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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **SEP 27 2005**
EAC 02 188 51518

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

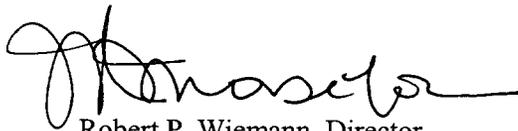
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director denied the preference visa petition, and subsequently denied a motion to reopen/reconsider submitted by the petitioner. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a synagogue and religious school. It seeks to employ the beneficiary permanently in the United States as a religious teacher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because he determined that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On motion to reopen/reconsider, counsel asserted that the director incorrectly stated that the Form ETA 750 required a bachelor's degree, and that the labor certification clearly reflected that the petitioner required either a baccalaureate degree or its equivalent. Counsel further stated that the petitioner did not specify that the equivalent of the bachelor's degree should be either a functional or educational equivalent. On April 15, 2004, the director granted the petitioner's motion to reopen/reconsider and again affirmed her decision. The director determined that the beneficiary was required by the ETA 750 to have a baccalaureate degree, and that presently she possessed only the "functional equivalent" of a baccalaureate degree.

On appeal, the petitioner's counsel contends that the director's interpretation of "degree or equivalent" is too restrictive and contrary to relevant Citizenship and Immigration Services (CIS) regulations and to the Department of Labor's (DOL) Technical Assistance Guide. Counsel further states that the beneficiary's credentials are sufficient to meet the requirements of the 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.

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

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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

If the petitioner 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 The minimum requirements for this classification are at least the two years of training or experience.

To be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is March 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of teacher, adult education. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|--------------------------|
| 14. Education | |
| Grade School | 8 |
| High School | 4 |
| College | 4 years |
| College Degree Required | BA or its equivalent |
| Major Field of Study | Education or Special Ed. |

The petitioner also specified that any applicants have one year of experience in the job offered, and one year in a related occupation of teacher. Under Item 15, the petitioner set forth an additional special requirement: "Must be fluent in Hebrew." The job offered lists the following duties on Item 13: "Choose textbooks, prepare lesson plans to teach Hebrew language, Bible, Jewish holidays and customs, prayer, Jewish history and Jewish rituals. Tutor students on a private basis."

The beneficiary set forth her credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), she indicates that she attended Haifa University, Haifa, Israel, studying special education, from March 1977 to April 1978, and received a certificate or diploma. The beneficiary then indicates she attended Tel Aviv University, Tel Aviv, Israel, studying special education, from July 1979 to January 1984 and received a certificate. She provides no further information concerning her educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that she worked in positions for two past employers as follows in reverse chronology:

1. Temple Beth Or, Clark, New Jersey, religious studies teacher, June 1999 to the time the Form ETA 750 was signed.
2. Akim School, Kiryat Motzkin, Haifa, Israel, special education teacher, 1986 to 1995.

With the initial petition, the petitioner provided a copy of a credential evaluation from Foundation for International Services, Inc.(FIS), Bothell, Washington, that concludes that the beneficiary "has the equivalent of three years of university-level credit in special education from an accredited college or university in the United States and has, as a result of her educational background and employment experiences (3 years of experience = 1 year of university-level credit), an education background the equivalent of an individual with a bachelor's degree in special education."

With the educational equivalency document, the petitioner also provided the following documents, with translations:

A copy of a certificate from Haifa University that states the beneficiary participated in teaching qualification in the subject of special education in the school year 1977 to 1978 for 480 hours. The FIS evaluator states that this coursework was the equivalent of one year of university-level credit from an accredited U.S. university.

A copy of a letter from the Ministry of Education and Culture in Israel, Supervisor and coordinator of special education in Israel dated 1980 that states the beneficiary completed a course of special methods in treating the mentally disabled, for 520 hours. The evaluator states that this coursework is equivalent to one year of university level credit from an accredited U.S. college or university.

A copy of a letter from Professor [REDACTED] Supervisor and coordinator of special education, [REDACTED] dated January 13, 1984, that states the beneficiary studied a course for special methods in handling mentally ill students, for 120 hours. The evaluator states that this coursework is equivalent to one quarter of a year university –level credit from an accredited U.S. college or university.

A copy of a letter of confirmation from the Ministry of Education and Culture in Israel, Unit for Teachers Qualifications, Haifa District, dated February 18, 1985 that certifies the beneficiary qualified in the course subject of special education-Teachers Conference Room Study, that was held from 1984 to 1985, for 345 hours. The evaluator states that this coursework is equivalent of two third of a year of university-level credit from an accredited U.S. college or university.

The petitioner also submitted a letter, with translation from an unidentified writer, Akim-Israel Association for Rehabilitation of Mentally Handicapped, Kiryat-Ata branch, Kiryat-Ata, Israel that states the beneficiary was employed by the organization in Haifa, Israel for August 1986 to December 1994 as a special education teacher.

Because the evidence was insufficient, the director requested additional evidence on September 4, 2003. The director stated that the credentials evaluation indicated that the beneficiary possessed a “functional equivalent” of a bachelor degree in special education from an accredited U.S. institution. The director specifically requested proof that the beneficiary possessed the required baccalaureate degree or its educational equivalent as of March 30, 2001, the priority date. The director stated that an acceptable evaluation should only consider formal education; state if the collegiate training was post-secondary; provide a detailed explanation of the material evaluated; and briefly state the qualifications and experience of the evaluator.

In response to the director’s request for evidence, on November 16, 2003, the petitioner submitted a second educational equivalency document prepared by [REDACTED] Indiana University, School of Education, Bloomington, Indiana. [REDACTED] states that the beneficiary completed one year of academic studies at Haifa University in 1978 in special education. [REDACTED] describes the beneficiary’s coursework with the Ministry of Education and Culture as completed in 1980 and he stated that she received a certificate for more than one year of academic studies in her area of concentration, special education. [REDACTED] then went on to describe the beneficiary’s 19 years of professional training and work experience in education and related areas. According to Dr.

the beneficiary worked from 1975 to 1986 working as a part-time religious studies and special education teacher with the Haifa Board of Education. He also described her work from 1986 to 1995, with Akim, as a special education teacher. also described the beneficiary work at Temple Clark, New Jersey as a Jewish Studies teacher. then considers the equivalency ratio outlined in CIS regulations for H-1B visa petitions and states that six of the beneficiary's eighteen years of experience represent the time equivalent of not less than four additional years of baccalaureate level academic training and education. then states that it is his judgment that the beneficiary has attained the academic equivalent of a bachelor degree, with a concentration in special education, from an accredited U.S. educational institution.

The director denied the petition on January 13, 2004. The director stated that the second educational equivalency document also used the combination of education and work experience to provide the beneficiary with the "functional equivalent" of a baccalaureate degree. The director then determined that the petitioner had not established that the beneficiary possessed a baccalaureate degree as of the priority date and that, as a consequence, the petitioner had not established that the beneficiary was qualified for the position.

As previously stated, on motion to reopen/reconsider, counsel asserted that the director incorrectly stated that the Form ETA 750 required a bachelor's degree, and that the labor certification clearly reflected that the petitioner required either a bachelor's degree or its equivalent. Counsel also stated that the petitioner did not specify that the equivalent of the bachelor's degree should be either a "functional" or educational equivalent. Counsel then asserted that it was incongruous and even inappropriate for the director to insert her perception of the petitioner's requirement by stating that only an educational equivalent could be the equivalent of a bachelor's degree. Counsel stated that the labor certification was clear that the employer would accept applicants who had a bachelor's degree or its equivalent, and that there was no statutory requirement that petitioner could only accept an educational equivalent as opposed to a "functional equivalent" when specifying underlying education requirements.

Counsel then stated that the analysis of the basic requirements for obtaining an H-1B visa for a specialty occupation further amplifies the concept of evaluating the equivalency of both education and experience in determination of beneficiaries' qualifications. Counsel stated that CIS accepts that an alien who has the education, specialized training or work that is equivalent to training acquired by means of a bachelor's degree or higher is eligible to apply for an H-1B specialty occupation visa. Counsel states that it would be contradictory for CIS to accept the concept of equivalency for purposes of an H-1B visa while simultaneously denying a preference employment-based petition for the same beneficiary with the same identical criteria.

On April 15, 2004, the director granted the petitioner's motion to reopen/reconsider and again affirmed her decision. In reference to counsel's reference to H-1B visa petitions, the director stated that the three years of experience for one year of education rule, used in the beneficiary's educational equivalency documents was valid only for nonimmigrant H-1B petitions, not immigrant petitions. The director also states that the petitioner's actual minimum requirements for the position could have been clarified or changed before the Department of Labor certified the ETA 750. The director then stated that the beneficiary was required by the ETA 750 to have a baccalaureate degree, and that presently she possessed only the "functional equivalent" of a baccalaureate degree. The director then sent the matter to the AAO as an appeal.

On appeal, counsel states that for years, the Department of Labor approved labor certifications for positions requiring "degree or equivalent" in cases where it was apparent that the beneficiary had no degree. The DOL then reversed itself and said that "degree or equivalent" meant a U.S. degree or equivalent foreign degree. Counsel states that following the DOL position, CIS will deny petitions for people who have no foreign degree but have equivalent

work experience. Counsel states that this restrictive interpretation is contrary to the relevant statute, CIS regulations, and the DOL's Technical Assistance Guide, all of which use the term to mean degree or equivalent work experience.

Counsel then states on March 1993, DOL announced a new policy to henceforth interpret "degree or equivalent" to mean "degree or equivalent work experience.", and refers to a letter from Flora T. Richardson, Chief, Division of Foreign Labor Certification, Department of Labor, to Michael Phulwani (March 21, 1993) reprinted in 12 AILA Monthly Mailing 366 (May 1993).

Counsel further states that DOL said its new policy should be applied only to new cases, not those previously certified, and the DOL has since abandoned this policy. Counsel asserts that DOL's inconsistencies and reversal in interpreting degree equivalency are inexplicable. Counsel states that CIS has introduced a new policy that is contradictory to previous statutory and case law, and inherently incorrect, based upon prior CIS procedure. Counsel finally states that in the instant petition, the petitioner specified that it would accept the equivalent of a bachelor's degree in an educational field, and in fact, the applicant provided an evaluation which clearly established her qualifications for the job at hand.

The director in her decision stated that the petitioner could have corrected or changed the actual minimum educational requirements for the position before the ETA-750 was certified by the Department of Labor. This reference appears to be directed at I-140 petition positions that require less training or education than a baccalaureate degree, such as skilled worker. For this reason, the AAO includes some explanatory text with regard to the differences between these two categories, both identified in the same block of the I-140 petition, namely, page 1, Part 2, Petition Type, section e. At the outset, the AAO notes that the ETA 750 only requires one year of experience, so despite the director's comments, the instant petition can only be considered under the regulations pertaining to the "professional" classification.

It is not within the purview of these proceedings to examine the policy changes of the Department of Labor with regard to educational equivalencies for positions listed on the Form ETA 750 as requiring a baccalaureate degree. However, contrary to counsel's assertions on motion and appeal, CIS regulations do clearly address educational requirements for third preference immigrant professionals. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. And for the “professional category,” the beneficiary must also show evidence of a “United States baccalaureate degree or a foreign equivalent degree.” Thus, regardless of category sought, the petitioner must show that the beneficiary meets the requirements of the Form ETA 750A, which, in the instant petition, includes a requirement that the beneficiary have four years of college and a baccalaureate degree in education or special education.

In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In the instant case, on appeal, counsel asserts that the petitioner did not specify that the equivalent of the required bachelor’s degree in special education be viewed from either a functional or educational perspective. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record is devoid of any evidence that the petitioner would have accepted less than a baccalaureate degree or foreign equivalent degree as the minimum requirements for the proffered position. As correctly noted by the director, the ETA 750 could have been amended or corrected prior to its certification, if this were the case. Therefore, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 that, in this case, includes a bachelor's degree in special education, one year of experience in the actual job, one year of experience in the related field of education, and fluency in Hebrew.

The petitioner has established that the beneficiary has the requisite work experience as a teacher of special education, and the beneficiary, as a native of Israel, is fluent in Hebrew. The only remaining issues to be discussed in this decision are whether or not the beneficiary has four years of college and a bachelor’s degree or its equivalent in education or special education.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). It is noted that noted that the two evaluation documents submitted to the record provide conflicting testimony as to the length of beneficiary’s university level studies and her work experience. The first FIS evaluation concludes that the beneficiary possesses the equivalent of three years of university-level credit in special education from an accredited U.S. educational institution, and states that her resume reflects 22 years of work experience. The second evaluation submitted by [REDACTED] suggested that the beneficiary possessed over two years of university-level studies, based on her coursework at the University of Haifa, and the Israeli Ministry of Education and Culture, and states that she has eighteen years in training and work experience. Nevertheless both evaluation documents indicate that the beneficiary has less than four years of formal university studies, as required by the ETA 750.¹ Thus, the petitioner has not established that the beneficiary has four years of college.

¹ It is also noted that neither evaluation submitted to the record is accepted as competent and probative evidence

In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor's degree must be an equivalent degree, not a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year bachelor of science degree from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies regardless of whether or not a petition is filed as a skilled worker or professional.

As stated previously, the regulations define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(l)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language 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.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from Israel could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. Here, the record reflects that the beneficiary's formal education consists of less than a four-year curriculum. As previously stated, neither evaluation submitted to the record is accepted as competent and probative evidence that the beneficiary holds a foreign equivalent degree to a United State's bachelor's degree because they both include employment experience in the evaluations.. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

Contrary to counsel's assertions, Item 14 of the Form ETA 750A does not expand the educational requirements to work experience that is equivalent to a bachelor's degree. "BA or its equivalent" listed under a question eliciting "College Degree Required," can lead to no alternate conclusion, especially since additional employment experience was set forth under the boxes eliciting employment experience requirements.

The AAO concurs with the director's decision that the petitioner has not established that the beneficiary is qualified for the proffered position, since it has not proven that the beneficiary has four years of college and holds a four-year baccalaureate degree or foreign equivalent.

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.

that the beneficiary holds a foreign equivalent degree to a United State's bachelor's degree because they both include employment experience in the evaluations..