

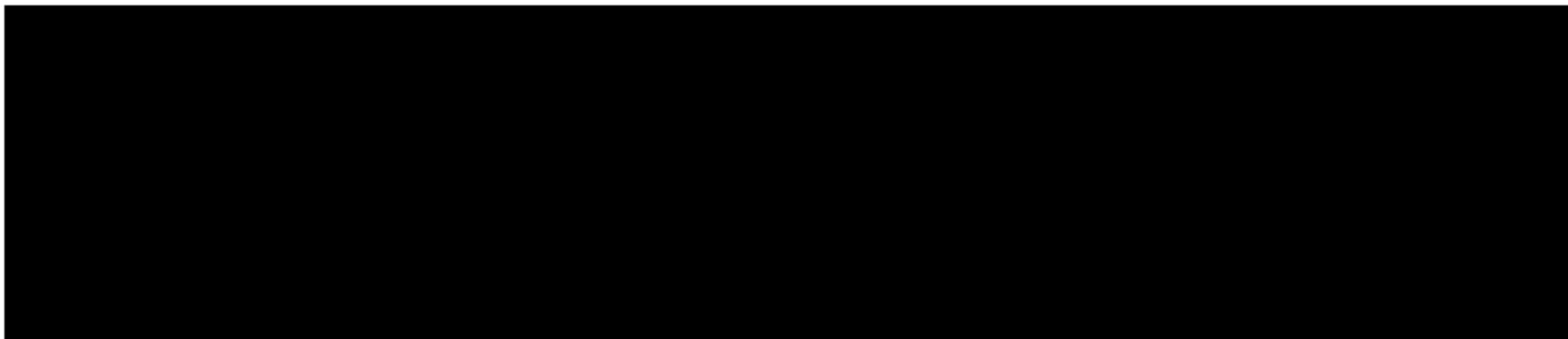
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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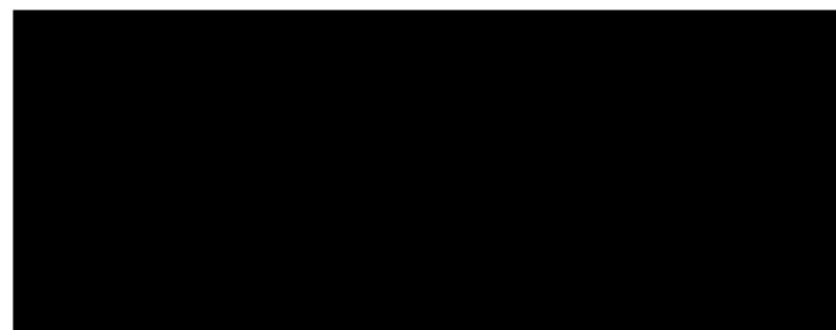
DATE: **JUL 06 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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:



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.

Thank you,

A handwritten signature in cursive ink that appears to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, (director) denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further consideration.

The petitioner is a public school system. It seeks to permanently employ the beneficiary in the United States as a high school teacher.

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

The director's denial concludes that the petitioner failed to establish that the beneficiary possessed the minimum educational requirements of the offered position as set forth in the labor certification.

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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is October 27, 2006, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The Immigrant Petition for Alien Worker (Form I-140) was filed on February 21, 2007.

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position requires a bachelor's degree in Mathematics. On Line H-7 the petitioner specified that there was no acceptable alternate field of study. On Line H.8 the petitioner specified that there was no acceptable alternate combination of education and experience.

¹ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

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

(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.

(B) 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.

(C) Professionals. 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

In support of the petition, the petitioner provided a copy of the beneficiary's diploma and transcripts from Kenyatta University, certifying the beneficiary was awarded the degree of "Bachelor of Education (Science)" on October 19, 1995. The petitioner also provided a copy of the beneficiary's diploma and transcripts from Morgan State University, where he was awarded a Master of Engineering degree on December 23, 2003, as well as his transcripts from Morgan State University reflecting that the beneficiary was enrolled in graduate-level studies in Mathematics Science/Education as of fall 2005. The beneficiary's official transcripts from Kenyatta University and Morgan State University reflect a heavy course load of mathematics courses. The record also reveals that the beneficiary was certified by the Maryland State Department of Education to teach mathematics from July 1, 2005, through June 30, 2010.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." <http://www.aacrao.org/About-AACRAO.aspx> (accessed June 20, 2012). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of

foreign educational credentials.” <http://edge.aacrao.org/info.php> (accessed June 20, 2012). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO’s National Council on the Evaluation of Foreign Educational Credentials.² If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.³

EDGE states that the Bachelor of Education degree in Kenya “represents attainment of a level of education comparable to a bachelor’s degree in the United States.”⁴ Additionally, according to the beneficiary’s undergraduate and graduate transcripts, he took numerous mathematics and mathematics-related courses in pursuit of his Bachelor of Education degree and subsequent graduate-level coursework in Engineering and Mathematics Education. Further, the beneficiary is certified to teach mathematics to grades 7-12 by the Maryland State Department of Education.

The AAO recognizes the *Occupational Outlook Handbook*⁵ (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook* indicates that high school teachers are required to possess a bachelor’s degree and a state-issued certification or license. *Id.*

The *Handbook* goes on to state that “[a]ll states require public high school teachers to have at least a bachelor’s degree. Most states require high school teachers to have majored in a content area, such as chemistry or history. While majoring in a content area, future teachers typically enroll in their higher education’s teacher preparation program and take classes in education and child psychology, as well.” *Id.*

In this context, the beneficiary’s Bachelor of Education (Science), along with his advanced degree studies in Engineering and Mathematics Education demonstrate that he has met the requirements of a high school teacher per the *Handbook* because he not only possesses a bachelor’s degree, but he focused his studies on mathematics and mathematics-related content courses, along with coursework

² See *An Author’s Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

³ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

⁴ <http://edge.aacrao.org/country/credential/bachelor-of-arts-6?cid=single> (accessed June 20, 2012).

⁵ Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2011-12 ed., available at <http://www.bls.gov/OCO> (last accessed June 20, 2012).

relating to education and psychology, during his undergraduate and graduate studies. Additionally, it is clear that the beneficiary possesses the requisite education for the position based on the fact that he is certified to teach mathematics by the Maryland State Department of Education.⁶

Thus, upon review of the entire record, including evidence submitted on appeal, the AAO concludes that the petitioner has established that it is more likely than not that the beneficiary had all the education, training, and experience specified on the ETA Form 9089 as of the priority date. Accordingly, the petitioner has overcome the ground for denial cited in the director's decision.

Beyond the decision of the director, the petitioner failed to establish that it will be the actual employer of the beneficiary. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "Clackamas"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. The petitioner describes its role is "establishing legislative priorities and setting policies...in the Baltimore City Public Schools."⁷ The petitioner does not appear to hire, fire, or direct the actual work of teachers within the school system. Rather, it appears that the Baltimore City Public Schools and not the petitioner is responsible for recruiting, hiring, and promoting teachers, in addition to contracting with the Baltimore Teachers Union.⁸ Therefore, the petition cannot be approved because the petitioner failed to establish that it will actually employ the beneficiary.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. 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; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this

⁶ The Maryland State Department of Education's mission is "[t]o ensure, through certification standards, that each student is served by professional educational staff who possess the minimum essential knowledge and skills needed to achieve outcomes for public education declared by the State Board of Education."
http://www.marylandpublicschools.org/MSDE/divisions/certification/certification_branch/ (last accessed June 20, 2012).

⁷ http://www.baltimorecityschools.org/Page/13551 (Accessed June 20, 2012).
⁸ See www.baltimorecityschools.org.

time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.