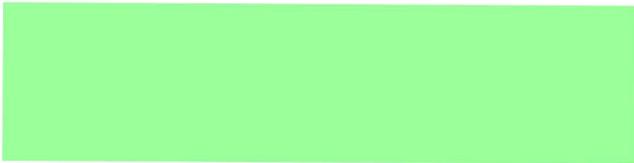
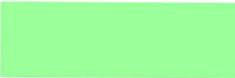


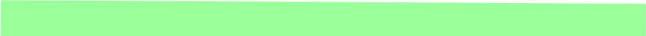


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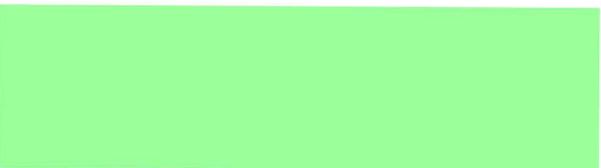
(b)(6)



DATE: JUN 20 2013 OFFICE: TEXAS SERVICE CENTER FILE: 

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 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, Texas Service Center (director), denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on September 14, 2012, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup> The record shows that the motion to reopen is properly filed and timely. The motion is accompanied by new evidence, and therefore, qualifies for consideration under 8 C.F.R. § 103.5(a)(2).

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 on motion.

The petitioner is a religious organization and seeks to employ the beneficiary permanently in the United States as a Greek teacher.<sup>2</sup> On July 28, 2007, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on behalf of the beneficiary. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. 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).

The director concluded that the petitioner failed to establish that the beneficiary possesses a U.S. bachelor's degree or a foreign equivalent degree as required by the labor certification and that the petitioner did not establish its continuing ability to pay the proffered wage as of the priority date onward. The director denied the petition accordingly. The AAO dismissed the appeal, finding that the petitioner failed to establish that the beneficiary possesses a U.S. bachelor's degree or a foreign equivalent degree as required by the labor certification; that the petitioner failed to establish its continuing ability to pay the proffered wage as of the priority date onward; and that the beneficiary does not possess the required experience as set forth on the labor certification.

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<sup>1</sup>The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

<sup>2</sup> 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.

On motion, counsel asserts that new documents submitted with the motion showing the beneficiary's specific dates of attendance at [REDACTED] establish that the beneficiary's diploma is the U.S. academic equivalent of a bachelor degree. In support of his assertions, counsel submits a diploma and a certificate, dated March 9, 2009, along with English translations, which indicate that the beneficiary was registered for courses at [REDACTED] on October 8, 2001 and graduated February 28, 2006. Counsel also asserts that the beneficiary's student teaching experience constitutes teaching experience and therefore meets the requirements of the labor certification. In support of the petitioner's ability to pay the proffered wage, counsel submits a statement, dated November 9, 2012, from the petitioner's certified public accountant stating that the petitioner has no debts indicated on its financial statements and its assets total more than \$3.5 million.

The AAO will first consider whether the petition may be approved in the professional classification.<sup>3</sup> 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(1)(2).

The regulation at 8 C.F.R. § 204.5(1)(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(1)(3)(ii)(C).

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<sup>3</sup> 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.

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; 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.

On the ETA Form 9089, signed by the beneficiary on June 28, 2007, she indicated that the highest level of achieved education related to the requested occupation was a bachelor's degree in education. She listed the institution of study where that education was obtained as [REDACTED] in Arta, Greece, and the year completed as 2006. The record contains a copy of the beneficiary's Bachelor's degree from the [REDACTED] Greece, issued in February 2006. The record also contains a list of the beneficiary's course titles and grades, along with an English translation.

An evaluation of the beneficiary's educational credentials prepared by [REDACTED] for [REDACTED] on March 5, 2009 is also in the record. The evaluation concludes that the beneficiary's Bachelor of Education from [REDACTED] is equivalent to a Bachelor of Education degree from an accredited institution of higher education in the United States. The credentials evaluation states that the beneficiary "completed coursework in general studies, including English, the social sciences, mathematics and the sciences." However, the beneficiary's list of courses and grades does not state courses in English or mathematics. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Prior to issuing its decision, the AAO reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." See <http://edge.aacrao.org/info.php>. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.<sup>4</sup> If

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<sup>4</sup> See *An Author's Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNA](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNA)

placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>5</sup>

According to EDGE, a certificate or degree from [REDACTED] in Greece is awarded after one to three years and represents attainment of a level of education comparable to one to three years of university study in the United States. Therefore, based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in education. The AAO informed the petitioner of EDGE's conclusions in a request for evidence (RFE) dated May 7, 2012.

In response to the RFE, counsel submitted a number of internet printouts regarding the Greek educational system and materials from [REDACTED]. Counsel explained in his response letter that, "publically available resources suggest that the EDGE database has wrong information regarding Greek educational system and [REDACTED]." Counsel asserted that EDGE's information may not reflect the current state of the Greek educational system.

In its September 14, 2012 decision, the AAO concluded that the evidence in the record on appeal was not sufficient to overcome the conclusions of EDGE that a degree from [REDACTED] in Greece is comparable to one to three years of university study in United States; and therefore, the petitioner failed to establish that the beneficiary possessed the foreign equivalent of a U.S. bachelor's degree in education. The AAO also stated that the credential evaluation was inconsistent with the list of courses that the beneficiary completed at [REDACTED] and counsel's explanation of the discrepancy was not enough to dispel the doubt cast on the accuracy of the evaluation. The AAO further noted that the beneficiary has completed only 42 of the 53 compulsory courses listed on the [REDACTED] website. The AAO also stated that the translation of the transcript did not indicate the dates of the beneficiary's attendance at [REDACTED].

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<sup>5</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

On motion, although the petitioner submits a document showing the beneficiary's dates of attendance at [REDACTED] we find this document alone insufficient to overcome the conclusions of EDGE that a degree from [REDACTED] in Greece is comparable to one to three years of university study in United States. Furthermore, the petitioner submits no independent, objective evidence addressing the other issues raised in the AAO's decision. The record, as it stands, fails to resolve the inconsistency between the credentials evaluation from [REDACTED] and the document that lists the beneficiary's coursework at [REDACTED]. The record further fails to demonstrate that the program information shown on the [REDACTED] website is reflective of the program during the beneficiary's attendance at [REDACTED].

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university. The petitioner has failed to overcome the conclusions of EDGE with reliable, peer-reviewed information. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

The AAO also considers whether the petition may be approved in the skilled worker classification based on the requirements as set forth on the labor certification. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable 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. *See also* 8 C.F.R. § 204.5(1)(2).

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) states:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(1)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(1)(2). Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

To warrant an approval, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983). Where the job

requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *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.” (Emphasis added). *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984).

On the ETA Form 9089, the “job offer” position description for Greek teacher provides:

Teaching modern Greek language to children with emphasis on Greek literature, culture, with emphasis on elements [sic] of Greek Orthodox faith, as well as Greek art, history from classical to modern times, mythology, geography.

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”

H.4-B. Major Field Study: “Education”

H.6. Is experience in the job offered required for the job?

The petitioner checked “yes.”

H.6A. If yes, number of months experience required?

The petitioner indicated “12.”

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

The petitioner checked “no” to this question.

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

The petitioner checked “no” to this question.

H.9. Is a foreign educational equivalent acceptable?

The petitioner checked “yes” that a foreign educational equivalent would be accepted.

H.10. Is experience in an alternative occupation acceptable?

The petitioner checked “no” to this question.

The AAO noted the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of college and a “B.S. or foreign equivalent.” The district court determined that “B.S. or foreign equivalent” relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at \*11-13. Additionally, the court determined that the word “equivalent” in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at \*14.<sup>6</sup> In addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at \*7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner’s asserted intent, USCIS “does not err in applying the requirements as written.” *Id.* See also *Maramjaya v. USCIS, Civ. Act No. 06-2158* (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term “bachelor’s or equivalent” on the labor certification necessitated a single four-year degree).

The AAO concluded, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean*, the language of the instant labor certification was unambiguous and the labor certification did not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.<sup>7</sup> Nonetheless, the AAO permitted the

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<sup>6</sup> In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act.

<sup>7</sup> The DOL has provided the following field guidance: “When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job.” See Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep’t. of Labor’s Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep’t. of Labor’s Empl. & Training Administration, Interpretation of “Equivalent Degree,” 2 (June 13, 1994). The DOL’s certification of job requirements stating that “a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer’s definition.” See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that “[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an

petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.<sup>8</sup> Specifically, the AAO requested that the petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts.

In response to the RFE, the petitioner submitted copies of the prevailing wage request, two job postings, and several online and newspaper advertisements for the position. The AAO noted that much of the prevailing wage request was illegible, but it appeared to state that a "BA in Education" and one year of experience were required for the position of Greek Teacher. One of the job postings, posted at [REDACTED] from December 11, 2006 to January 10, 2007, stated that the position required a "BA or equivalent in Education and 1 [year] of experience." The second job posting and newspaper advertisements stated that the position required a "BA in education and 1 year experience." One online job posting from [REDACTED] stated that the position required a "BS or BA in Education and one year of experience." Only the job posting at [REDACTED] used the term "equivalent," but it did not describe what would qualify as an "equivalent." Therefore, the AAO concluded that the job postings and advertisements require a bachelor's degree in education or an equivalent foreign degree.

On appeal, the AAO found that the petitioner failed to establish that the terms of the labor certification were ambiguous and that the petitioner intended the labor certification to require less than a four-year U.S. bachelor's or foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers. On motion, counsel makes no assertions and submits no new evidence demonstrating the petitioner's intent at the time of the filing of the labor certification.

Therefore, it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in education or a foreign equivalent degree. The beneficiary does not possess

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equivalent foreign degree." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

<sup>8</sup> In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. See *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. See *Id.* at 14.

such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.

Beyond the director's decision, the AAO also concluded that the petitioner failed to establish that the beneficiary possessed the required experience for the offered position by the priority date. 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). 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'r 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires 12 months of experience in the job offered of Greek teacher. On the labor certification, the beneficiary claims to qualify for the offered position based on the following experience.

- [REDACTED], Greece. Intern. October 1, 2001 to June 1, 2004; 10 hours per week.
- [REDACTED], Greece. Teacher. July 1, 2003 to July 30, 2003; 70 hours per week.
- [REDACTED] Greece. Teacher. July 1, 2004 to July 30, 2004; 70 hours per week.
- [REDACTED] Greece. Teacher. April 1, 2005 to April 30, 2005. 40 hours per week.
- [REDACTED], Greece. Greek Teacher. May 1, 2005 to October 1, 2005; 30 hours per week.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains several letters. The first letter, dated May 12, 2008, is from [REDACTED], Chancellor of [REDACTED]. The letter states that the [REDACTED] is in association with [REDACTED] and he is personally familiar with the beneficiary's employment at [REDACTED] as a teacher of Greek language, culture and history from October 1, 2001 to June 1, 2004.

In the May 7, 2012 RFE, the AAO requested additional evidence of the beneficiary's experience. The RFE noted that the record did not contain a letter from the beneficiary's trainer or supervisor

from the [REDACTED] as required by regulation. Moreover, the labor certification states that the beneficiary worked only 10 hours per week for [REDACTED] and this part-time employment therefore would not satisfy the required 12 months of experience.

In response to the RFE, the petitioner submitted a letter dated June 1, 2012 from [REDACTED], an individual claiming to be a former co-worker of the beneficiary at the [REDACTED] stating that he worked with the beneficiary as an intern teaching Greek language, Greek Art and culture, history mythology and literature from October 2001 until June of 2004 for "about 10 hours per week." The letter also states that their supervisor, [REDACTED], was now retired, and that [REDACTED] is no longer in existence. However, a letter from a former co-worker does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), and the claimed part-time employment does not satisfy the 12 months of full-time employment required by the terms of the labor certification.

The petitioner also submitted a letter dated May 29, 2012 from [REDACTED] Former Supervisor, along with an English translation, describing the beneficiary's employment at [REDACTED] from May 1, 2005 to October 1, 2005, working 30 hours per week. [REDACTED] states that the beneficiary "taught children the Greek language, how to write and read. She also taught psychology, design, music and art."

In addition, the petitioner submitted a letter from [REDACTED] who claims to be a former co-worker of the beneficiary at [REDACTED]. [REDACTED] states that the beneficiary worked at [REDACTED] for the month of April 2005, 30 hours per week, where she taught Greek reading and writing. This letter is not from the employer, and does not provide the address of the employer. Therefore, the letter does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A).

Finally, the petitioner submitted a letter from [REDACTED], Supervisor, [REDACTED] dated May 17, 2012. In the letter, [REDACTED] states that this is the church's summer camp and the beneficiary worked two summers, from July 1, 2003 to July 30, 2003 and from July 1, 2004 to July 30, 2004. He states that she "worked 70 hours per week, teaching chemistry, physics, Greek history, design, Greek language, mythology, music, ancient Greek, and Greek religion to 13 to 16 year old kids." The letter, dated May 17, 2012, is not on letterhead and fails to state the employer's address. Therefore, the letter does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). Further, the signature from [REDACTED] on the letter dated May 17, 2012 is different than the signature of [REDACTED] on the letter dated May 12, 2008. Additionally, although the same phone number is listed in each signature block and the two letters seem to be from the same individual, the last name is spelled slightly differently on the two letters. These variations cast doubt on the credibility of the letter submitted in response to the RFE. 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. *Matter of Ho*, 19 I&N Dec. at 591.

In addition to the deficiencies listed above, the labor certification states that the position of Greek teacher requires a bachelor's in education and 12 months of experience in the job offered. The

AAO concluded that the 12 months of experience must be in the job offered, Greek teacher, thus experience as an “intern” or as a teacher of another subject does not count as experience in the job offered.

On motion, counsel asserts that the beneficiary’s student teaching experience constitutes teaching experience and therefore meets the requirements of the labor certification. The AAO notes that without documentary evidence, the assertions of counsel will not satisfy the applicant’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also submits a letter, dated July 11, 2012, from [REDACTED], Chancellor of the [REDACTED] stating that the beneficiary worked for the Diocese’s summer camp from July 1, 2003 until July 30, 2003 and from July 1, 2004 until July 30 2004 as a teacher. [REDACTED] also states that “as far as [he] know[s]” the beneficiary was associated with [REDACTED] and worked for this organization as a teacher from October 1, 2001 until June 1, 2004. The AAO first notes that [REDACTED] was not the beneficiary’s supervisor or trainer at [REDACTED] and therefore, his letter does not satisfy the requirements of 8 C.F.R. § 204.5(1)(3). Moreover, [REDACTED] letter fails to explain why his previous two letters contained different signatures as noted by the AAO in its appeal decision. Therefore, the AAO concludes that the evidence in the record fails to demonstrate that the beneficiary possesses the required experience set forth on the labor certification.

The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 9089 was accepted on March 13, 2007. The proffered wage as stated on the Form ETA 9089 is \$17.47 per hour.

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

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent 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 is a tax exempt organization. On the petition, the petitioner claimed to have been established in 1922 and to currently employ six workers. On the ETA Form 9089, signed by the beneficiary on June 28, 2007, the beneficiary did not claim to have worked for the petitioner.

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 employed the beneficiary and therefore, has not paid her a salary equal to or greater than the proffered wage.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record before the director closed on May 29, 2008 with the receipt by the director of the petitioner's response to his RFE. The petitioner did not submit its Federal Return for Exempt Organizations the years 2006 and 2007, as requested by the director. Instead, the petitioner submitted a letter from its accountant describing the size of the church's congregation and annual budget. The accountant also attested that the petitioner has the ability to pay the proffered wage. The director noted that the regulation requires that evidence of ability to pay be in the form of federal tax returns, audited financial statements or annual reports.

On appeal, counsel noted in his letter that as a church, the petitioner is not required to file tax returns. Counsel further states that he is submitting the petitioner's "audited financial statements . . . prepared by a New Jersey Certified Public Accountant." The financial statements submitted on appeal are for December 31, 2006, December 31, 2007 and December 31, 2008. However, the accountant's letter accompanying each financial statement indicates that they were compiled, rather than audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner

relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On motion, counsel submits a statement, dated November 9, 2012, from the petitioner's certified public accountant stating that the petitioner has no debts indicated on its financial statements and its assets are more than \$3.5 million. The letter further indicates that the petitioner is not required to file an annual tax return and its financial statements are for the petitioner's management use only. The AAO notes that this evidence does not meet the requirements of 8 C.F.R. § 204.5(g)(2), which states evidence of the petitioner's ability to pay shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. Therefore, the AAO concludes that the petitioner has failed to demonstrate its continuing ability to pay the proffered wage as of the priority date onwards.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion to reopen is granted, the previous decision of the AAO is affirmed, and the petition remains denied.