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20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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Services

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FILE: LIN-04-005-51334 Office: NEBRASKA SERVICE CENTER Date: **SEP 29 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care facility for handicapped children. It seeks to employ the beneficiary permanently in the United States as a “Developmental Disability Specialist (DOT: 195.227-018; OES 21-1093).” A photocopy of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. No original ETA 750 is found in the record. The director determined that the petitioner had not established that the beneficiary had the training required to qualify as a skilled worker in the occupation of disability recreational therapist, and denied the petition accordingly.

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 or seasonal nature, for which qualified workers are not available in the United States.

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. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Comm. 1977). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is August 12, 2002.

The I-140 petition was submitted on October 6, 2003. On the petition, in Part 2, Petition type, the petitioner checked box “g” for “any other worker (requiring less than two years of specialized training or experience).” (I-140 petition, Part 2). In Part 5 of the petition, Additional information about the petitioner, the petitioner claimed to have been established in 1975, to currently have 140 employees, to have a gross annual income of “+\$20 Million,” and to have a net annual income of “+\$889,000.” (I-140 petition, Part 5). With the petition, the petitioner submitted supporting evidence.

In a September 17, 2004 decision, the director determined that the petition of Developmental Disability Specialist requires the services of a skilled worker and that therefore the beneficiary cannot be awarded the “other worker” visa classification. The director accordingly denied the petition.

On appeal, counsel submits a brief and no additional evidence. Counsel also submits copies of three AAO decisions in petitions submitted previously by the petitioner which had been certified by the director to the AAO. Those decisions are not evidentiary documents, but are submitted as legal authority in support of the instant appeal.

Counsel states in the notice of appeal that the beneficiary’s post-secondary education is a Bachelor’s degree in Special Education. In her brief, however, counsel states that the beneficiary has a Bachelor’s in Commerce degree. Counsel then states that teaching was one of the field mentioned by the AAO as relevant to the offered position and states that graduate level courses in Special Education would be one path a person could use to pursue teaching. Counsel then quotes extensively from the language of the AAO decision in one of those petitions. Counsel then states that the beneficiary’s education and experience has been evaluated to be equivalent to a U.S. Bachelor’s in Special Education.

The AAO reviews appeals on a *de novo* basis. *See Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

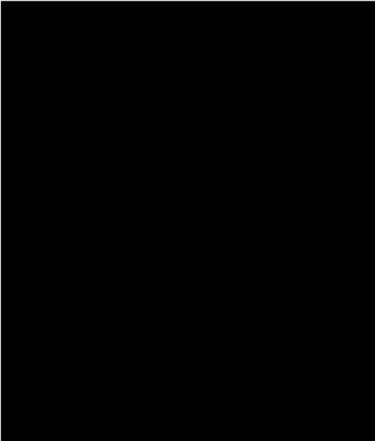
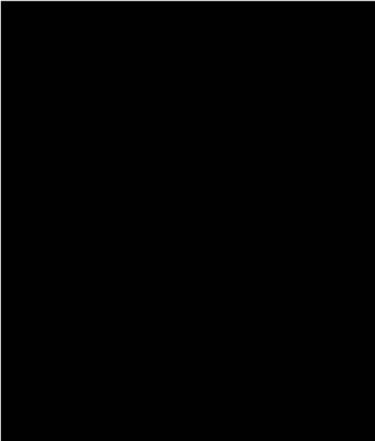
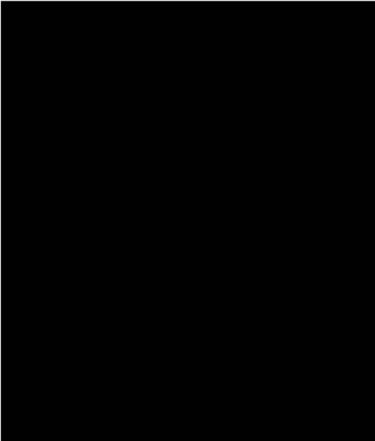
To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of developmental disability specialist. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

- | | | |
|-----|------------------------------|--|
| 14. | Education (number of years) | |
| | Grade School | 8 |
| | High School | 4 |
| | College | 4 |
| | College Degree Required | Bachelor's** |
| | Major Field of Study | Any field |
| | Training - yrs | n/a |
| | Experience | |
| | Job Offered | Yrs 0 |
| | Related Occupation | Yrs 0 |
| | Related Occupation (specify) | None |
| 15. | Other Special Requirements | ** Bachelor's/ Foreign Equivalent/ Credential Evaluation which shows a combination of education, training and or work experience equivalency |

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

<u>Schools, Colleges and Universities, etc.</u>	<u>Field of Study</u>	<u>From</u>	<u>To</u>	<u>Degrees or Certificates Received</u>
	Commerce	08/1991	05/1985	B.S. in Commerce
[remaining rows blank]				

On the ETA 750B submitted with the instant petition, in block 15, for information on the beneficiary's work experience the beneficiary states the following:

<u>Name and Address of Employer</u>	<u>Name of Job</u>	<u>From</u>	<u>To</u>	<u>Kind of Business</u>
	Teacher	06/2001	03/2002	Private Special Education
	Therapist and Subject Teacher	09/2000	03/2001	Private School
	Special Teacher/Advisor	06/1994	03/2000	Private Special Education Teacher for Hearing Impaired

The regulation at 8 C.F.R. § 204.5(l)(2) states in pertinent part:

Definitions. As used in this part:

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

Copies of three AAO decisions submitted on appeal discuss the portion of the regulatory definition of skilled worker which states, "Relevant post-secondary education may be considered as training for the purposes of this provision." 8 C.F.R. § 204.5(l)(2). Each of those decision was issued on July 9, 2004. In those decisions, the AAO discusses the meaning of the word "relevant" in the foregoing definition and states, "for a beneficiary's post secondary education to be considered it must be logically related and have appreciable probative value as to the capacity of the beneficiary to perform the job duties on the basis of the educational qualifications alone." (AAO decision in LIN-03-110-55083, at 6). The AAO's reasoning was based on the definition of the term "relevant" found in Black's Law Dictionary, a definition which appears to address the

meaning of that term as it relates to evidentiary questions. (AAO decision in LIN-03-110-55083, at 6, quoting Black's Law Dictionary 1293 (7th ed. 1999)).

None of the three cases submitted by the petitioner has been published as a precedent case. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Nonetheless, the analysis in the three decisions submitted by the petitioner of the skilled worker definition in the regulation at 8 C.F.R. § 204.5(1)(2) is reasonable.

Two of the decisions state that study "in various fields of health care" would be sufficient to qualify as relevant post-secondary education for the position of developmental disability specialist. (AAO decisions in LIN-03-067-51563, at 8, and in LIN-03-110-55083, at 8). The other AAO decision finds that the beneficiary's education in the field of medicine is sufficient for that occupation. (AAO decision in LIN-03-072-51157, at 7). The latter decision also states the following:

The AAO is not suggesting that a post-secondary education other than a medical degree is not relevant as a number of other fields would have a substantial connection to the duties of a Developmental Disability Specialist as set forth in the ETA 750. Among the post secondary education likely to have such a connection would be areas of study involving teaching, various fields of health care, occupational training, or therapy.

(AAO decision in LIN-03-072-51157, at 8, fn. 5).

Concerning a suggestion by counsel that the classification of denied cases could be changed to that of unskilled workers, the AAO stated the following.

The difficulty with accepting counsel's argument that [the] beneficiary should be considered as an "other worker" arises from the evidence already in the record with respect to the job duties and DOL's reliance upon that information in issuing the labor certifications.

As noted previously, the petitioner is seeking to employ the beneficiary in the position of Developmental Disability Specialists (aka Teacher-Home Therapy). The Department of Labor, in the course of reviewing the offered position including the description of duties to be performed and the education, training, and experience required, classifies the position under the applicable Industry and Occupational Codes, and designates the appropriate Occupational Title. (See DOL endorsement on Part A of the ETA 750).

As counsel has noted in the response submitted to the Service Center's Notice of Intent to Deny (NOID), the requirements specified for the position of DDS [Developmental Disability Specialist] were certified by the DOL indicating that those requirements were consistent with "those defined for the job in the Dictionary of Occupational Titles (DOT) including those for subclasses of jobs" citing 20 C.F.R. § 656.21(b)(2). Counsel further noted in her response that "[generally positions in the Labor Department's Dictionary of Occupational Titles with a Specific Vocational Preparation (SVP) code of seven or greater will be qualified as skilled" noting that the position of DDS has an SVP code of 7.

(AAO decision in LIN-03-110-55083, at 10).

The AAO then discussed an explanation of SVP code 7 in Appendix C of the Dictionary of Occupational Titles and stated the following:

The appendix goes on to note that a position which has been assigned an SVP code of 7 is one which requires “over 2 years up to and including 4 years.” Counsel also attached the Dictionary of Occupational Titles description corresponding to the DDT [sic] position which clearly provides an SVP code of 7.

The fact that the position, as contemplated by DOL through its classification process, is one that requires a certain amount of vocational preparation, leads us to conclude that it cannot at one time be a position for which there are requirements that lead DOL to assign it a fairly high SVP code of 7, yet can simultaneously be considered ones requiring no skills or training – and presumably a low SVP rating. Counsel herself acknowledges this when she states in response to the NOID, “we assert that the position of Developmental Disability Specialist is most appropriately classified as a 203(A)(b)(3)(i) skilled worker.” Counsel’s desire to have the petition considered under the unskilled worker category results not from an assessment that this is the correct petition category, but out of an understandable desire to address the client’s needs. However, having made certain representations regarding the type of position and its requirements, counsel cannot now modify those representations. Furthermore, CIS has the obligation to ensure that the position is filled with a qualified worker. Because we conclude that the position’s requirements corresponds [sic] to a skilled worker, and the beneficiaries do not have the necessary qualifications, the unskilled worker category cannot be used to accomplish the outcome that is otherwise unavailable.

(AAO decision in LIN-03-110-55083, at 10-11).

In the instant I-140 petition, the ETA 750 specifies the following duties for the position of developmental disability specialist:

To develop and implement a continuous active treatment program for each profoundly mentally and physically handicapped resident to enable each individual to function as independently as possible and prevent skill regression. Observe, instruct and play with resident and confer with professionals and parents to obtain information relating to child’s mental and physical development. Develop individual teaching plan covering self-help, motor, social, cognitive and language skills development. Revises teaching plan to correspond with child’s rate of development. Consults and coordinates plans with other professionals.

(ETA 750, Part A, block 13).

In a September 17, 2004 decision, the director determined that the petition of Developmental Disability Specialist requires the services of a skilled worker and that therefore the beneficiary cannot be awarded the “other worker” visa classification. The director accordingly denied the petition.

Based on the evidence in the record, the director’s decision to deny the petition was correct.

The job duties described in the ETA 750 for the position of Developmental Disability Specialist are those of a skilled worker. The ETA 750 was certified by the Department of Labor with those job duties. The Department of Labor's job title for the occupation is "Teacher, Home Therapy." That is the same position as is discussed above in the decision of the AAO in LIN-03-110-55083, which states that the position has a Specific Vocational Preparation code of 7, corresponding to a job which requires from two to four years of experience.

The instant petition was filed under the "other worker" visa preference classification, rather than under the classification for skilled workers and professionals. The petition therefore has been filed under the incorrect classification, and must be denied.

In her brief, counsel implicitly concedes that the instant petition is for a skilled worker. Counsel's asserts in her brief that the beneficiary qualifies under the regulatory definition of skilled worker since the beneficiary has education and experience which has been evaluated as equivalent to a Bachelor's degree in Special Education from a regionally-accredited college or university in the United States. Counsel's brief purports to quote language from the director's decision finding that "the beneficiary does not possess relevant post-secondary education." (Brief, at 2). But in fact, the director's decision in the instant petition contains no such language and makes no such finding. Rather, the director determined that the petition had been filed under the incorrect preference classification. Nothing in counsel's brief addresses that determination by the director.

The prior decisions of the AAO discussed above indicate that counsel had asserted that if the job qualifications stated on its Form ETA 750's were not sufficient to satisfy the regulatory definition of a skilled worker, then the offered positions with those job qualifications must qualify as "other worker" positions. Although that assertion by counsel may seem logical, it fails to place the employment-based immigrant visa process within the larger context of a program to grant visas to aliens for full-time permanent positions in the United States for which qualified United States workers cannot be found.

In the instant petition, the stated job requirements on the ETA 750 of a Bachelor's degree in "Any field" if taken literally would allow for study in fields with no reasonable connection to the duties of a developmental disability specialist. Such an interpretation of the petitioner's job requirements has been rejected by the AAO in its previous decisions, as discussed above.

In her decision, the director did not evaluate the qualifications of the beneficiary, on the grounds that the filing of the petition under the incorrect visa preference classification was a sufficient reason to deny the petition, regardless of the qualifications of the beneficiary. The analysis of the director was correct and the decision of the director to deny the petition was therefore also correct. For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

Beyond the decision of the director and as noted above, no original ETA 750 is found in the record. The record on appeal is a record of proceeding and it does not include the entire A-file of the beneficiary. In a letter in the record dated October 1, 2003, counsel states that the petitioner has also filed an I-140 petition with receipt number LIN-03-126-50458 for the same beneficiary, apparently in the skilled workers preference category of section 203(b)(3)(A)(i) of the Act. Presumably the original certified ETA 750 was submitted in support of that other I-140 and will be found in the record of proceeding in that petition. In the instant petition, even if all other issues discussed above were resolved in favor of the petitioner, it would be necessary to place the original certified ETA 750 in the record prior to approval of the instant I-140 petition in order to assure that the same ETA 750 is not used as the basis for another I-140 petition on behalf of another beneficiary as a substituted beneficiary.

In summary, the evidence indicates that the petition was filed under the incorrect visa preference category for an “other worker,” for an unskilled worker, rather than under the preference category for a skilled worker. The petition therefore must be denied.

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.