identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

B6

[redacted]

APR 28 2010

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN 07 106 53123

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:

[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.

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

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Montessori school. It seeks to employ the beneficiary permanently in the United States as a Montessori teacher. As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, on March 5, 2007, the director determined that the beneficiary did not possess a U.S. bachelor's degree or a foreign equivalent degree. The director also determined that the petitioner failed to demonstrate its continuing ability to pay the proffered wage.

On appeal and in response to the AAO's request for evidence, the petitioner, through former and current counsel, submitted additional evidence and asserted that the beneficiary has the required educational credentials, meets the qualifications set forth in the approved labor certification, and has established its ability to pay the certified salary.[2]

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).

For the reasons explained below, the AAO finds that although the petitioner demonstrated its continuing ability to pay the proffered wage, it failed to establish that the beneficiary's educational credentials meets the requirements set forth on the approved labor certification.

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

---

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

[2] 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 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.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. The petitioner must also demonstrate its continuing financial ability to pay the proffered wage. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The priority date for the instant petition is September 26, 2003. The petitioner filed the Immigrant Petition for Alien Worker (Form I-140) on February 28, 2007. The proffered wage is stated as $23,920 per year. The ETA 750 B, signed by the beneficiary on September 23, 2003, indicates that she has worked for the petitioner since September 2002.

In support of its ability to pay the proffered salary of $17,825.60 per year, the petitioner has provided copies of its 2003, 2004, 2005, 2006 and 2007 Form 1120S U.S. Income Tax Return for an S Corporation.[3] The tax returns indicate that the petitioner's fiscal year is a standard calendar year. The returns contain the following information:

---

[3] Where an S Corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2003); line 17e (2004, 2005), and line 18 (2006, 2007) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, because the petitioner reported additional deductions,

	2003	2004	2005	2006	2007
Net Income (Form 1120S)	$416,971	$326,863	$463,050	$263,606	$483,974
Current Assets (Sched. L)	$ 37,558	$277,120	$571,050	$470,183	$685,795
Current Liabilities (Sched.	$ n/a	$ 3,549	$ 3,827	$ 12,629	$ n/a
Net Current Assets	$ 37,558	$273,571	$567,223	$457,554	$685,795

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.[5]

As set forth above, in each of the years from 2003 to 2007, the petitioner has consistently shown either sufficient net income ($416,971 in 2003; $326,863 in 2004; $463,050 in 2005; $263,606 in 2006; and $483,974 in 2007) or sufficient net current assets ($37,558 in 2003; $273,571 in 2004; $567,223 in 2005; $457,554 in 2006; and $685,795 in 2007) to establish its ability to pay the proffered wage.[6]

---

credits and adjustments, its net income is found on Schedule K, line 23 for 2003, line 17e for 2004 and 2005, and on line 18 for 2006 and 2007.

[4]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[5] A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

[6] In evaluating a petitioner's ability to pay the proffered wage, USCIS considers whether a petitioner has employed and paid wages to the beneficiary. 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 (1st Cir. 2009). Reliance on federal income tax returns as a

Authority to Evaluate Whether the Alien is Eligible for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss the DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission

---

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In this case, because the petitioner has demonstrated that either its net income or net current assets was sufficient to pay the proffered wage, examination of additional factors is not necessary.

> into the United States and at the place where the alien is to perform the work, and
>
> (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
>
> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

Qualifications for Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. ***The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.***

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d (D. Or. 2005), mentioned by counsel, in which it was found that USCIS "does

not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." A judge in the same district subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 *5 (D. Ore Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The *Snapnames.com, Inc.* court concluded that that 'B.S. or foreign equivalent' relates solely to the alien's educational background and precludes consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *14. However, in the context of a skilled worker classification, deference may be given to an employer's intent because the court termed the word 'equivalent' to be ambiguous. *Id. at *14.* If the classification sought is for a professional or advanced degree professional, the court found that USCIS properly required that a single foreign degree may be required. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

However, it is noted that in *Maramjaya v. USCIS,* Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008), the district court granted summary judgment in favor of USCIS. It upheld an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree to qualify for the approval of a professional visa classification and also upheld the denial of a skilled worker visa because the beneficiary only met the minimum educational requirement by combining a three-year foreign diploma with other credentials.

The instructions for the Form ETA 750A, item 14, 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 key to determining the job qualifications is found on Form ETA-750 Part A. Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	Grad
High school	Grad
College	Grad
College Degree Required	Bachelors Degree or equivalent
Major Field of Study	Education

Experience:

Job Offered	6 mos.
Related Occupation	6 mos. (Preschool/Kindergarten Teacher, Student Teacher or Childcare Worker)

Block 15:

Other Special Requirements

6 months of experience assisting in the preparation of course objectives and outlining a course of study consistent with Montessori concepts;

6 months experience supervising pre-school age in the classroom and during school activities;

6 months experience assessing academic performance of students; and

Montessori Teacher Certification required.

* Experience may be gained concurrently with Job Offered or Related Occupation.

As set forth above, relevant to formal education, the proffered position requires graduation from college culminating in a U.S. bachelor's degree or foreign equivalent degree in education.[7] Further, the job duties described on the ETA 750 indicate that the applicant must assist the lead teacher in providing instruction, preparing lesson plans consistent with Montessori concepts, monitor student progress, administer tests, and assist in meetings with students' parents to discuss progress and student problem areas. The applicant must also exercise discretionary authority over the management of day-to-day teaching of children from ages of three to six in specific areas of responsibility.

As shown on the ETA 750, the DOL assigned the occupational code and title of 092.227-018, Teacher, Pre-school to the certified position. DOL's occupational codes are assigned based on

[7] Although, the petitioner states "equivalent," the ETA Form 750 requires graduation from college with a bachelor's degree in education.

normalized occupational standards. According to DOL's public online database[8] most analogous to the certified position of Montessori teacher, the position falls within Job Zone Three requiring "medium preparation" for the occupation type closest to the proffered position. According to DOL, previous work-related skill, knowledge, or experience is required for these occupations. DOL assigns a standard vocational preparation (SVP) range of 6.0 to < 7.0 to the occupation, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree."[9] Additionally, relevant to the overall training and experience of these occupations, DOL states that the employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers. DOL further states that an example may consist of an electrician who must have completed three or four years of apprenticeship or vocational training and often must acquire a license to perform the job. *See id.*

It is additionally noted that in a statement from petitioner's director that was submitted with the petition, it is specifically stated that the beneficiary is being sponsored as a professional worker under the employment-based third preference classification.[10] Based on this as well as both the stated minimum requirements described on the ETA 750 and the standardized occupational requirements as set forth above, the position will be considered under a professional visa category. It some circumstances, it may also be considered in the skilled worker category. However, it is noted that while the skilled worker classification minimum requirements do not require that an applicant possess a baccalaureate degree to be classified as a skilled worker, the beneficiary must still meet the terms set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(B).

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.

---

[8] http://online.onetcenter.org/link/summary/ 25-2011.00 (Preschool Teachers, Except Special Education). Accessed 11/19/09.

[9] http://online.onetcenter.org//link/summary/25-2011.00. Accessed 11/19/09.

[10] It is also noted that section 101(a)(32) of the Act provides that "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.)

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 educational requirement that a beneficiary must produce one degree from a college or university 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.

As the record reflects, the beneficiary possesses a 1988 Bachelor's of Business Administration degree from Soochow University in Taipei, Taiwan, a 1991 Master's of Business Administration degree from Wayne State University in Detroit, Michigan, and an "Early Childhood Credential" issued in August 2002 from the American Montessori Society representing the beneficiary's completion of studies and student teaching experience at the Institute for Advanced Montessori Studies in Silver Spring, Maryland (hereinafter "Institute").

In support of the beneficiary's educational qualifications, the petitioner also submitted an academic evaluation report, dated August 7, 2002, from [redacted] of The Trustforte Corporation. [redacted] evaluation determines that the beneficiary's certificate from the Institute for Advanced Montessori Studies is analogous to the completion of three semesters of advanced bachelor's level academic studies and that when combined with her other bachelor's and master's degrees, represents the U.S. equivalent of a Bachelor of Arts degree in Education.

It is noted that the AAO requested the petitioner to provide additional evidence including a copy of the beneficiary's grade transcript from the Institute for Advanced Montessori Studies, evidence that the Institute for Advanced Montessori Studies was accredited by a U.S. post-secondary school association of regional or national scope recognized by the U.S. Department of Education to be equipped to accredit institutions offering baccalaureate level classes, and evidence that the Institute for Advanced Montessori Studies was empowered to confer baccalaureate credit to the beneficiary.

In response the petitioner, through current counsel, indicates that the Institute does not issue grades or transcripts but has records of time spent in each area of study. Counsel provided copies of documents that reflect observations made of the beneficiary's practicum teaching experience as well as a copy of a document, dated April 21, 2008, signed by the Institute's director, which lists the areas of study and the clock hours credited to the beneficiary. Counsel also provides evidence indicating that the Institute is accredited by the Montessori Accreditation Council for Teacher Education Commission and some documentation indicating that in the 2001-2002 academic year, the Institute and Trinity College in Washington D.C. had an agreement whereby students admitted to Trinity's Master of Arts in Teaching degree program may receive graduate credit for the successful completion of Institute course work.

The AAO does not find this evidence to be persuasive in demonstrating that the beneficiary has a bachelor's degree in education or a foreign equivalent bachelor's degree in education. It is noted that although the Institute may be accredited as a school that can provide certification in Montessori training, it is noted that the Maryland Higher Education Commission recognizes it only as a "private career school" and lists it along with such other schools as beauty schools, schools to become certified as a geriatric nursing assistant, schools offering cosmetology and nail technician training, barbering, and electroneurodiagnostic technology.[11] The documentation indicates that while the Institute may be accredited to offer training in Montessori methods of teaching, and notwithstanding that Trinity College may recognize some of the Institute's courses for graduate credit for Trinity's master of arts in teaching program, none of the evidence establishes that the Institute is, standing alone, an institution empowered to confer undergraduate degrees or authorized to award baccalaureate credit. Further, there is no evidence that Trinity College awarded the beneficiary any credits for courses she took at the Institute. Nor is [redacted] evaluation persuasive in this matter. The fact that the beneficiary obtained training as a Montessori teacher subsequent to her U.S. MBA does not transform her baccalaureate degree from Taiwan or her U.S. master's degree into a bachelor's degree in education. For the purpose of qualifying as a professional under 8 C.F.R. § 204.5(l)(3)(ii)(C), evidence of a baccalaureate degree must be in the form of an official college or university record, not a combination of educational credentials or education and experience.[12] USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As noted above, although The Trustforte evaluation assessed the beneficiary's certificate from the Institute for Advanced Montessori Studies as analogous to the completion of three semesters of advanced bachelor's level academic studies, the AAO does not concur as the evidence fails to indicate that the Institute is an institution authorized to confer undergraduate degrees or award baccalaureate

---

[11] *See* http://mhec.maryland.gov/utilities/PCS_Search/pcs_results.asp?T=A&ID=I. Accessed 11/19/09.

[12] The formula of equating three years of experience for one year of education, which may be used pursuant to the regulations governing non-immigrant petitions is not permitted in the regulations governing the instant petition. *See* 8 CFR § 214.2(h)(4)(iii)(D)(*5*). It is noted that former counsel's reliance on case law cited in the appeal for the proposition that a combination of training and experience may be considered as the basis for approving a petition for the professional visa category is misplaced. As noted above, the regulations relating to immigrant employment-based petitions, as amended in 1991, do not provide for the approval of the classification as a professional based on a combination of work experience and academic credentials or the substitution of experience for education.

credit but is recognized as a "private career school" by the Maryland Higher Education Commission.

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, the beneficiary does not possess either a foreign equivalent baccalaureate degree in education or a U.S. bachelor's degree in education. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," she may not qualify as a professional under section 203(b)(3)(A)(ii) of the Act as she does not have the minimum level of education as set forth by the terms of the ETA 750A.

The beneficiary is also not eligible for qualification as a skilled worker under section 203(b)(3)(A)(i) of the Act. For this qualification, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides that:

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

In this case, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements set forth on the ETA 750. The petitioner specified that the beneficiary must have graduated from college and possess a U.S. bachelor's degree or equivalent with a major in education. This equivalency is not specifically defined on the ETA 750. As indicated above, the beneficiary's certificate issued by the Institute may be considered, at most, to be vocational training in Montessori teaching, but does not represent in combination with her other educational credentials, a bachelor's degree in education.

It is noted that the petitioner provided two copies of job advertisements including an online posting with "Montessori Connections" and a copy of a newspaper advertisement. As indicated by an e-mail communication from Montessori Connections, one of these ads required 10 months of experience. Neither the online ads nor the newspaper advertisement specified the special skills required on the ETA 750. These advertisements merely stated that an AMS certified Montessori teacher for a school in Reston, Virginia was required. They also stated that qualified applicants will possess a U.S. bachelor's degree in education or equivalent combination of education, training and experience. A copy of the posting of the internal job opportunity used the same language as the ETA 750 in requiring an applicant with a "U.S. Bachelor's Degree in Education or its equivalent and 6 months experience in job described or 6 months experience in related occupation (Preschool/Kindergarten Teacher, Student Teacher or Childcare Worker) . . ."

As presented, except for the internal job posting, the newspaper and online advertisements do not list the job's requirements consistent with those set forth on the ETA 750. The ETA 750 fails to specify that a defined equivalency that represents a combination of lesser certificates and diplomas would be acceptable and the online and newspaper advertisement imply that the bachelor's degree may be satisfied with some kind of unspecified combination of education, training and experience. A defined educational equivalency to the petitioner's requirement of a bachelor's degree in education was not specifically communicated to other U.S. applicants.

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). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petition 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 this matter, the beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree in education pursuant to the terms of the labor certification.[13] As noted above,

---

[13] DOL has also provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. From Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree, " 2 (June 13, 1994). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, this field guidance memoranda has not been rescinded.

the evidence failed to clearly establish that the U.S. based Institute for Advanced Montessori Studies was empowered to grant baccalaureate credit to the beneficiary rather than simply accredited to provide certification in Montessori training. The Trustforte Evaluation is not persuasive in its determination relevant to the Institute for Advanced Montessori Studies. It is noted that the AAO will not accept an evaluation that attempts to somehow make a U.S. equivalency evaluation on a U.S. institution that is not clearly already accredited as a college or university empowered to confer baccalaureate credit. The evidence submitted in this matter does not establish that the Institute for Advanced Montessori Studies is such an institution. The petitioner, therefore, has not demonstrated that the beneficiary has a four-year single source Bachelor's degree in education. Further, the petitioner has not adequately demonstrated that the beneficiary's education and certificate could be considered the equivalent of a bachelor's degree as the Montessori program is not clearly established to grant baccalaureate credit.

The petitioner's actual minimum requirements could have been changed or clarified before the Form ETA 750 was certified by the DOL. Since that was not done, the director's decision to deny the petition is affirmed. Because the beneficiary does not meet the job requirements as stated on the ETA Form 750 labor certification, the petition may not be approved under either the professional or skilled worker category pursuant to section 203(b)(3) of the Act.

Based on the foregoing, the petitioner failed to demonstrate that the beneficiary met the qualifications of the labor certification. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.