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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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Services

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FILE: [Redacted]
WAC 06 111 53278

Office: CALIFORNIA SERVICE CENTER

Date: JUL 31 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 petitioner is a religious day school.¹ It seeks to employ the beneficiary permanently in the United States as a teacher of Judaic studies. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not submitted regulatory-prescribed documentation to the record sufficient to establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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.

As set forth in the director's July 3, 2006 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO in a subsequent RFE sent to the petitioner on March 9, 2009 also requested further clarification of the petitioner's ability to pay the proffered wage based on its audited financial statements submitted to the record, and further questioned whether the beneficiary had the requisite qualifications to perform the proffered position. The issue of the beneficiary's qualifications will also be examined in these proceedings.

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.

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

¹ The petitioner identified itself as a "day school." On the ETA 750, the petitioner identified itself as a "Judaic religious day school." Former counsel in his submission of materials for the first motion to reopen described the petitioner as a "religious seminary." As verified on the state of California Business Portal at <http://kepler.ss.ca.gov>, the petitioner is a religious corporation. (Available as of December 9, 2008.)

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$35,340 per year.² The Form ETA 750 states that the position requires four years of high school and two years of work experience, with special requirements of “fluent Hebrew, familiarity with Chabad-Hassidic approach to Judaism.”

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).³

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. With the initial I-140 petition, the petitioner submitted its compiled balance sheets and statements of income for years 2003 and 2004 prepared by [REDACTED] and a second compiled balance sheet prepared by [REDACTED] for 2005. In a response to the director’s RFE dated May 9, 2006, former counsel for the petitioner submitted copies of the petitioner’s State of California DE-6 Quarterly Tax report for the first quarter of 2006, with the Petitioner’s W-3 Statements and W-2 Wage and Tax Statements for its employees for tax years 2001 to 2005. These documents indicated wages paid to 39 employees in 2001; 50 employees in 2002; 55 employees in 2003; 53 employees in 2004, and 22 employees with wages paid in the first quarter of 2006. The petitioner also submitted Forms 941, Employer’s Quarterly Federal Tax Return for the four quarters of tax year 2005 and for the first quarter of 2006. These documents indicated 26 employees in the first quarter of 2006, and 22 to 27 employees in four quarters of 2005. The petitioner also submitted

² The Form ETA 750 indicated an initial wage of \$25,000, later amended to \$75,340, and finally amended in 2005 by DOL to \$35,340. Former counsel noted on the DOL correspondence that the \$75,340 wage had been a “typo.”

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by the regulation at 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).

three checks paid to the beneficiary during June 2006; two checks totaling \$2,945 dated June 9, 2006, and the third check dated June 15, 2006 for the sum of \$1,700. The petitioner also noted that it was established on July 22, 1993, had 66 employees, a gross annual income of \$1,200,000 and was a non-profit entity.⁴ The director in his decision stated that the petitioner had not submitted any of the documentation cited at 8 C.F.R. 204.5(g)(2) in the form of tax returns, audited financial statements, or annual reports, and denied the petition accordingly.

Procedural History

On motion, former counsel submits a document described as "Accountant's Review Report," written to the petitioner's board of directors by [REDACTED]. Mr. [REDACTED] stated that the financial statements were a review and substantially more narrow in scope than an audit. The petitioner also submitted the beneficiary's additional paychecks for July and August 2006. In his decision on the motion, the director stated that the financial statements submitted on motion were unaudited, and the additional checks did not establish that the petitioner was currently paying the beneficiary the proffered wage. The director dismissed the motion.

New counsel filed another Motion to Reopen received on May 24, 2007 and submitted an audited financial statement prepared by [REDACTED] for the petitioner's years of operation from 2001 to 2005. Current counsel submits additional documents from the petitioner's accountant to explain the frequency of wages paid to the petitioner's employees, and the beneficiary's actual wages paid by the petitioner for six months of tax year 2006. Counsel states that either by examining the beneficiary's wages or the petitioner's audited financial statements, the petitioner has established its ability to pay the proffered wage. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On March 9, 2009, the AAO issued an RFE to the petitioner. The AAO asked that the petitioner explain its operations and clarify whether the school operates under the same Employer Identification Number (EIN) as the religious organization; whether the W-2 statements submitted accounted for only the petitioner's employees or for all employees employed by the entire religious organization. The AAO also asked for further evidence that the beneficiary had graduated from high school and had the requisite two years of previous work experience teaching 6th to 8th grade boys.

In response, counsel submits the following evidence:

- (1) The petitioner's Articles of Incorporation as filed with the state of California Secretary of State on July 22, 1993. The document states that the petitioner is a religious corporation,

⁴ On the petition, the petitioner did not indicate its date of establishment, current number of employees and gross or net annual income. In the director's RFE dated May 9, 2006, the director requested information as to the petitioner's date of establishment, gross and net annual income, and current number of employees. In the petitioner's June 20, 2006 response to the RFE, former counsel submitted the requested information.

organized under the non-profit Religious Corporation Law primary for religious purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. The document also states that the petitioner's religious purposes shall consist primarily of the operation of an institution for the study of Judaism and secondarily of a school for secular studies.

- (2) A letter signed by [REDACTED] Director, Customer Account Services, Internal Revenue Service, dated May 5, 2006, states that in July 1995, the IRS issued a determination letter that recognized the petitioner as exempt from federal income tax. Federal tax records indicate that the petitioner is currently exempt under section 501(c)(3) of the IRS code. The letter continues that the IRS records indicate the petitioner's classification as a school under sections 509(A)(1) and 170(b)(1)(A)(ii) of the code.
- (3) An excerpt from an IRS publication that refers to final regulations that exempt certain integrated auxiliaries of church from filing information returns. Counsel highlighted a section of this document that indicates that to be an integrated auxiliary of a church, an organization must first be described in section 501(c)(3) and section 509(a)(1), (2), or (3), and be affiliated with a church.
- (4) A letter from [REDACTED] the petitioner's accountant, dated April 30, 2009. In his letter, Mr. [REDACTED] states that the audited financial statements that he prepared relate only to the religious school Cheder Menachem and to no other entity.
- (5) A copy of an email message from [REDACTED] to [REDACTED] dated April 30, 2009. Mr. [REDACTED] attaches four quarterly payroll tax returns for 2005 sent to the California Employment Development Department. [REDACTED] states that these documents, unlike the IRS Form 941, required payroll information for each individual employee. [REDACTED] states that he examined the four state documents and numbered each non-recurring name to prove that the petitioner employed 36 people during 2005, which matches the number of W-2 Forms issued. [REDACTED] states that the reason each quarter only shows 25 or 26 names is that "there were different people each quarter, some left and new people were hired." Mr. [REDACTED] states that the total wages on the state quarterly reports match the total wages on the federal Forms 941.
- (6) Correspondence from [REDACTED] to the IRS dated December 13, 2000 and a response from the IRS to his correspondence. In his letter, [REDACTED] stated that the petitioner is an elementary school established and operated by the Chabad Lubavitch Chassidic movement, which is a branch of Orthodox Judaism. [REDACTED] cites IRS Section 1.6033-2, that states one of the types of organization that are not required to file Form 990 is a school (below college level) described in Code Section 170(b)(1)(A)(ii) and its affiliates with a church or operated by a religious order. [REDACTED] states that the petitioner fulfills all the requirements of the regulation and is not required to file Form 990. In its response to Mr. [REDACTED]'s correspondence, the IRS shows that the petitioner's previous balance of \$400 due to the IRS is adjusted to show no balance due.

- (7) An Internet excerpt dated April 21, 2009 from the Chabad-Lubavitch website (<http://lubavitchcom> available as of June 16, 2009) that lists the petitioner as part of the Chabad Lubavitch global network. This excerpt also describes the Chabad-Lubavitch movement.

Ability to Pay Analysis

The regulation at 8 C.F.R. § 204.5(g)(2) 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Evidence in the record of proceeding shows that the petitioner is a tax exempt religious corporation and is not required to file federal income tax returns. On the Form ETA 750B, signed by the beneficiary on April 11, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date; however, it did establish that it paid the beneficiary \$9,535 in wages and an additional non-taxable parsonage of \$12,780. According to the petitioner's accountant, the beneficiary's total compensation for 2006 was \$22,315. Since the petitioner provided no substantiating evidence for [REDACTED] statements with regard to parsonage compensation, the AAO will only consider the beneficiary's wages in 2006 as

established by the IRS W-2 Wage and Tax Statement for 2006. Thus, the petitioner has to establish its ability to pay the entire proffered wage of \$35,340 in the 2001 priority year as well as during years 2002 to 2005. In addition the petitioner has to establish its ability to pay the difference between the beneficiary's wages and the proffered wage in 2006, namely \$25,805.⁵

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The AAO notes that based on materials submitted by counsel on motion/appeal or in response to the AAO's RFE, the petitioner has established its non-profit religious corporation status and that it is not required to file an income tax return. With regard to the audited financial statements submitted by the petitioner, the AAO will consider the petitioner's net receipts for tax years 2001 to 2005, listed on the petitioner's audited Statement of Cash Receipts and Disbursements submitted to the record. For tax year 2006, the petitioner's Statement of Cash Receipts and Disbursements identifies the petitioner's net ordinary income, which the AAO will consider as analogous to the petitioner's net receipts. The record before the director closed on June 20, 2006 with the receipt by the director of the petitioner's submissions in response to the director's May 9, 2006 request for evidence. Therefore the AAO will consider only the petitioner's audited financial statements from the 2001 priority year to tax year 2006. The petitioner's audited financial statements indicate the following net receipts or ordinary net income:

- In 2001, the petitioner's audited financial statements indicate net receipts⁶ of \$43,719.38.
- In 2002, the petitioner's audited financial statements indicate a net income of \$44,056.45.

⁵ This is the proffered wage of \$35,340 minus the beneficiary's documented wages of \$9,535.

⁶ This figure is the petitioner's total receipts minus its total disbursements for the year.

- In 2003, the petitioner's audited financial statements indicate a net income of \$52,313.85.
- In 2004, the petitioner's audited financial statements indicate a net income of \$79,320.82.
- In 2005, the petitioner's audited financial statements indicate a net income of \$82,553.88.
- In 2006, the petitioner's audited financial statements indicate a net ordinary income of \$68,832.57.

Therefore, for the years 2001 to 2006, the petitioner had sufficient net receipts or ordinary net income to either pay the entire wage in tax years 2001 to 2005, or the difference between the beneficiary's wages and the proffered wage in tax year 2006. Thus, the petitioner has established its ability to pay the proffered wage. This part of the director's decision will be withdrawn. Further, the AAO finds that the petitioner has provided a reasonable explanation for the discrepancy in the number of employees reported on various forms submitted to the record.

The Beneficiary's Qualifications

The AAO will now address the issue raised in its RFE with regard to the beneficiary's qualifications to perform the duties of the proffered position.

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.

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). Here, the Form ETA 750 was accepted for processing on April 16, 2001.⁷ The Immigrant Petition for Alien Worker (Form I-140) was filed on February 21, 2006.

The job qualifications for the certified position of Teacher of Judaic Studies are found on Form ETA-750 Part A. Item 13 describes the job duties to be performed as follows:

Will teach Torah Judaic studies to 6-8th grade boys including Talmud, Bible with Commentaries, Jewish Laws & Customs, Sabbath and Holiday observances.

⁷ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	(blank)
High school	4
College	
College Degree Required	
Major Field of Study	

Experience:

Job Offered	2
(or)	
Related Occupation	(blank)

Block 15:

Other Special Requirements Fluent Hebrew, familiarity with Chabad-Hassidic approach to Judaism.⁸

With regard to his work experience, the beneficiary noted on Form ETA 750, Part B, that he had worked as a Teacher of Religion from January 1997 to May 1999 for [REDACTED]. He described his duties as “taught Judaic Studies including Talmud, Bible, Jewish Laws and Customs, ethics to youth and adults.” The Form ETA 750, Part B also has a correction on it that refers to a letter dated July 25, 2002. This letter is signed by both former counsel, [REDACTED] and the beneficiary and was sent to the Sacramento DOL Employment Development Department. The letter states that the beneficiary worked from May 1999 to April 2001 fulltime as an Associate Rabbi at Congregation Levi Yitzhak, Los Angeles, California.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he attended ORT,⁹ Holon, Israel, studying general studies

⁸ DOL assigned the Occupational Classification Code of 25-2022, Middle School Teachers, Except Special and Vocational Education, on the ETA 750, Part A.

⁹ Organization for Rehabilitation through Training (ORT) was started in Czarist Russia in 1880, and the World ORT system operates Jewish-based vocational schools in some 58 countries. Until September of 2006, its largest base of operation was in Israel, where ORT Israel was the management company for 162 schools with more than 100,000 students. See an April 7, 2007 article “World ORT and ORT Israel Square Off over Rights to Name” at

from 1983 to 1989, and obtained a diploma.¹⁰ The beneficiary also represented that he studied at Sokolov, Bat-Yam, Israel, studying general studies from 1977 to 1983, and described the degrees or certificates as “n/a.” The beneficiary also noted in Item 12, Additional Qualifications and Skills Alien Possesses and Proficiency in the Use of Tools, Machines or Equipment which Would Help Establish if Alien Meets Requirements for the Occupation, the following: “Experienced in teaching Judaic subjects; background of Judaic Studies and fluent Hebrew.” The beneficiary did not list any rabbinical studies in Israel or the United States. The petitioner’s director, however, submitted a letter dated May 16, 2007 that stated the beneficiary had “spent many years at the Yeshiva in Israel,” and that he studied at the seminary Tomchei Tmimim Higher Yeshiva of Los Angeles.¹¹

With regard to his work experience, the beneficiary represented that he taught Judaic studies including Talmud, Bible, Jewish Laws, customs and ethics to youth and adults, at Beit Chabad, Bat-Yam, Israel from January 1997 to May 1999. The ETA 750 Part B also has an amendment submitted to and approved by DOL on July 25, 2002 that refers to a letter signed by Rabbi Mishulovin, counsel and the beneficiary that describes the proposed schedule of classes for the beneficiary. This letter also describes the beneficiary’s earlier work experience from May 1999 to April 2001, as an associate rabbi at Congregation Levi Yitzhak, Los Angeles, California. The petitioner on motion submits a letter from Rabbi Raichik of this same congregation that describes the work done by the beneficiary as an associate rabbi, and states the congregation would like to hire the beneficiary as an associate rabbi for \$20,000 per annum.

Section 212(a)(5)(A)(i) of the Act and the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

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.

http://www.jewishsf.com/content/2-0/module/displaystory/sotry_id/600/format/html/displaystory available as of December 10, 2008.

¹⁰ There was no evidence in the record to corroborate the beneficiary’s attendance and graduation from ORT.

¹¹ In the petitioner’s response to the AAO RFE, it submitted the beneficiary’s certificate of ordination as a rabbi dated 2000 from Tomchei Tmimim Higher Yeshiva of Los Angeles.

It is left to USCIS to determine whether the proffered position and alien qualify 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).¹² *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.

* * *

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).¹³

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. *See Matter of Silver Dragon*

¹² Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

¹³ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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).

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; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The petitioner in its initial petition submitted a letter of work verification dated January 26, 2001 from [REDACTED]. The translation of the letter does not indicate who signed this letter. The letter states that the beneficiary "worked for us from January 26, 1997 to May 18, 1999 (two years and five months) as a Judaic Studies teacher and holy subjects (sic) in our institution and he conducted lectures in Talmud, Bible, Jewish Law, and Philosophy to our satisfaction." The letter writer did not identify the level of teaching conducted by the beneficiary, specifically whether it involved teaching 6th to 8th grade boys. The director in her RFE asked for letters of prior employer to verify experience there were from a current or former employers that included the name, address and titled of the writer, and a specific description of the duties performed by the beneficiary. In response to the director’s RFE dated May 9, 2006, former counsel resubmitted the same letter as evidence of the beneficiary’s two years of prior work experience, still without identifying who signed the letter, and providing any more specifics as to what level of instruction the beneficiary performed.

In response to the director’s RFE, former counsel resubmitted the initial letter from [REDACTED] still without identifying who signed the letter, and providing any more specifics as to what level of instruction the beneficiary performed. In her decision dated July 3, 2006, the director did not address further the beneficiary’s work experience or other qualifications for the proffered position.

On current motion, the petitioner submitted two certificates of rabbinical ordination from Israel and Los Angeles respectively, that referred to the beneficiary’s studies as of 1996, and later. However, neither of these certificates supported any previous middle school level teaching, or specifically the instruction of 6th to 8th grade boys prior to the April 16, 2001 priority date. The letter from Rabbi [REDACTED] dated May 16, 2007, submitted on motion, described the beneficiary’s teaching at Cheder Menachem; however, it did not establish any such teaching duties prior to the April 16, 2001 priority date. Finally the letter from [REDACTED], Congregation Levi Yitzhak, did not establish that the beneficiary’s full-time work as an associate rabbi prior to April 16, 2001 could constitute part of

the requisite two years of prior work experience as a teacher of Judaic studies, working with 6th to 8th grade boys.

On March 9, 2009, the AAO requested that the petitioner submit further evidence with regard to the beneficiary's qualifications. The AAO noted that the letter from [REDACTED] lacked the name of the letter signer, and did not indicate the level of teaching conducted by the beneficiary and whether it is full-time employment. Further, the letter of work experience submitted failed to document that the beneficiary had the requisite "familiarity with Chabad-Hassidic approach to Judaism," or whether the employment was full-time or part-time. If part-time, the AAO noted that the documented experience may be less than the requisite two years of work experience.

The AAO stated that the record did not establish that the beneficiary had the two requisite years of middle school experience, teaching 6th through 8th grade boys in Judaic Studies prior to the April 16, 2001 priority date. The AAO requested any further evidentiary documentation to establish the beneficiary's requisite two years of work experience in teaching Judaic Studies to 6th through 8th grade boys prior to the April 16, 2001 priority date, and to establish that the beneficiary had the required familiarity with the Chabad-Hassidic approach to Judaism.

In response to the AAO request for evidence, counsel submits:

- (1) A Certificate of Rabbinical Ordination, dated June 30, 1996, from the Tomchei Tmimim Lubavitch Yeshiva Gfedola Rabbinical College, Kfar Chabad, Israel. This document stated that the beneficiary studied classic works of Rabbinic literature and was ordained a Rabbi;
- (2) A Certificate of Rabbinical Ordination, dated 2000 from the Tomchei Tmimim Higher Yeshiva of Los Angeles . This document states that the beneficiary studied classic work in Rabbinic Literature, succeeded in his studies until he was worthy of being ordained as a Rabbi;
- (3) A Certificate of Completion from ORT, Tel Giborim High School, Holon, Israel. This document is dated June 1989 and states that the beneficiary completed studies in the ORET school in the field of Auto Mechanics on the Auto Mechanic track of study in 1989, and that the beneficiary had taken all of the Ministry of Education and Culture's examinations, and had studied in the school for four years from 1985 to 1989;
- (4) Certification from Nahum Sokolov State School, Bat-yam, Israel dated March 26, 2009. This document signed by the school administration states that the beneficiary studied in the school from grade one to eight from 1977 to 1985;
- (5) A Letter dated April 7, 2009 from [REDACTED] Israel, dated April 7, 2009. In his letter [REDACTED] states that [REDACTED] taught at the school on a continuous basis during the years January 1997 to May 1999. [REDACTED] states that the beneficiary taught 6th through 8th grades, and taught the following subjects: Talmud, the Bible, Jewish laws, customs, and the practice of the Sabbath and

Holidays. ██████████ concludes by stating all classes were taught using the approach of Chabad Hassidic thought and were taught in Hebrew; and

- (6) An excerpt from an Internet website identified as Lubavitch.com that identifies the petitioner as part of the Lubavitch global network.

Upon review of the materials submitted in response to the RFE, the AAO notes that the documentation with regard to the beneficiary's high school studies conflicts with the information provided by the beneficiary in the Form ETA 750, Part B. The beneficiary stated that he studied general studies for four years and indicated he did not receive a diploma or certificate, while the letter from Sokolov School in Israel indicates the beneficiary graduated with a certificate in auto mechanics. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Nevertheless, the AAO notes that the petitioner did not specify any particular studies for the applicant's high school studies, so the four years of the beneficiary's high school studies in auto mechanics would suffice to meet the terms of educational experience outlined in the ETA 750, Part A.

Further, the AAO acknowledges that the new letter of work verification from ██████████ provided by current counsel provides more substantive evidence with regard to the beneficiary's claimed two years of work experience teaching Judaic Studies to 6th to 8th grade boys prior to the 2001 priority year, which was the concern raised in the AAO RFE. To the extent that the petitioner has provided sufficient documentation of the beneficiary's previous work experience, the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position.

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.