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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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U.S. Citizenship  
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Services

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DATE: **JAN 17 2012** OFFICE: TEXAS SERVICE CENTER

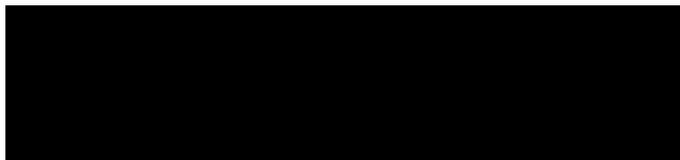


IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pre-school. It seeks to employ the beneficiary permanently in the United States as a prekindergarten lead teacher. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition.<sup>1</sup> Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

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.

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). The priority date of the petition is April 25, 2007, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).<sup>3</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on August 14, 2007.

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<sup>1</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

<sup>3</sup> 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

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a teacher provides that the teacher "organize, lead, and instruct prekindergarten students in learning activities designed to promote intellectual, social, and academic development needed for primary school education..."

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

H.4. Education: Minimum level required: bachelor's degree.

4-A. States "if other indicated in question 4 [in relation to the minimum education], specify the education required."

N/A.

4-B. Major Field Study: early childhood education.

7. Is there an alternate field of study that is acceptable.

The petitioner checked "yes" to this question.

7-A. If Yes, specify the major field of study: primary education.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

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immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

8-A. If yes, specify the alternate level of education required:

N/A.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: 12 months in the position offered,  
10. or 12 months experience in the related occupation as an elementary school teacher.

14. Specific skills or other requirements: None.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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 Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires 4 years of college culminating in a Bachelor's degree in Early Childhood Education or Primary Education and 12 months of experience in the job offered or in the related job of elementary school teacher.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was "a bachelor's degree." He listed the institution of study where that education was obtained as Sichuan International Studies University in Chongqing, China, and the year completed as 1986. The ETA Form 9089 also reflects the beneficiary's experience as follows: prekindergarten lead teacher at All About Learning, Inc. from November 24, 2003 through September 6, 2006; English and Math teacher at Annexed School to Southwest China Research Institute of Electronics Equipment from September 1, 1990 through June 30, 1998; and prekindergarten lead teacher at Affiliated Preschool to Sichuan International Studies University from September 1, 1988 through June 30, 1990.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's Degree in Teaching of English Language. It indicates that the beneficiary was awarded a Bachelor of Arts degree in 1986.

The record contains a translated copy of the beneficiary's Bachelor's Degree in Teaching of English Language from the Sichuan International Studies University in China, and a translated copy of his transcripts from that university, titled "Academic Record of Sichuan International Studies University," which indicates that he majored in English. On appeal, the petitioner submitted a translated "restatement" of the courses taken by the beneficiary at Sichuan International Studies University. The restated version of the beneficiary's college transcripts indicate that he majored in English Teaching (0-18 Years). The course descriptions are contained in the following table.

<b>DEGREE IN ENGLISH</b>	<b>DEGREE IN ENGLISH TEACHING (0-18)</b>
Written English	Teaching Written English in Primary School, Middle School, and High School
Oral English	Teaching Spoken English in Preschool, Primary School, Middle School, and High School
Listening Comprehension	Teaching English Listening Comprehension in Preschool, Primary School, Middle School, and High School
Extensive Reading	Teaching English Reading in Preschool, Primary School, Middle School, and High School
Chinese Grammar & Rhetoric	Chinese Grammar and Rhetoric
Gym	Teaching Physical Education in Preschool, Primary School, Middle School, and High School
Chinese Communist Party History	Chinese Communist Party History
Moral Lessons	Teaching Moral Lessons in Primary School, Middle School, and High School
Music	Teaching Music to Children (0-18 years)
Listening & Speaking	Teaching English Listening and Speaking to Children (0-18 years)
Modern Essays & Composition	Reading and Writing Modern Essays
Grammar	Teaching English Grammar in Primary School, Middle School, and High School
English Writing	Teaching English Writing Basics in Primary School – Teaching English Writing in Primary School, Middle School, and High School
Political Economics	Political Economics I & II
Classic Literature	Classic Literature I & II
Introduction to Linguistics	Introduction to Linguistics
Logic	Logic Studies
Composition	Composition
Psychology	Psychology of Child Development at Preschool, Primary School, Middle School, and High School
American Culture	Teaching American Culture in Chinese Community
Fine Art	Teaching Fine Arts in Class

Philosophy	Philosophy I & II
Pedagogy	Pedagogy: Principles and Methods of Instruction in Preschool, Primary School, Middle School, and High School
English for Science & Technology	Teaching Science and Technology in English at Primary School, Middle School, and High School
Foreign Newspaper Reading	English Reading Journals & Newspapers I, II, III, and IV
Education of Policy & Current Affairs	Education of Politics and Current Affairs I, II, and III
Learning Skills	Development of Learning Skills of Children (0-18 years of age)
2 <sup>nd</sup> Foreign Language Japanese	Japanese as a Foreign Language I, II, III, and IV
Cross-Culture Communication	Teaching Cross-Culture Communication in Primary School, Middle School, and High School
Typing	English Typing
Translation From English to Chinese	English-Chinese Translation I and II
Selection of British Literature	British Literature
Listening of Foreign Radio Program	Teaching Listening of English Radio Programs at Preschool, Primary School, Middle School, and High School
Translation	Chinese-English Translation I & II
Computer	Computer-Aided Technology in Classroom
Literature Searching	Literature Searching
Selection of American Essays	American Literature
Language Test	Assessment and Test of Language Acquisition (0-18 years)
Public Speeches	Public Speech
American Short Stories	American Short Stories (0-18 years)
	Practice Teaching at Primary School
	Dissertation on Teaching English of Science and Technology at Primary School

The petitioner has offered no explanation for why the beneficiary's academic transcripts submitted with the petition differ so fundamentally from the transcripts submitted on appeal. The original transcripts list 40 courses taken over a period of 4 years, including courses involving the English language, without any mention whatsoever of an emphasis on teaching children. However, on appeal and as indicated above, the newly submitted transcripts breakdown and re-characterize almost all of the beneficiary's courses to indicate that they actually involved teaching children of various ages. The petitioner has not explained how or why the original transcripts totally omitted such a basic aspect of the beneficiary's curriculum (early childhood education) from the description of every single course taken if, in fact, the beneficiary's education was designed to prepare him for a teaching career. Accordingly, the AAO finds that the newly submitted transcripts lack credibility and declines to accept them as an accurate characterization of the beneficiary's education at the

Sichuan International Studies University. It is more likely than not that the beneficiary majored in English and took those courses related to his own education in the English language – as described in the original transcripts submitted by the petitioner – and did not take courses related to educating of young children. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record contains an evaluation of the beneficiary's credentials prepared by [REDACTED] on August 28, 2003. The evaluation concludes that the beneficiary's degree from Sichuan International Studies University is considered to have established a functional equivalency of a U.S. four-year Bachelor's Degree in Education, with a concentration in elementary education.

The record also contains an evaluation of the beneficiary's credentials prepared by [REDACTED] on September 10, 2009. The evaluation concludes that the beneficiary's degree from the university is equivalent to a bachelor's degree in the United States. The professor further stated that based upon the curricula completed by the beneficiary at the university in China, he completed a dual specialization in primary education and secondary education in his bachelor's program.

The record contains an evaluation from "California University" dated July 30, 2009 which indicates that the beneficiary's Chinese education is equivalent to a U.S. bachelor's degree in primary education.

The record contains an evaluation from [REDACTED] dated September 12, 2011 which indicates that the beneficiary has fulfilled the equivalent of a four-year United States Bachelor of Arts degree in elementary education, with an emphasis in English language education.

The record also contains an evaluation from the American Association of Collegiate Registrars and Admissions Officers (AACRAO), Office of International Education Services which indicates that the beneficiary was awarded a bachelor's degree in teaching English at primary school level and that the degree is comparable to a bachelor's degree from a regionally accredited university or college in the United States.

The petitioner submitted copies of posted employment ads in which it is stated that the educational requirement for the position of prekindergarten teacher was a bachelor's degree in education or in a related field. It is evident from the petitioner's ads that its intent was to recruit and hire an applicant with a degree in early childhood education not a degree in English language, as is the case with the

beneficiary.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, 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. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also, Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)).

In this matter, none of the evaluations credibly compare the beneficiary's education in China to a U.S. bachelor's degree in early childhood education or primary education or, crucially, establish that this foreign degree is equivalent to a U.S. bachelor's degree in the same field(s) through the completion of similar academic requirements. To the contrary, it appears that the beneficiary's major field of study was English language and that he did not complete any major courses in early childhood education. The beneficiary's originally submitted transcript is devoid of any classes pertaining to early childhood or primary education, or teaching children in general.

The director denied the petition on June 6, 2008 after determining that the beneficiary's bachelor's degree could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree in early childhood education or primary education because it was a degree in English language.

The position requires four years of college culminating in a Bachelor of Arts degree in early childhood education (teacher) or primary education and 12 months of experience, which is more than the minimum required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(l)(3)(ii)(C). Thus, with the assignment of educational and experiential requirements (teacher) for the occupation, the certified position must be considered as a professional occupation.

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 above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification 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.

On September 12, 2011, the AAO issued a request for evidence to the petitioner. In this request, the AAO noted that according to EDGE, a Bachelor's Degree Certificate from Sichuan International Studies University in China is comparable to a four-year Bachelor of Arts degree in the United States. However, there was no evidence in the record to demonstrate that a bachelor's degree in Teaching of English Language or an English major, is comparable to a four-year bachelor's degree in Early Childhood Education or Primary Education.

In response to the request for evidence, counsel submitted the above noted evaluations, transcripts, and posted ads.

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of 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.

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).<sup>4</sup> *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.

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<sup>4</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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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).<sup>5</sup>

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

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 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.*

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<sup>5</sup> 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 (9<sup>th</sup> Cir. 1984).

*Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, 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 evidence in the record is not sufficient to establish that the beneficiary possesses a U.S. bachelor’s degree in early childhood education or primary education or a foreign equivalent degree as required by the terms of the labor certification and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act. The beneficiary has earned a foreign equivalent degree in a different field of study, i.e., English.

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.