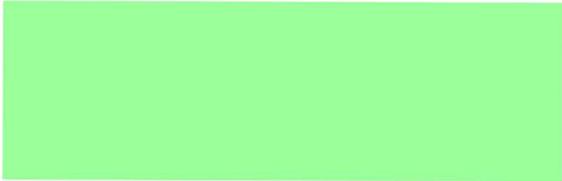


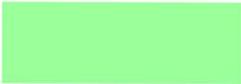
(b)(6)

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

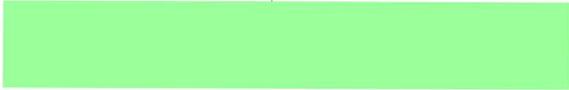
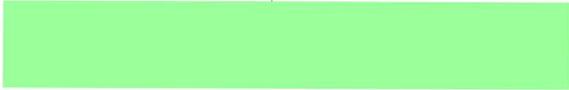


U.S. Citizenship  
and Immigration  
Services



DATE: OFFICE: NEBRASKA SERVICE CENTER FILE: 

**FEB 05 2013**

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:

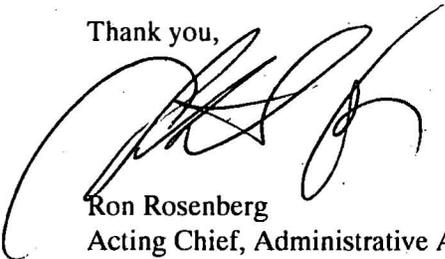
SELF-REPRESENTED

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 in accordance with the instructions on 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,



Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner has filed a motion to reconsider the AAO decision. The motion will be granted; however, the prior decision of the AAO, dated January 12, 2011, will be upheld.

The petitioner is a Montessori school. It seeks to employ the beneficiary permanently in the United States as a Montessori preschool teacher. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner had not demonstrated that the beneficiary was qualified for the instant position. The AAO similarly determined on appeal that the petitioner failed to establish that the beneficiary met the minimum education requirements of the labor certification. The AAO also concluded that the petitioner had not demonstrated its continuing ability to pay the beneficiary's proffered wage from the priority date onward and dismissed the appeal.

The petitioner filed a motion to reconsider the AAO decision. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The petitioner has stated reasons for reconsideration in its motion, however, the petitioner has not established that the decision was incorrect based on evidence in the record at the time of the decision.

On motion, the petitioner indicates that the U.S. Citizenship and Immigration Services (USCIS) had accepted the evaluation of the beneficiary's degree from the American Evaluation Institution (AEI) in granting the beneficiary's H-1B visa, and that the petitioner would accept an alternate combination of education and experience even though it marked "no" in response to this question on the ETA Form 9089.<sup>1</sup>

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<sup>1</sup> The petitioner stated on the Form I-290B, "If USCIS allows, [the beneficiary] can still earn the remaining credits and earn a U.S. bachelor's degree, or if USCIS permits us to file a new labor certification so that we can correct the part H.4 to others, H.8 as 'yes,' I.a.1 to 'no.'" The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The petitioner cannot amend the certified labor certification before USCIS. Further, there are no provisions permitting the petitioner to amend the petition on appeal or motion in order to establish eligibility under a lesser classification. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988) (a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements).

The AAO's prior decision stated that the petitioner had not stated any alternate education on the labor certification or demonstrated an intent, on the labor certification or during its recruitment for the position offered, that it would accept an alternative to a four-year bachelor's degree, such as a combination of lesser degrees and/or experience to meet the minimum academic requirement of a bachelor's degree. As noted and considered in the AAO's prior decision, the labor certification stated that the position offered required a bachelor's degree in an "education field." The petitioner stated on the labor certification that it would not accept a combination of lesser degrees and/or experience to meet the minimum academic requirement of a bachelor's degree. The advertisements in the record related to recruitment for the position also state that a bachelor's degree is required, and do not state that a combination of lesser degrees and/or experience is acceptable.

The record contains certificates of the beneficiary's two foreign degrees, a Bachelor of Arts and a Bachelor of Education, with transcripts, from the [REDACTED]. The record also contains a "Montessori Diploma" awarded to the beneficiary from the [REDACTED] (AMI).

The record contains a September 21, 2001 evaluation by AEI which appears to have relied upon the beneficiary's Bachelor of Arts and Bachelor of Education degrees to conclude that the combination of the beneficiary's academic credentials, based on certificates and transcripts, "is equivalent to an Accredited American Bachelor of Arts in Education Degree." In reaching this conclusion, the AEI equates the beneficiary's education to 126 credit hours at an accredited university in the United States. As the AAO determined in its initial decision, the petitioner's minimum requirements as stated on the labor certification and in its recruitment for the position do not allow for a combination of lesser degrees and/or experience. Further, the AEI evaluation conflicts with other evaluations provided by the petitioner. The December 3, 2008 evaluation by World Education Services (WES) states that the beneficiary's Bachelor of Arts and Bachelor of Education degrees are equivalent to 96 credit hours at an accredited university in the United States. Neither evaluation discusses how they determined the individual course credit numbers. Therefore, the conflicting information in these two evaluations diminishes the conclusions they support.

The record contains a third evaluation, dated May 6, 2010, by Worldwide Education Evaluators, Inc. which states the following:

- That the beneficiary's Bachelor of Arts degree is a two-year program of study that is equivalent to two years of study toward a four-year U.S. bachelor's degree from a regionally accredited university in the United States;
- That the beneficiary's Bachelor of Education degree is a one-year program of study that is equivalent to one year of study from a regionally accredited university in the United States;
- That the beneficiary's [REDACTED] diploma from the [REDACTED] (AMI) is equivalent to one year of study from an accredited [REDACTED] in the United States; and

- That the combination of the beneficiary's Bachelor of Arts degree, Bachelor of Education degree, and the AMI diploma is equivalent to a four-year bachelor's degree in pre-primary education.

The record contains a December 2, 2008 evaluation from the American Association of Collegiate Registrars and Admissions Officers (AACRAO) which states the following:

- That the beneficiary's Bachelor of Arts degree is comparable to two years of undergraduate study at a regionally-accredited college or university in the United States;
- That the beneficiary's two-year part-time Bachelor of Education degree is comparable to one year of undergraduate study at a regionally-accredited college or university in the United States; and
- That the beneficiary's AMI training is vocational in nature and is not appropriate for university transfer credit.

On motion, the petitioner states that the beneficiary possesses the academic equivalent of a U.S. awarded bachelor's degree through a combination of the beneficiary's two degrees from the [redacted] and the beneficiary's AMI training. The petitioner seeks to rely on the AEI evaluation, but fails to address the conflicts in the other evaluations submitted as outlined in the AAO's January 12, 2011 decision. The petitioner must resolve any inconsistencies in the record by independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Because the evaluation by Worldwide Education Evaluators, Inc. states that the beneficiary's AMI diploma is equivalent to one year of study from an accredited Montessori training center in the United States, and the AACRAO evaluation states that the beneficiary's AMI training is vocational in nature and not appropriate for university transfer credit, the AAO finds that this AMI training does not equate to university credit. Accordingly, none of the above evidence is sufficient to establish that the beneficiary possesses either the required foreign equivalent to a U.S. bachelor's degree, or even the asserted [but unstated on the labor certification] equivalent of a four-year bachelor's degree from an accredited university in the United States. The petitioner has not presented any new facts that warrant a reversal of the AAO's January 12, 2011 decision. *See* 8 C.F.R. § 103.5(a)(2). The petitioner has not demonstrated that the AAO's decision was incorrect based on the evidence of record at that time. *See* 8 C.F.R. § 103.5(a)(3).

The petitioner appears to argue that because it believed USCIS accepted the conclusions of the AEI evaluation of the beneficiary's degree by granting the beneficiary H-1B nonimmigrant status, the petitioner relied on this inferred acceptance in requiring a bachelor's degree on the labor certification requirements. The AAO notes that academic equivalency requirements for nonimmigrant petitions are separate from and do not apply to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D); 8 C.F.R. § 204.5(l)(3)(ii). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness

testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). Further, the AAO previously found that the terms of the labor certification were unambiguous in the petitioner's requirement of only a bachelor's degree, or the foreign equivalent thereof and that the terms of the labor certification did not state or allow for any equivalent based on a combination of degrees and/or experience. The AAO also found that the beneficiary's academic credentials were not equivalent to the minimum requirements for the position offered as stated on the labor certification. While the petitioner's motion argues that the petitioner intended the actual minimum requirements for the position offered are not a four-year bachelor's degree, as evidenced by its employment of other "U.S. workers of quantitatively lesser degrees," this assertion alone is not sufficient to warrant reversal of the AAO's decision, which was based on evidence provided by the petitioner and the plain terms of the labor certification as certified. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Additionally, in the petitioner's motion, the petitioner failed to overcome the second basis for dismissal, that the petitioner failed to establish its continuing ability to pay the beneficiary's proffered wage. In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). The AAO's January 12, 2011 decision stated that the petitioner did not demonstrate its ability to pay the proffered wage for 2008. The petitioner did not submit any further evidence regarding its ability to pay the proffered wage for 2008.<sup>2</sup> The record demonstrates that the petitioner paid the beneficiary \$17,002.36 in 2008, which is \$10,997.64 less than the proffered wage. The petitioner argues that as its fiscal year begins August 1 and ends July 31, the AAO should rely on its fiscal year 2007, which ended July 31, 2008. However, determining the petitioner's ability to pay in 2008 is not simply a matter of using the net income from the 2007 tax return because it is not clear how much, if any, of the petitioner's 2007 net income is attributable to calendar year 2008; thus, it is not clear how much, if any, of the petitioner's net income was available to pay the proffered wage in 2008. The record is devoid of evidence establishing that enough of this net income was available in calendar year 2008, and not in the second half of calendar year 2007, to make up the difference between the proffered wage and the wage actually paid to the beneficiary in 2008. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Accordingly, the petitioner has failed to establish its ability to pay the proffered wage in either calendar year 2008 or fiscal year 2008.

The petitioner submitted an unaudited balance sheet for 2010, but the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its

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<sup>2</sup> The regulation specifies that this evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2).

ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

After a review of the petitioner's tax returns and other evidence, this office concludes that the petitioner has not established that it had the ability to continuously pay the proffered wage from the priority date onward. Additionally, as set forth above, the petitioner has failed to establish that the beneficiary has the required education to meet the terms of the certified labor certification and is qualified for the position offered.

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 motion to reconsider the previous decision of the AAO is granted. The previous decision of the AAO, dated January 12, 2011, will not be disturbed. The petition remains denied.