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U.S. Citizenship
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Services

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APR 13 2005

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:
WAC 03 086 50225

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

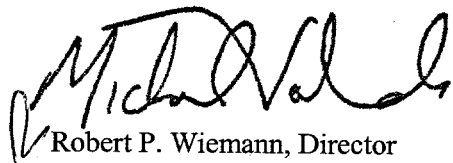
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private non-profit Islamic foundation and center doing business as an Islamic school for kindergarten through sixth grade. It seeks to employ the beneficiary permanently in the United States as a teacher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary had the required educational credentials as outlined in Form ETA 750. Accordingly, the director denied the petition.

On appeal, counsel states that the petitioner does possess sufficient funds to pay the beneficiary and the beneficiary does possess the requisite bachelor of science in education degree. Counsel submits new documentation.

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) not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. 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 establish 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 [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) Other documentation—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled worker.* If the petitioner 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 individual labor certification . . .
. . . The minimum requirements for this classification are at least the two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 3, 2001. The proffered wage as stated on the Form ETA 750 is \$32,214 annually.

The petitioner stated that it was established in 1984, has twenty employees, and an annual gross annual income of \$4,843,533. With the petition, the petitioner submitted documentation with regard to the beneficiary's academic studies at the University of Bangalore and Annamalai University, both in India, as well as a copy of the IRS Form 990, Return of Organization Exempt from Income Tax, for the tax year 2001 with accompanying attachments and schedules. The petitioner also submitted Form 199, the state of California Exempt Organization Information Form. The entity filing the tax returns is identified as the Islamic Foundation of Southern California, at [REDACTED] the petitioner submitted materials on New Horizons School, Los Angeles campus. The materials included a directory of the school dated May 2000, and a newsletter published for the friends and parents of the school, dated September/October 2000.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or the beneficiary's educational credentials, on July 17, 2003, the director requested additional evidence. The director stated that the Form 990 submitted by the petitioner was for the Islamic Foundation of Southern California, and not for New Horizon School, Los Angeles campus. The director stated that the petitioner was New Horizon School, Los Angeles campus, and requested that the petitioner provide either annual reports, federal tax returns, with all pages dated and signed or audited financial statements for New Horizon School, Los Angeles campus. Furthermore the director requested that the petitioner provide evidence of the New Horizon School's ability to pay the beneficiary's wage for 2001 and 2002. The director further specified that if the petitioner submitted federal tax returns as evidence, that the petitioner also submit evidence that the returns were filed with the Internal Revenue Service (IRS) by submitting signed, dated and IRS-certified copies of its federal forms. In lieu of signed and certified returns, the director indicated that the petitioner could submit original IRS computer tax records, date stamped by the IRS.

With regard to the beneficiary's qualifications, the director stated that the advisory evaluation submitted by the petitioner from the International Education Research Foundation, Inc., Los Angeles, California, did not evaluate how the beneficiary's degrees from Bangalore University and from Annamalai University were equivalent to a U.S. bachelor's degree. The director stated that the advisory evaluation must address each degree and how it was equivalent to a U.S. degree. The director requested that the petitioner submit a new advisory evaluation of the beneficiary's foreign educational credentials that identifies the qualifications and contact information for the evaluator, and that presents a detailed description of the materials evaluated rather than conclusory statements.

The director also noted that the petitioner submitted Statements of Marks from Bangalore University for April and October of the petitioner's first year of studies and for April of the beneficiary's second year of studies. The director requested a copy of the official college or university transcript or copies of all Statements of Marks from Bangalore University. The director requested that any such evidence of education should be

submitted on the institution's official letterhead or stationery indicating all courses taken and all credits received, and any conferring of certificates or degrees. With regard to the beneficiary's studies at Annamalai University, the director requested that the petitioner submit a copy of the official college transcript on official letterhead that stated the courses taken and the credits received by the beneficiary as well as any conferring of certificates or degrees.

The director also asked for a clarification of the two names shown on the documentation submitted, namely, [REDACTED]. With regard to the letters of employment verification, the director stated that the letters from Webb's Carmel School and the International Indian School, Damman, Saudi Arabia, did not contain the number of hours worked per week. The director requested that the petitioner submit letters of employment verification on the previous employer's letterhead that showed the name, title, address, and phone number of the person verifying the beneficiary's title, duties, dates of employment/experience, and number of hours worked per week. The director also noted that the ETA 750 indicated that the beneficiary worked for the International Indian School in Damman from February 1984 to March 1988, while the employment letters submitted to the record indicated that the beneficiary worked for the International Indian School from March 1989 to June 1998. The director asked the petitioner to clarify this discrepancy.

With regard to evidence of the petitioner's ability to pay the proffered wage, the director requested copies of the beneficiary's IRS Forms W-2 for 2000, 2001, and 2002, as well as the petitioner's W-3 Forms, Transmittal of Wage and Tax Statements for 2001 and 2002. Finally the director requested that the petitioner submit a copy of its current valid business license.

In response, the petitioner submitted a letter from [REDACTED] administrator, The Islamic Center of Southern California. [REDACTED] stated that the New Horizon School, Los Angeles is one of four schools owned and operated by the Islamic Center of Southern California, and that the financial statement of the school was included in the Center's consolidated financial statements and tax returns filed with IRS annually. The petitioner also resubmitted IRS Form 990 for 2001 and submitted IRS Form 990 for the Islamic Center of Southern California for 2002. Previous counsel stated that the portions of the 2001 and 2002 tax forms that referred to New Horizon School-Los Angeles were highlighted. The petitioner also submitted a copy of IRS Form 4506 requesting certified copies of the petitioner's IRS tax forms.

With regard to the beneficiary's qualifications, the petitioner submitted a new educational evaluation document from Global Education Group, Miami Beach, Florida, a copy of the Statements of Marks for each year of the beneficiary's studies at Bangalore University, and a document from Bangalore University that admitted the beneficiary to the degree of Bachelor of Science, in Home Science in April 1983. The petitioner also submitted a Statement of Marks from Annamalai University, and a document dated October 3, 1993 from the Annamalai University Faculty of Education, distance division, that stated the beneficiary had been admitted to the degree of bachelor of education as of June 1991.

With regard to the two names utilized in the petition, the beneficiary submitted an affidavit and a marriage certificate to explain the difference between her single and married surname. The petitioner submitted letters from the International Indian School Damman, Saudi Arabia; Webb's Carmel School, India; and from the Orange Crescent School, Garden Grove, California that indicated the dates of her employment at these schools in addition to hours worked. With regard to the discrepancy on the ETA 750 as to the dates of employment for the International Indian School, Damman, Saudi Arabia, the beneficiary submitted a statement that the dates of her employment in Damman was from March 1989 to June 1998, and that the dates February 1984 to March 1988 were erroneously put on the ETA 750.

With regard to the beneficiary's wages while working for the petitioner, the petitioner submitted Forms W-2 for the beneficiary that indicated she earned \$31,478 in 2002, \$39,449 in 2001, and \$13,631 in 2000. The petitioner also submitted Forms W-3 forms for 2001 which indicated the Islamic Foundation of Southern California had paid \$321,809 in wages in 2001, and \$369,856 in wages in 2002. It submitted an additional 23 Forms W-2 for the year 2001 for employees of New Horizon School, Los Angeles campus, and an additional 25 Forms W-2 for 2002, for the same school.

With regard to the licensure of New Horizon, Los Angeles campus, the petitioner submitted a license from the state of California, Department of Social Services, dated February 9, 1996, for a day care center called New Horizon Preschool, for 40 preschool children aged two and a half years old through five years old. The petitioner also submitted an Internet document called Private School Affidavit Form that contained information on the New Horizon school that is described as a K-6th grade school. Finally, the petitioner also submitted three certification documents for New Horizon School, Los Angeles. The document from the Western Association of Schools and Colleges, Accrediting Commission for Schools, stated that the New Horizon School, Los Angeles had accreditation until June 30, 2005. Another document from the California Association of Independent Schools indicated accreditation from June 2003 to June 2005. Finally the petitioner submitted a congratulatory letter to the school from the mayor of Los Angeles for its fifteen years of operation, dated March 2000.

On November 18, 2003, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, or that the beneficiary was qualified to perform the duties of the position, and, accordingly, denied the petition. In his decision, the director stated that the petitioner had not submitted the IRS-certified tax returns, as requested by the director, and noted that the petitioner had submitted a signed request to the IRS for a copy for the tax transcripts or forms over one and half months after the petitioner received the director's request. The director further noted that the petitioner submitted no evidence of inability to obtain IRS computer printouts from a local IRS office.

The director then examined the beneficiary's IRS Form W-2 for 2002 and determined that the beneficiary's actual salary for 2002, namely \$31,478.25 was less than the proffered wage, namely, \$32,214. The director stated that since the petitioner had not provided further substantiation of the initial tax evidence submitted by the petitioner, it had not established that it had the ability to pay the remainder of the proffered wage in 2002. The director did not address whether the petitioner had the ability to pay the proffered as of the priority date.

With regard to the beneficiary's qualifications, the director stated that the labor certification was filed for the position of teacher and stated that the minimum qualification for the position was a bachelor's degree in education. With regard to the academic evaluation report provided by International Education Research Foundation, Inc., the director stated that the evaluator combined the beneficiary's degree from Bangalore University and her bachelor of education degree from Annamalai University to reach the conclusion that the beneficiary had a foreign degree that was equivalent to a U.S. degree in education. The director stated that there is no provision to allow for the combination of two foreign degrees to equate one degree specified on the DOL labor certification. The director stated that the foreign equivalent of a baccalaureate degree must be a college or university degree that, by itself, is equivalent to a U.S. baccalaureate degree.

With regard to the second advisory evaluation from Global Education Group, the director noted that this advisory evaluation found that the beneficiary's studies at Bangalore University were the equivalent of three years of undergraduate study at a regionally accredited university in the United States. The director further

noted that Global Education Group stated that the beneficiary's degree from Annamalai University was the equivalent to the completion of the U.S. degree of a bachelor of science degree in education. The director stated that the evaluator did not provide a detailed description as to how this final conclusion was reached.

According to the director, the ETA Form 750 had established that the beneficiary had attended the second university for one academic year. The director stated that the typical U.S. baccalaureate degree was four years in length. The director then determined that the beneficiary's studies at Annamalai University were not equivalent to the completion of a U.S. baccalaureate degree. The director's final conclusion was that neither the degree from Bangalore University nor the degree from Annamalai University was the equivalent to a U.S. baccalaureate degree.

On appeal, on December 17, 2003, counsel states that the director's denial references a notice of intent to deny dated August 27, 2003; however, neither the petitioner, the beneficiary or previous counsel received such a notice, and that as of August 27, 2003, the petitioner was still in possession of a pending request for further evidence.

With regard to the documentation requested to establish that the petitioner has the ability to pay the proffered wage, counsel states that the documentation that the director required the petitioner to submit is overly burdensome. Counsel cites to 8 C.F.R. § 204.5(g)(2) and the types of documentation that the petitioner must submit to establish its ability to pay the proffered wage. Counsel states that the petitioner's submission of complete, signed, and dated federal income forms for 2001 and 2002 satisfied this regulation. Finally counsel submits a general investors account report from American Finance House LARIBA, dated September 30, 2003 as evidence of the petitioner's ability to use other financial resources to pay the proffered wage. The account for New Horizons School of Los Angeles is listed as having a balance of \$29,727.25

Counsel also states that CIS is biased in the manner that it issues requests for further evidence. Counsel states that the petitioner should have been offered the opportunity to submit a letter from its financial officer, similar to those petitioners with over a hundred employees, whose financial officers can submit a letter, stating that the company has over 100 employees, and has the ability to pay. According to counsel, this type of letter satisfies the request for evidence to pay the proffered wage. Counsel states that the petitioner's financial officer will submit such a letter. Counsel also submits requests of further evidence from other unrelated I-140 petitions that do not contain requests for certified IRS tax returns.

Counsel states that the petitioner had only received the request for certified tax returns following the petitioner's reopening for the 2003 school year which delayed the petitioner's response, and that the IRS took more than 54 days to provide copies of uncertified tax returns for only one tax year. Counsel submits documentation with regard to the petitioner's receipt of the director's request and its efforts to obtain certified tax returns. Counsel also describes the director's alternative method of providing further substantiation of the petitioner's IRS documents, by obtaining IRS computer printouts from a local IRS, as overly burdensome. Counsel states that CIS is well aware that walk-in requests to the IRS are no longer permitted and that such requests were never permitted for non-profit organizations that file IRS Form 990.

Finally counsel states that the CIS interpretation that the wage the beneficiary received in 2002 establishes that the petitioner cannot pay the proffered wage is mistaken. Counsel states that the petitioner does not have to pay the proffered wage until permanent residency is granted. Counsel points out that the shortfall of funds between the beneficiary's actual wage in 2002 and the proffered wage was \$736.25. Counsel states that based on the how the holidays fall in the year, the amount of unpaid family leave that can be taken and other variables, not every calendar year produces the same amount of workdays. Counsel also states that the

Islamic Foundation has a budget of over \$5,496,203 in 2002, and that the petitioner could manage to move [REDACTED] line item and have enough money to pay the proffered wage. Finally counsel states that the petitioner will produce the 2001 and 2002 certified tax returns when the IRS sends the correct items, and will submit a letter stating that the Islamic Foundation employs over 100 employees and is financially capable to pay the additional [REDACTED]. [REDACTED] notes that the petitioner's financial officer is out of the office until December 21, 2003, and at that time the letter and taxes would be sent within 60 day of filing the appeal.

Counsel states that she wishes to offer some information and photographs of the petitioner's school to put a human face on the petitions. Counsel submits letters of support for the petitioner and the beneficiary, as well as the petitioner's mission statement, the school's yearbooks fro 2001 and 2002, and photographs of a visit to the school by then governor Grey Davis.

On February 17, 2004, counsel submits further evidence to the record, including IRS correspondence from Shelly Dunn, Territory Manager, California dated 2003 that states that IRS Taxpayer Assistance Centers no longer provide tax return transcripts, except in emergency situations. With regard to emergency situations, the letter states acceptable evidence of an emergency situation for legacy INS customers would include proof of an CIS appointment within two weeks of the request. Counsel also submits correspondence from IRS in Fresno, California, dated December 29, 2002, that states transcripts for IRS Form 990 are not available, and that copies of the original returns may be obtained. Counsel also submits the petitioner's original request to the IRS for transcripts or a copy of its tax forms for 2001 and 2002. Finally counsel submits a letter from [REDACTED] administrator that states the Islamic Center of Southern California has over 100 employees. [REDACTED] described New Horizon School as a private religious school operation by the center and that the center files the tax exempt Form 990, administers the budges, receives the funding and is the administrative headquarters for the four private schools operated by the organization. Counsel also submits a New Horizon Schools Staff directory that lists staff members in Pasadena, Los Angeles, Irvine, and the Center's employees.

Finally, on January 5, 2005, counsel states, that after several phone calls and written requests, the IRS has not been able to locate the petitioner's requests for certified tax returns and has asked the petitioner to rebuild the file along with providing proof that the checks submitted by the petitioner were cashed. Counsel submits the beneficiary's cancelled check for \$46 processed by the Orange Country Teachers Federal Credit Union. Counsel states that the petitioner never received the certified tax returns after 17 months.

Upon examination of the petitioner's evidentiary documentation, the petitioner appears to be the Islamic Center of Southern California, doing business as New Horizon, Los Angeles campus. While the I-140 and the ETA 750 indicate that the beneficiary does work for New Horizons, the tax documentation submitted as well as the Forms W-2 submitted by the petitioner establish that the Islamic Center of Southern California is the actual employer of the beneficiary, and that the petitioner is a subsidiary of the Islamic Center. A search of publicly available databases reveals that the Islamic Center of Southern California does business as New Horizon School and they share a common federal employer ID number. If the Islamic Center had been identified as the petitioner, the director, as counsel asserts, could have allowed the petitioner to submit a letter from its financial officer, stating that the petitioner had over 100 employees and had the ability to pay the proffered wage. However, it should be noted that the actual petitioner was not clearly identified in the initial petition, and even with the submission of a letter from the petitioner's financial officer, that the director could have still required further documentation of the petitioner's financial resources such as certified copies of its tax forms. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) says that CIS "may" accept such a letter, but in cases where the record is not satisfactorily clear, the director may opt not to accept such a letter.

With regard to counsel's assertion that the submission of IRS-certified tax returns is overly burdensome, the director can request additional documents, such as certified tax returns in addition to the documents listed in 8 C.F.R. § 204.5(g)(2), such as annual reports, federal tax returns, or audited financial statements. Based on the IRS documentation submitted by the petitioner, however, the IRS does not provide transcripts of Forms 990, although copies of tax forms such as Form 990 are available. The record also indicates that although the petitioner submitted documentation that it had requested certified copies of its tax forms from the IRS on at least two occasions, the petitioner did not receive any such certified tax forms for either 2001 or 2002.

If the director requested certified tax forms to verify the receipt of the forms by IRS, the copy of the petitioner's Form 990 tax form for 2001 obtained by the petitioner which is date stamped by the IRS in Ogden, Utah, as of July 16, 2002 is sufficient to establish receipt of the petitioner's 2001 tax forms by the IRS. It should be noted that the copy of the Form 990 provided by the IRS and the copy submitted by the petitioner in the initial petition appear identical. Based on the IRS copy of the 2001 tax form, and the subsequent IRS clarification of the non-availability of Form 990 transcripts, and on the fact that the petitioner appears to have attempted in good faith to obtain IRS certified copies and transcripts of the tax forms submitted for 2001 and 2002 in response to the director's request, the AAO finds the signed and dated IRS-generated copy of the petitioner's 2001 tax form and the Form 990 for the tax year 2002 submitted by the petitioner are sufficient evidence to examine the petitioner's ability to pay the proffered salary, for purposes of these proceedings.

Counsel also submits on appeal a letter from the administrator of the Islamic Center of Southern California that states it has over 100 employees and it is capable of paying the proffered wage. In doing so, counsel also states that the petitioner should have had the opportunity earlier in the proceedings to provide such a document to the director. In general, 8 C.F.R. 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "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 establish the prospective employer's ability to pay the proffered wage." However, it should be noted that the initial petition that was submitted by the school that the petitioner operates, stated that it had 20 employees. There was no reason for the director to have requested such a document, prior to the petitioner's response to the director's request for further evidence. Furthermore, as noted previously, the Islamic Center of Southern California was not listed as the petitioner, although the AAO has accepted the petitioner's identification of the actual employer.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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. With regard to the W-2 forms submitted by the petitioner, the year 2000 is before the priority date of April 3, 2001, and therefore the beneficiary's W-2 Form for 2000 is not relevant to the proceedings. The W-2 forms for the years 2001 and 2002 are relevant evidence and establish that the petitioner paid the beneficiary \$39,449 in 2001, and \$31,478 in 2002. Since the proffered annual salary is \$32,214, the petitioner established that it paid the beneficiary a sum equal to or greater than the proffered salary at the time the priority date was established, in 2001. However, the petitioner did not establish that it paid the beneficiary a wage equal to or greater than the proffered salary in 2002.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income. As previously stated, the IRS copy of the petitioner's 2001 tax form is considered sufficient evidence with regard to the petitioner's financial resources in 2001. With regard to the petitioner's 2001 Form 990, Part IV Balance Sheets, on page three, examines the petitioner's total assets and liabilities. The total net assets or fund balances based on the petitioner's assets and liabilities is noted on line 73 as \$3,048,672. Attachment I of the form lists tuition and other income for New Horizon School-LA as \$481,259. The program expenses for the four school programs are listed in the aggregate, under Part III Statement of Program Service Accomplishments, as \$3,092,273. Based on the petitioner's financial resources as documented by its federal tax Forms 990, and the fact that CIS computer records reflect no further I-140 petitions being submitted by the Islamic Center of Southern California or the New Horizon School, Los Angeles, it appears reasonable that the petitioner and its subsidiary could make up the difference between the beneficiary's actual salary and the proffered wage in 2002, or \$736.25. The petitioner has, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and to the present day. The director's decision with regard to the petitioner's ability to pay the proffered wage is withdrawn.

With regard to the second issue raised by the director, namely, the beneficiary's educational credentials, Form ETA 750 indicates that the beneficiary needed a baccalaureate degree in education and two years of work experience to qualify for the position. Upon review of the record, the petitioner has not established that the beneficiary has a foreign degree equivalent to a U.S. baccalaureate degree in education.

On appeal, counsel states that the petitioner through the submission of two academic credentials evaluations met its burden of proof with regard to the beneficiary's qualifications. Counsel states that CIS holds the beneficiary to the higher EB-2 standards with regard to the equivalency of her foreign education to a U.S. bachelor's degree. Counsel quotes from a letter from [REDACTED] Director of Business and Trades Services, INS Office of Adjudications, dated January 7, 2003, that refers to the foreign equivalent of an advanced degree, and whether the foreign equivalent degree must be in the form of a single degree. The letter states:

A foreign equivalent degree in 8 CFR § 204.5(k)(2) means that the foreign equivalent advanced degree must be in the form of a single degree. Despite the use of the singular "degree," it is not the intent of the regulations that only a single foreign degree may satisfy the equivalency requirement. Provided that the proper credential evaluations service finds that the foreign degree or degrees are the equivalent of the required U.S. degree, the requirement may be met.

Counsel submits a copy of the [REDACTED]. Counsel states that it is a false statement to say there is no provision to allow for the combination of two foreign degrees to equate to one degree as there is no provision at all under the EB-3 category that defines the degree requirement as a singular foreign degree. Counsel further states that the director's determination that the foreign equivalent of a baccalaureate degree must be a college or university degree that, by itself, is equivalent to a United States baccalaureate degree is not a

promulgated rule, and that no portion of the Act states such a rule, and no case law holds such a finding. Counsel cites to 8 C.F.R. § 205.5(1) as follows: "The petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or foreign equivalent degree." Counsel asserts that this regulation does not say that the foreign education is limited to one degree, but rather states the foreign degree is an equivalent degree.¹ Counsel states that equivalent degrees have been defined as all of the applicant's education, knowledge, and experience taken as a whole. Counsel also notes that the more rigorous EB-2 category even states that a U.S. baccalaureate degree followed by at least five years of progressive experience in a specialty shall be considered the equivalent of a master's degree, thus allowing for the combination of education and work experience for advanced degrees.

Counsel states that most schools in the United Kingdom, specifically India and Pakistan, have three year programs that are then followed up by a one year graduate program equivalent to a U.S. degree. Counsel submitted no evidentiary documentation to support this assertion. Counsel then submits a third credential evaluation from Morningside Evaluations and Consulting, New York City. In this evaluation, [REDACTED] determines that the beneficiary satisfied requirements substantially similar to those required for three years of academic studies from an accredited U.S. institution, and then completed her bachelor level studies at Annamalai University. [REDACTED] concludes that the beneficiary attained the equivalent of a bachelor of education degree from an U.S. accredited institution of higher education. Counsel states that based upon three credential evaluations from three different evaluation companies, the petitioner and the beneficiary have met the burden with regard to the beneficiary's qualifications.

Counsel further states that the Department of Labor determined that the beneficiary was qualified for the job when it approved the labor certification, and that the DOL determinations cannot be overturned unilaterally by CIS. Counsel states furthermore that CIS can only invalidate labor certifications for fraud or willful misrepresentation of material and that by giving the DOL certification no weight, the CIS has in fact invalidated the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," states the following:

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

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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 individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for

¹ It is noted that the cite utilized by counsel refers to professionals, not to skilled workers.

the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of category sought, the petitioner must show that the beneficiary meets the requirements of the Form ETA 750A, which includes a baccalaureate degree.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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, *Mandany 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 (1st Cir. 1981). In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 that, in this case, includes a bachelor's degree of science in education and two years of work experience. The petitioner and the beneficiary clearly established that the beneficiary has the required two years of work experience. What is in question is whether her foreign degrees are the equivalence of a U.S. baccalaureate degree in education.

In this case, the labor certification clearly indicates that a U.S. bachelor's degree is the required amount of education. The ETA 750 does not specify what types of degree equivalencies would be acceptable. A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year bachelor of science degree from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies regardless of whether or not the petition was filed as a skilled worker or professional.

The regulations define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(l)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes. If the instant petition were for a professional, the beneficiary's combination of degrees would not qualify her as a professional. With reference to the letter submitted to the record by counsel, this letter's guidance was in the context of second preference "advanced professional" visa categories not third preference "professional" visa categories. The January 7, 2003 letter from the Director, Business and Trade Services does not purport to issue an opinion pertinent to the instant visa category, but only pertinent to a visa filed pursuant to 8 C.F.R. § 204.5(k)(2). As such, it is irrelevant to the instant visa category.

Furthermore, letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered

as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree, and two years of work experience. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of a U.S. bachelor's degree. Without further clarification on how this requirement can be met by means of a foreign degree, CIS must adhere to the plain reading of the requirement—a singular degree. CIS 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).

If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. Here, the record reflects that the beneficiary's formal education consists of a three year program of studies from Bangalore University that resulted in a baccalaureate degree in home sciences, and a one year period of studies in the department of education distance learning program at Annamalai University that allowed the beneficiary to receive the bachelor's degree in education. Contrary to counsel's assertion, unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

Contrary to counsel's additional assertion with regard to the predominance of three-year degree programs in India, according to India's Department of Education, the nation's educational degree structure provides for both three-year and four-year bachelor's degree programs. After 12 years of primary and upper primary school, a bachelor's degree in the arts, commerce, or the sciences may be earned after three years of higher education. A bachelor's degree in a professional field of study, such as agriculture, dentistry, engineering, pharmacy, technology, and veterinary science, generally requires four years of education. See generally Government of India, Department of Education, Higher Education, *Degrees Specified and Recognized by the University Grants Commission* and a paper written by the Minister of Human Resource Development and Science and Technology, at <http://www.education.nic.in/htmlweb/higedu.htm> (Updated 2001 and available as of April 5, 2005). If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be deemed to be the "foreign equivalent degree" to a United States baccalaureate degree. However, as previously stated, in *Matter of Shah*, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah* at 245. Based on the same reasoning, the beneficiary's three-year bachelor of science degree from Bangalore University will not be considered the "foreign equivalent degree" to a United States baccalaureate degree for purposes of this immigrant visa petition.

With regard to the one year period of studies at Annamalai University, the documentation submitted in response to the director's request for further evidence indicates that the beneficiary took mandatory courses in pedagogy,

educational technology and teacher education, and engaged in practical examinations in such areas as teaching competency, and audio-visual education. While the coursework is specialized and focused on education, there is no information provided by the petitioner as to whether this one year period of studies constituted a graduate degree, a one year teaching degree, or an additional year of studies required to obtain a teaching license. Nevertheless, the petitioner submitted a document that indicates that the beneficiary was admitted to the degree of Bachelor of Science in Education based on her one year of studies at Annamalai University. The documentation provided by the petitioner includes statements that the beneficiary received a bachelor's degree from each university; however, neither degree is the equivalent of a U.S. baccalaureate degree.

The petitioner submitted three educational evaluation reports. The first evaluation from International Education Research Foundation, Inc. did not identify the beneficiary's studies as a three-year program, but rather stated that her studies at Bangalore University were considered equivalent to ninety semester units of undergraduate coursework at U.S. college and universities. The first evaluator then stated that the beneficiary's earned 32 semester units at Annamalai University, in combination with the previous coursework at Bangalore University, were the equivalent to a U.S. bachelor of science in education degree.

The second report from Global Education Group, Inc., examined the beneficiary's studies at Annamalai University and stated that the degree obtained by the beneficiary there was the equivalent of the completion of the U.S. degree of bachelor of science in education. This evaluation report provides no further insight into whether the second degree is a separate bachelor's degree, a graduate level one year program, or any explanation as to how the second degree from Annamalai University completed the initial three year period of studies in home sciences, for which the beneficiary had already received a diploma. The final evaluation by Morningside Evaluations and Consulting states that the beneficiary satisfied requirements substantially similar to those required toward the completion of three years of academic studies from a U.S. accredited institution of higher education and that the beneficiary then completed her bachelor's level studies at Annamalai University. Thus the third evaluator also disregards completely and gives no weight to the diploma received by the beneficiary from Bangalore University, but rather states that the beneficiary finished her baccalaureate studies at Annamalai University. In comparing the educational evaluations, they vary with regard to university level three-year baccalaureate degrees in India and how the beneficiary's studies equate to a single U.S. baccalaureate degree. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

None of the education evaluations provide any authoritative basis for their conclusions that the beneficiary's one year of studies at Annamalai University that resulted in a degree could constitute a U.S. four-year baccalaureate degree, or the beneficiary's three years of study at Bangalore University which also resulted in a degree, could constitute a U.S. four year baccalaureate degree.

The AAO concurs with the director's decision that the petitioner has not established that the beneficiary is qualified for the proffered position, either under a skilled worker or a professional under the third preference immigrant visa category, since it has not proven that the beneficiary holds a four-year baccalaureate degree or foreign equivalent. The issue is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. Without more

persuasive evidence, the petitioner has not established that the beneficiary had a baccalaureate degree in education that is the equivalent to a U.S. baccalaureate degree in education.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. While the petitioner has met that burden with regard to whether the petitioner is able to pay the proffered position, the petitioner has not met that burden with regard to the beneficiary's qualifications to perform the duties of the position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.