U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

Date: JUN 22 2012 Office: NEBRASKA SERVICE CENTER [redacted]

IN RE: [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:

[redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth Cronack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a motion to reopen and reconsider which resulted in the affirmance of the prior decision. The denied petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fabric and custom display product company. It seeks to employ the beneficiary permanently in the United States as an assistant production manager pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary had the education required by the terms of the labor certification. The director denied the petition accordingly. The petitioner filed a motion to reopen and reconsider the decision. The director granted the motion to reopen and affirmed the prior decision.

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 June 16, 2008 denial and reiterated in the denial of the petitioner's motion to reopen, the issue in this case is whether or not the beneficiary had the required amount of education as of the priority date.

The AAO conducts appellate review on a *de novo* basis. *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.[1]

The petitioner must demonstrate the beneficiary's eligibility as of the priority date, the day 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); 8 C.F.R. § 103.2(b)(12) and *Matter of Katigbak,* 14 I&N Dec. at 49. The Form ETA 750 in this matter was accepted for processing on January 10, 2005.

The Form ETA 750 requires a bachelor's degree in commercial design and one year of experience as an assistant product manager.

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

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[1] 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). 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).

> 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-
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> > (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 significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. 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).[2] 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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> . . .
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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). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining

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[2] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating:

> 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).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).[3] The AAO will first consider whether the petition may be approved in the professional classification.

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

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

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

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

In addition, the job offer portion of the labor certification underlying a petition for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i)

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor's degree as a minimum for entry;

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[3] Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in the record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

the beneficiary possesses a U.S. bachelor's degree or foreign equivalent degree from a college or university; the job offer portion of the labor certification requires at least a bachelor's degree or foreign equivalent degree; and the beneficiary meets all of the requirements of the labor certification.

It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. 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).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' requirement of a single "degree" for members of the professions is deliberate.

The regulation also requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). However, for the professional category, it is clear that the degree must be from a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. *See also Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

The petitioner submitted the beneficiary's Bachelor of Arts degree in Commercial Design awarded by Taipei, Taiwan and corresponding transcripts. The petitioner also submitted a letter dated July 12, 2008 from the College which states that the College had approximately 1,200 students per year from 1995 to 1999, but that from 2004 onward, the College had difficulty enrolling a full class of students. The letter also stated that one location was closed in December 2008 and that another location was being closed in August 2008. The remaining single location has only two departments, Music and English, in operation. This letter states that the College currently is unaccredited.

The word "Bachelor's" is not open to broad interpretation. It is a specific graduate degree awarded by a university. To ensure a basic level of quality, private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluation institutions or programs to determine whether or not they are operating at basic levels of quality. The Ministry of Education for Taiwan recognizes certain accrediting bodies for the accreditation of institutions of higher (postsecondary) education. *See* http://english.moe.gov.tw/ct.asp?xItem=552&CtNode=415&mp=1 (accessed March 20, 2012). Eternal Life Christ College is not on the list of institutions accredited by the Taiwanese Ministry of Education. As stated in the director's June 16, 2008 decision, degrees from non-accredited institutions are assumed to not provide the academic background required for entry into an occupation. Without an indication on the labor certification that an alternate education would be acceptable, a bachelor's degree is defined as a degree from an accredited institution.

The record contains two evaluations. The evaluation from of Globe Language Services, Inc. dated October 17, 2002 states that the beneficiary's degree is equivalent to a "Bachelor's Degree in Design and Commercial Arts from a regionally accredited educational institution in the United States." The evaluation does not give reasoning behind the conclusion beyond stating that examined the beneficiary's diploma and transcripts and additionally stating that consulted a 1992 publication by on China, the 1998 *International Handbook of Universities, 15th edition,* and the U.S. Department of Education *Classification of Instructional Programs, 2000 edition*. The second evaluation, dated May 16, 2008, was submitted in response to the director's request for evidence and was authored by of International Evaluation Services. The evaluation states that the beneficiary's degree "represents the equivalent of a Bachelor of Arts degree in Commercial Design by a non-accredited institution in the United States." states that he reached this conclusion after reviewing the documents supplied by the beneficiary and that he referenced the UNESCO online database, the British Council *International Guide to Qualification in Education* published in 1991, a 1999 publication titled *A Guide to Educational Systems Around the World,* and the 2004 PIER World Education Series publication on Taiwan.

"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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The evaluations submitted by the petitioner conflict in that one opinion states that the beneficiary's degree is equivalent to a degree from a regionally accredited

U.S. institution while the other evaluation states that the degree is the equivalent of a degree from an un-accredited U.S. institution.

On appeal and in the motion to reopen, counsel states that USCIS has previously accepted this degree when filed with H-1B petitions and, as a result, the degree has been deemed acceptable. As stated by the director, the education requirement for the non-immigrant, H-1B petitions differs from that of an immigrant petition. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5).

Counsel also asserts that the difference in the evaluations and the current non-accredited status of Eternal Life Christ College is due to the decline in enrollment and facilities. The petitioner submitted no evidence to demonstrate that the College was accredited at any time in the past, specifically when it awarded the beneficiary's degree in 1998. As noted by the director, both of the evaluations relied upon information published prior to the award of the beneficiary's degree and the latest source relied upon by the evaluators was dated 2004, which is a year in which counsel stated that the College was not recruiting sufficient numbers of students. The information relied upon by the evaluators does not establish that the College was accredited at the time the beneficiary received her degree. "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." *Matter of Ho,* 19 I&N Dec. at 591-592.

U.S. Citizenship and Immigration Services (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 (Comm. 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 those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even 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 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm. 1972)).

A "Bachelor of Arts" diploma from an unaccredited institution cannot be presumed to be an actual bachelor's degree. *See generally Tang v. INS,* 298 F. Supp. 413, 419 (C.D. Cal. 1969). Accreditation is necessary to ensure that standards to earn a particular degree are the same among education institutions within the country. According to the U.S. Department of Education, "Accreditation of an institution or program by a recognized accrediting agency provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees." www.ed.gov/print/admins/finaid/accred/accreditation.html (accessed March 29, 2012). In Taiwan, accreditation is handled by the Ministry of Education, which maintains a list of accredited institutions at http://english.moe.gov.tw/ct.asp?xItem=552&CtNode=415&mp=1 (accessed June 14, 2012).[4] Eternal Life Christ College is not currently listed as an accredited institution with the Ministry of Education.

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[4] The Ministry of Education's (MOE) 2006 publication on higher education states in pertinent part:

We emphasize that the petitioner was advised of the director's concerns in the Request for Evidence and again in the director's two decisions and has not provided evidence that a bachelor's degree from Eternal Life Christ College is equivalent to a bachelor's degree from a regionally accredited institution.

Even if the petition qualified for skilled worker consideration, the beneficiary does not meet the terms of the labor certification. Specifically, the petitioner has not demonstrated that the beneficiary holds a bachelor's degree in commercial design, and the petition would be denied on that basis as well. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

> With the increase in colleges and universities, maintaining the quality of schools becomes an important issue. Besides encouraging schools to do self- evaluation, the MOE also delegates professional institutions to do evaluations on administrative affairs, medical evaluation, management evaluation and chemistry evaluation, hoping that through the process, an evaluation standard could be built. The quality of schools can thus be enhanced.
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> From July 2004 to September 2004, the MOE authorized specialized institutions to carry out a comprehensive college and university evaluation.
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> In 2005 the MOE established a professional evaluation institute - the Higher Education Evaluation and Accreditation Council of Taiwan (HEEACT) – to train professional staff and set up standards and database.
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> In the future, the MOE will regularly hold college and university evaluation.

http://english.moe.gov.tw/public/Attachment/692014333671.pdf (accessed June 14, 2012).