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

(b)(6)

DATE: JAN 2 8 2014 OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based petition was denied by the Director, Nebraska Service Center (director). The petitioner appealed the director's decision and the Administrative Appeals Office (AAO) dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision. The AAO affirmed the dismissal of the appeal. The petitioner has filed a second motion to reconsider the AAO's decision. The petition will remain denied.

The petitioner is a Montessori school. It seeks to employ the beneficiary permanently in the United States as a kindergarten teacher pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the visa classification selected by the petitioner was not supported by the ETA Form 9089 and denied the petition accordingly.

On August 2, 2013, the AAO dismissed the appeal, concurring with the director that the visa classification of a third preference "professional"[1] is not supported by the ETA Form 9089, and further determining that the beneficiary does not satisfy the minimum level of education required for the professional visa classification, or that the beneficiary possesses the required training, special skills and experience as set forth on the labor certification.[2] The petitioner filed a motion to reopen and reconsider this decision. On November 1, 2013, the AAO granted the motion and dismissed the appeal.

The petitioner, through counsel, has filed a motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO will reconsider its previous decisions.

With its motion, the petitioner submitted no argument or evidence concerning or resolving the previous issue noted concerning its identity and and the '[redacted]'[3] In

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[1] The offered position is for a kindergarten teacher. In its August 2, 2013 decision, the AAO found that this position is statutorily designated as a profession under section 101(a)(32) of the Act. (i.e. teachers in elementary or secondary schools).

[2] 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). 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.

[3] The AAO's August 2, 2013 decision indicated in footnote 1 and again in the November 1, 2013 decision in footnote 3 that the petitioner's name as specified on the Form I-140 and on the labor certification is "[redacted] There is no indication in the record that this entity is a corporation or has its own federal identification tax number as indicated on the Form I-140, which, as suggested by the petitioner's documents, appears to belong to the "[redacted] Further, the petitioner has submitted no evidence establishing that [redacted] was the registered fictitious business name of the [redacted] as of the priority date of November 15, 2010.

addition, the petitioner did not submit any evidence to demonstrate that the labor certification supports the classification requested. As stated in the prior AAO decisions, the petitioner requested the visa classification for the beneficiary on the Form I-140 as a professional pursuant to section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii),[4] which grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. §204.5(l)(2).[5] Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. baccalaureate (or a foreign equivalent degree).

In this case, on Part H.8 of the Form ETA 9089, the petitioner indicated that it would accept an alternate combination of education and experience designated in H.8-A as "other" and defined in H.8-B as, "Using 3 for 1 equivalency to be combination of B.A. level education + e" [presumed to be experience]." As set forth above and in the AAO's previous decisions, a professional classification requires a U.S. bachelor's degree or a foreign equivalent degree represented by an official college or university record designating the date of conferral and the field of study. The petitioner's acceptance of the alternate combination of education and experience, less than an actual bachelor's degree reflects that the ETA Form 9089 does not require at a minimum a U.S. bachelor's degree or foreign equivalent degree and therefore, does not support the visa designation of third preference professional designated on the Form I-140. As a result, the petition remains denied for this reason.

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[4] Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

> 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.

Section 101(a)(32) of the Act defines the term "profession" to include, but is not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If the offered position is not statutorily defined as a profession, "the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation." 8 C.F.R. § 204.5(l)(3)(ii)(C).

[5] For a professional visa classification, the petition must be submitted with evidence that the beneficiary holds a U.S. bachelor's degree or a foreign equivalent degree and by evidence that she is a member of the professions. The bachelor's degree shall be in the form of an official college or university record showing the date that it was awarded and the area of concentration of study. 8 C.F.R. § 204.5(l)(3)(ii)(C). This regulation uses a singular description of a foreign equivalent degree.

In addition to the labor certification not supporting the visa category requested, the petitioner did not demonstrate that the beneficiary has the qualifications required by the terms of the labor certification. As noted above, in order to be classified as a professional, the beneficiary must possess at least a U.S. bachelor's degree or a foreign equivalent degree from a college or university. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. The regulation also requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

In the previous decisions, the AAO considered two credentials evaluations from [redacted] In the evaluations, [redacted] uses a formula of equating three years of work experience to one year of college training. Including the beneficiary's work experience from April 1997 to March 2002, and the work experience gained with the petitioner since 2005, combined with her training represented by her 2003 Montessori Diploma, [redacted] determines that the beneficiary has the U.S. equivalent of at least a Bachelor of Education.

In the instant motion, counsel for the petitioner contends that [redacted] analysis was not given due deference and consideration in determining whether the beneficiary holds the qualifications required for the position. As stated above, [redacted] evaluations rely in part on the beneficiary's work experience to reach an educational equivalency. His evaluations state that the beneficiary's Bachelor of Arts degree is equivalent to three years of U.S. baccalaureate instruction;[6] but his evaluations do not conclude that the beneficiary's degree alone is equivalent to a U.S. bachelor's degree. Instead, his evaluation states that the beneficiary's nine years of experience in the education field are what qualify her as having the equivalent of a U.S. bachelor's degree in the field of education.[7]

Counsel cites Seventh Circuit cases such as *Niam v. Ashcroft,* 354 F.3d 652, 660 (7th Cir. 2004); *Donahue v. Bamhart,* 279 F.3d 441, 446 (7th Cir. 2002); and *Porter v. Whitehall Laboratories, Inc.,* 9 F.3d 607 (7th Cir. 1993), for the premise that [redacted] evaluations may not be discarded without due consideration. Counsel cites [redacted] achievements as proof of his

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[6] As stated in the AAO's August 2, 2013, decision, based on the American Association of Collegiate Registrars and Admissions Officers' (AACRAO's) educational equivalency determination of the Indian three-year bachelor's degree, the AAO finds that the beneficiary's three-year foreign bachelor's degree is comparable to three years of undergraduate university study in the United States.

[7] [redacted] uses three years of experience to one year of education equivalency to determine the beneficiary's degree equivalency. This experience to education equivalency is used in H-1B nonimmigrant petitions and cannot be used for the instant visa category. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of H-1B nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience represented by the three for one formula).

knowledge of the subject matter and qualifications as an expert witness. USCIS has not challenged knowledge or expertise in this area.[8] The issue with equivalency is that the regulations outlining the parameters for a professional immigrant work visa do not allow for an educational equivalency to be met through experience. Instead, the applicant must have a single degree from a foreign college or university that is equivalent to a U.S. bachelor's degree. has not stated that the beneficiary's education alone is equivalent to a U.S. bachelor's degree.

Counsel cites *Grace Korean United Methodist v. Chertoff,* 437 F.Supp.2d 1174, 1179 (D.Or. 2005), and *Hoosier Care, Inc. v. Chertoff,* 482 F.3d 987 (7th Cir. 2007), for the proposition that USCIS does not have the authority to determine whether the beneficiary is qualified for the position, but rather, it is the Department of Labor (DOL)'s purview to make such a determiniation regarding qualification.

In *Grace Korean,* 437 F. Supp. 2d at 1179, a federal district court held 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." 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. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). A judge in the same district, however, 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. Or. Nov. 30, 2006).

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The alien had a three-year degree and membership in the Institute of Chartered Accountants of India (ICAI). USCIS had concluded that the alien did not qualify for EB-2 or EB-3 (due to the specific job requirements on the labor certification). The court upheld the USCIS determinations on EB-2 and EB-3 as a professional but reversed USCIS in the EB-3 skilled worker classification.

In reaching its conclusions, the federal district court in *Snapnames.com, Inc.* 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. *Id.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous

[8] We note that 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, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795.

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. *Id.* at *14. In professional and advanced degree professional cases, however, where the alien is statutorily required to hold a bachelor's degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.*

As was the situation presented in *Snapnames.com, Inc.,* the petitioner here provided for an equivalency on its labor certification. The difference between the case presented in *Snapnames.com* and the instant case, however, is that the Form I-140 submitted by the petitioner in this case only requested consideration under the professional category and not the "skilled worker" category.[9] The professional category requires the applicant to have a bachelor's degree or a foreign degree equivalent to qualify for the visa category, regardless of the requirements for the position set forth on the labor certification. As a result, although the beneficiary may qualify for the position as set forth on the labor certification, the position will not qualify as a professional pursuant to the regulations' requirements for the visa category.

The petitioner has failed to establish that the ETA Form 9089 supports the visa classification designated on the Form I-140. The petitioner has also failed to establish that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university and that she qualifies for a professional classification.

The AAO also observes that the petitioner submitted no evidence on motion that addresses the deficiencies set forth in the AAO's August 2, 2013, decision regarding the lack of transcripts supporting the beneficiary's Montessori diploma or the employment verification letters submitted in support of her claimed qualifying experience. Therefore, the AAO continues to find that the petitioner failed to establish that the beneficiary meets the training, special skills and experience requirements of the labor certification.

Based on the foregoing, the AAO reaffirms its previous dismissals of the appeal on August 2, 2013 and November 1, 2013.

The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

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[9] At the time that *Snapnames.com* was decided, the Form I-140 did not contain separate blocks for professional and skilled worker so that the petitioner could opt for consideration of its application under both categories simultaneously. The Form I-140 has since been revised so that a petitioner must select whether the petition should be considered under the professional or skilled worker category. The petitioner in this case checked box e. on Part 2 of the Form I-140 requesting consideration of the petition as "A professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree)."

ORDER: The motion to reconsider is granted. The prior decisions of the AAO dated August 2, 2013 and November 1, 2013 are affirmed. The petition remains denied.