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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

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 05 2010
LIN 07 053 52324

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:

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 your 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 $585. 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 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 sustained. The petition will be approved.

The petitioner is a teacher staffing firm. It seeks to employ the beneficiary permanently in the United States as a science teacher. A ETA Form 9089, Application for Permanent 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. The director additionally concluded that the petitioner had not established its continuing financial ability to pay the proffered wage.

On appeal, the petitioner contends that the beneficiary's educational credentials satisfied the terms of the labor certification and that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[1]

For the reasons discussed below, the AAO finds that the beneficiary's credentials satisfied the minimum level of education stated on the labor certification. The AAO also finds that the petitioner has had the ability to pay the proffered wage to the beneficiary. Further, the AAO would also note that various 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.

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.

The regulation at 8 C.F.R. § 204.5(g)(2) also 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 in the

[1]The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

> form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d); *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on June 20, 2006. The visa preference petition was filed on December 13, 2006. The proffered wage is stated to be $37,420 per year.

The job qualifications requirements are found on Part H of the ETA Form 9089. As to the certified job's title, duties and minimum level of education and experience required for the proffered position in this matter, Part H-4 of the ETA Form 9089 indicates that the minimum educational requirements for the certified position of science teacher is a bachelor's degree in education or science. Part H-6 indicates that the beneficiary should have 12 months of work experience in the job offered of science teacher. Part H-7 and H-8 indicate that there is no alternate field of study acceptable, nor will the employer accept an alternate combination of education and experience. Part H-9 states that a foreign educational equivalent is acceptable. The job duties are defined on Part H-11. They are described as follows:

> Teach & demonstrate core curriculum with experiments & lab in Physical & Biological Sciences to students using interdisciplinary approach, various laboratory equipment & variety of teaching tools, settings & strategies including computers, digital imaging equipments, projectors, etc. Use differentiated instructions; integrate technology into curriculum to enhance student skills.

In determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (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, but must recognize that the DOL sets the contents of the labor certification. *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, 1016; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

DOL assigned the occupational code of 25-2022.00-Middle School Teachers, Except Special and Vocational Education, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database[2] 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."[3] 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.

Further, based on a Bureau of Labor Statistics survey of employees aged 25-44, DOL states that 94% of the respondents in this category hold a Bachelor's degree or higher level of education.[4] On this basis, as well as the title of the certified job, its responsibilities as set forth in Part A of the approved labor certification, and its minimum educational requirements of a Bachelor's degree in education or science, the job will be considered as a professional position. It is additionally noted that, according to section 101(a)(34) of the Act, 8 U.S.C. § 1101(34), a "'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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.

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[2] *See* http://online.onetcenter.org/link/summary/25-2022.00 (accessed 07/20/10).
[3] *See* Id.
[4] *See* http://online.onetcenter.org/link/details/25-2022.00 (accessed 07/20/10).

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.

As noted above, the ETA 750 in this matter is certified by DOL. 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 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.
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> * * *
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> 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). 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 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, revisited this issue, stating:

> 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).

In this matter, the issues are how the minimum educational requirements as set forth on the ETA Form 9089 should be interpreted and whether the beneficiary possesses the necessary academic credentials.

In support of the beneficiary's Indian educational credentials, the petitioner submitted copies of the beneficiary's [redacted] which is dated March 23, 2000. The Bachelor of Education diploma also stated that the beneficiary had specialized in the methods of teaching, english, biological science and computer education. The petitioner has also provided the corresponding marks sheets for each of the beneficiary's degrees. They corroborate the information stated on the diplomas by showing that the beneficiary passed her third-year examinations for her Bachelor of Science degree in 1997 and passed her Bachelor of Education examination in August 1998.

The petitioner also provided a copy of a credential evaluations from [redacted], dated July 21, 2005. It is presented in chart form and indicates that the beneficiary's [redacted] has a U.S. equivalency of "three years of undergraduate study." Her Bachelor of Education from [redacted] has the U.S. equivalency of a bachelor's degree. The evaluation also provides that the beneficiary's Bachelor of Education equivalency is stated in conjunction with the Bachelor of Science degree.

The director denied the petition on December 28, 2007, concluding that neither of the beneficiary's Indian bachelor's degrees represented the U.S. equivalent of a bachelor's degree in the required discipline. The director also determined that the petitioner had not provided any evidence of its ability to pay the proffered salary.

On appeal, counsel asserts that the beneficiary possessed the required educational credentials and also submits copies of a Wage and Tax Statement (W-2) for 2006 and a copy of the beneficiary's year-to-date earnings for 2007. It is noted that in response to the AAO's request for evidence (RFE) issued on April 19, 2010, the petitioner has provided additional W-2s issued by the petitioner to the

beneficiary. Together, these documents reflect that the petitioner paid wages to the beneficiary in the following amounts:

Year	Wages Paid	Proffered wage of $37,420 per Year
2006	[redacted]	Exceeds by $[redacted]
2007		Exceeds by $[redacted]
2008		Exceeds by $[redacted]
2009		Exceeds by $[redacted]

In determining a petitioner's ability to pay a given wage, and before examining a petitioner's net income or net current assets during a given period, USCIS will first review whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. In this case, based on the evidence submitted by the petitioner as shown in the above table, it has employed and compensated the beneficiary for the last several years at a salary that has exceeded the proffered wage of $37,420. It may be concluded that the petitioner has established its continuing financial ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

In regard to the beneficiary's educational qualifications, it is noted that in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. November 30, 2006), the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In this case, since the position is considered as a professional occupation, the petitioner must establish that the beneficiary possesses a single foreign degree.

This office has also reviewed the credentials information in the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). ACCRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://accraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

Authors for EDGE work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf 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.* at 11-12.[5]

In this matter, EDGE indicates that the entrance requirement to an Indian Bachelor of Education degree is a two or three-year bachelor's degree. In this case, the beneficiary's Bachelor of Education degree was predicated upon her completion of the three-year Bachelor of Science degree. EDGE states that an Indian Bachelor of Education degree following a three-year bachelor's degree represents the "attainment of a level of education comparable to a bachelor's degree in the United States." As EDGE indicates that the beneficiary's Bachelor of Education represents the U.S. equivalent to a bachelor's degree, this credential, predicated on completion of the three-year Bachelor of Science degree, represents a single degree which satisfies the requirements of the Form ETA 9089 and the regulation under section 8 C.F.R. § 204.5(l)(3)(ii)(C).

The petitioner has established its ability to pay the proffered wage. Further the beneficiary has a "United States baccalaureate degree or a foreign equivalent degree," and, thus, qualifies for preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

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[5] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.