOT code, the position of elementary teacher had a SVP of 7 allowing for two to four years of experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> 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. Evidence 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 that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification 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.

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education she achieved relevant to the requested occupation is a Bachelor's degree in Education from Johannesburg College of Education, University of Witwatersrand, Johannesburg, South Africa. In corroboration of the ETA Form 9089, the petitioner submitted a copy of the beneficiary's Higher Diploma in education degree, a credentials evaluation, and the beneficiary's American Montessori Society Elementary 1 credential dated June 2003. The credential evaluation confirmed that the beneficiary had the requisite education for the position offered. The petitioner submitted a certificate of work experience to document that the beneficiary was employed as a teacher in South Africa from January 1, 1982 to January 31, 1996.

Accordingly, the director determined that the beneficiary met the baccalaureate degree requirement as well as the 60 months experience requirement, but the beneficiary did not have the additionally required 60 months of training in Montessori Elementary I.

The key to determining the job qualifications is found on Form ETA 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA 9089 be read as a whole. The instructions for the Form ETA 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.

The ETA Form 9089, Part H sets forth the minimum requirements for the position of elementary teacher. The offered position requires a bachelor's degree in education and 60 months (five years) of training (i.e. Montessori Elementary 1) and 60 months (five years) experience in the job offered. Item 14 of Part H reflecting specific skills or other requirements was left blank.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner demonstrated that the beneficiary has both the requisite bachelor's degree plus five years of experience. At issue is whether the petitioner can demonstrate that the beneficiary has the additionally required five years of training.

Contentions on Appeal

On appeal, the petitioner contends that "The ETA Form 9089 has a typographical error at Item 5A on page 2. Should read 12 months and not 60 months."

In support, the petitioner has introduced an affidavit from [redacted], Executive Director of the American Montessori Society which is dated February 12, 2007, and states that that "the American Montessori Society Elementary 1 credentials entails, at a minimum, 12 months of training." We note that the petitioner submitted a Montessori certificate for the beneficiary, but the training was not based on five years as required by the labor certification.

The petitioner cites to a Board of Alien Labor Certification Appeals (BALCA) case, *In the Matter of HealthAmerica, on behalf of Uthayashanker Wimalendran, (*BALCA, July 18, 2006)[5] for the proposition that despite the requirement 60 months of training stated in the labor certification, the labor certification should be amended after the fact or that the organization should be relieved from its own requirement expressed in the labor certification that an applicant have 60 months training.

According to *Matter of HealthAmerica*, its central issue is whether or not a Certifying Officer of an Application for Permanent Employment Certification abused his/her discretion when denying the employer's motion for reconsideration. Despite the petitioner's contention, there is no discussion of amending a stated training requirement. The case resulted from the employer's failure to comply with DOL's "two-Sunday" newspaper job opportunity advertising policy based upon the contents of

[5] The issue in that case involved DOL's requirement of Sunday advertising of the job.

the labor certification filed in the matter.

Further BALCA decisions are not controlling on AAO determinations.[6] Rather, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, in addition to the degree and five years of experience required, the requirement is that the beneficiary has 60 months of training.

On November 8, 2006, the director had issued an RFE, which requested, *inter alia*:

> Submit additional evidence that the alien obtained the required 60 months training in Montessori Elementary I before January 9, 2006. While you submitted a credential from the American Montessori Society, there is no indication as to the training involved in attaining such credential and no evidence that the beneficiary actually completed 60 months of training. Evidence of training must be in the form of letter(s) from current or former trainer(s) giving the name, address, and title of the trainer and a description of the training received, including specific dates of the training.

In response the petitioner submitted a letter dated November 14, 2006, that stated, *inter alia:*

> The 60 months training is for Bachelor's Degree in Education and Montessori Elementary I. Newspaper ad, website listings and letter from Houston Montessori Training Center confirm.
>
> Newspaper ad and website listings specify 5 years teaching experience including 3 years in AMS Montessori School. Certificate of service confirms 15 years teaching experience in South Africa and we confirm that the beneficiary has been employed by ourselves as a 3rd grade teacher since December 1, 2000 to date. This teaching experience includes AMS Montessori teaching.

Along with the above, the petitioner submitted a newspaper advertisement for the offered job dated September 18, 2005; a webpage from the web site http://www.jobsearch.org accessed October 18, 2005, which is the State of Missouri's JOBBANK portal site that listed the offered job; a letter dated November 15, 2006, from [redacted], Houston Montessori Center Administrator, Houston, Texas, stating that the beneficiary completed training in Montessori Elementary I from June 2002 to June 2003 and attained an American Montessori Society Elementary I credential; and a letter from

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[6] While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding, precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

the petitioner dated November 14, 2006, from [redacted] Business Manager, as well as the beneficiary's educational materials.

The newspaper advertisement dated September 18, 2005 stated:

> Education - Full Time Teacher Elementary
>
> Full time 3rd grade math & cultural teacher at White Rd. Campus of Chesterfield Day School B.S./B.A. in Education, Montessori Elementary 1 Diploma, & 5 yrs. teaching experience including 3 yrs. in an AMS Montessori school required. Knowledge of and/or experience in African cultures pref. ....

The petitioner's ads listed different requirements then from the Form ETA 9089. The petitioner clearly required on Form ETA 9089 that the beneficiary have a Bachelor's degree, five years of training in Montessori Elementary I, and five years of experience. The Form ETA 9089, Section "H," did not specify that three years of experience in a Montessori School was required or list that any experience requisite or knowledge of African cultures was required in the actual job description.

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, USCIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (*citing Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL.

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA 9089 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 9089, a determination reserved to USCIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with the Ninth Circuit Court of Appeals.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petition's beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a

labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In its appeal of the director's decision that the beneficiary does not have 60 months of training in Montessori Elementary I, the petitioner has made several contentions. As already stated, the petitioner stated that the "The ETA Form 9089 has a typographical error at Item 5A on page 2. Should read 12 months and not 60 months."

Item 5 of Form ETA 9089 has three related parts which the petitioner answered and the responses became part of the labor certification. In summary in Item 5 the petitioner answered 'yes" to the question "Is training required in the job opportunity?" Next, in item 5-A the petitioner answered the question "If yes, number of months of training required" "60." In item 5-B the petitioner answered the question "Indicate the field of training" "Montessori Elementary 1."

The petitioner clearly designated that the position requires 60 months of training. Whether the petitioner committed a typographical error or not is irrelevant. A petitioner must demonstrate that the beneficiary is qualified for the offered position as of the time of the priority date. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. 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. This decision is made without prejudice to the petitioner's right to file an additional employment based petition.

ORDER: The appeal is dismissed.