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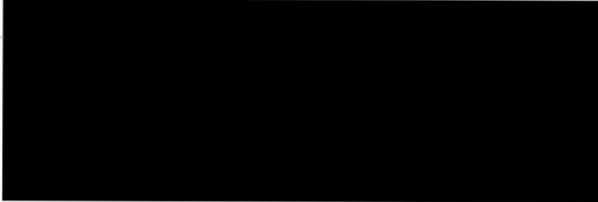
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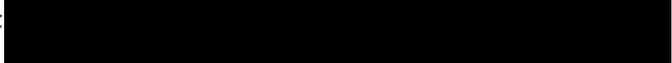
U.S. Citizenship  
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Services

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FILE: WAC 05 149 51645 Office: CALIFORNIA SERVICE CENTER Date: **OCT 30 2006**

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



**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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a private educational institution that is authorized to operate a day care and extended care center for a maximum of 29 children with the number of children in the extended care program to include only children up to the age of 10 with their number not to exceed 12. The petitioner seeks to extend the employment of the beneficiary as a preschool teacher. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record includes: (1) the April 29, 2005 Form I-129 and supporting documents; (2) the director's May 9, 2005 request for further evidence (RFE); (3) counsel's May 12, 2005 response to the director's RFE and supporting documents; (4) the director's May 27, 2005 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On May 27, 2005, the director denied the petition determining that the petitioner had failed to establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner submits a brief and attachments.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

On the Form I-129, the petitioner indicated that the proffered position is that of a "preschool teacher." In an April 20, 2005 letter appended to the petition, the petitioner indicated that the position includes:

Teach students up to 12 years old the subjects of reading, writing, spelling, music, mathematics, and foreign languages; Teach learning techniques to succeed in school, using games, music, art work, films, computers, and other tools to teach basic skills; Observe, evaluate, and judge student's [sic] performance, potential, and overall progress; Meet with parents and school staffs to discuss student's [sic] progress or personal problems; Participate in all aspects of curriculum including curriculum preparation, conference reports, curriculum meetings, and attendance at faculty meetings.

The petitioner also listed its teaching employees and their degrees in unspecified disciplines.

In a May 11, 2005 letter attached to counsel's May 12, 2005 response, the petitioner added to the position description as follows:

The work to be performed by [the beneficiary] as Preschool Teacher would necessarily involve and/or include the various tasks of establishing clear objectives for all lessons and communicating those objectives to children (10% of worker's time); organizing and leading activities designed to promote physical, mental and social development, such as games, arts and crafts, music s, [sic] and field trips (20% of worker's time); planning and conducting activities for a balanced program of instruction (15% of worker's time); teaching basic skills such as color, shape, number and letter recognition, and social skills (20% of worker's time); adapting teaching methods and instructional materials to meet students' varying needs and interests; arranging indoor and outdoor space to facilitate creative play, motor skill activities, and safety (10% of worker's time); and communicating information with parents and school staffs and participating in curriculum preparation (10% of worker's time).

The petitioner also indicated that it required a minimum of a bachelor's degree in arts or science or its equivalent for the proffered position of preschool teacher. The petitioner claimed that to effectively manage the specific and complex duties of the position the beneficiary would be required to have a broad-based yet carefully designated knowledge of preschool teaching and that based on the duties as described, the duties resembled the duties of a kindergarten or elementary school teacher. The petitioner also noted that it hired persons with a bachelor's or higher degree for the position of preschool teacher and teacher's assistant and referenced the academic qualifications of the five persons that it currently employed.

On May 27, 2005, the director denied the petition determining that the Department of Labor's *Occupational Outlook Handbook (Handbook)* did not report that a bachelor's degree or higher is necessary for employment in the position of preschool teacher. The director also referenced California's Employment Development Department website regarding the educational requirements for private preschool teachers in California which did not list a bachelor's degree or higher as a requirement. The director noted that the petitioner had not submitted documentation to establish that any industry related professional association required a bachelor's degree as a minimum requirement for entry into the occupation or any documentation to otherwise establish that a degree requirement is common to the industry in parallel positions among similar organizations. The director determined that the described duties did not establish that the proffered position is more unique or complex than other similar positions within the same industry or that the evidence distinguished the duties of the proffered position from the duties normally associated with the occupation. The director observed that the evidence presented regarding the petitioner's other employees was insufficient to demonstrate that the petitioner normally required a degree or its equivalent in a specific specialty for the position of preschool teacher.

On appeal, counsel for the petitioner asserts that upon review of the duties associated with the proffered position and given the ages of the children in the petitioner's "Joy"<sup>1</sup> class, the proffered position entailed a significant level of responsibility comparable to that of a kindergarten or elementary school teacher. Counsel also references the Department of Labor's *O\*NET* system and its description for kindergarten and elementary school teachers and asserts that the proffered position is more similar to these occupations than the position of a preschool teacher. Counsel also contends that the petitioner's hiring practices demonstrate that a bachelor's degree is required for the position. Counsel indicates that the teachers employed in teaching positions all possess a bachelor's or higher degree: specifically that one teacher holds a bachelor's degree in home economics, one teacher holds a bachelor's and master's degree in the "arts," and one teacher holds a bachelor's degree in liberal studies. Counsel contends that the proffered position meets at least two of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A); that is 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Counsel's assertions are not persuasive. The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) to determine whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With reference to preschool teachers, the *Handbook* 2006-2007 edition indicates that requirements for public preschool teachers are generally more

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<sup>1</sup> The age of the children in this class are from five years to ten years old and had been supervised by the beneficiary previously.

stringent than those for private preschool teachers and that private schools are generally exempt from meeting State-licensing standards. The *Handbook* 2006-2007 edition does not report that private school preschool teachers must have a baccalaureate degree in a specific specialty; it notes only that private institutions prefer candidates who have a bachelor's degree in childhood education for elementary school teachers; thus, the *Handbook* does not establish that a private preschool teacher must have a baccalaureate degree in a specific specialty for entry into the occupation. The AAO observes that the State of California does not require that private preschool teachers attain a baccalaureate degree or higher in a specific specialty. See <http://www.calmis.ca.gov/file/occguides/TeachPre.HTM>.

The AAO acknowledges counsel's reference to the *O\*NET* and its description of the responsibilities for preschool teachers, kindergarten teachers, and elementary teachers. However, the AAO does not consider the *O\*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The AAO does not find that the description of duties for the proffered position of preschool teacher more closely aligns with the duties of a kindergarten or elementary teacher. The record does not demonstrate that the position of a preschool teacher requires the attainment of a bachelor's degree or its equivalent in a specific specialty. The petitioner has not established that the duties of the proffered position satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. To determine whether the petitioner's degree requirement is shared within its industry, CIS often considers whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). In this matter as observed above, the *Handbook* does not report that a private preschool teacher requires a baccalaureate degree. With regard to parallel positions in similar private schools, the petitioner has not submitted any evidence and does not claim on appeal that parallel positions among similar organizations require the attainment of a bachelor's or higher degree in a specific specialty. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted no documentation that the proffered position involves duties seen as either unique or complex so that only an individual with a degree in a specific specialty could perform them. Therefore, the record does not demonstrate that the proffered position's complexity or unique nature distinguishes it from similar but non-degreed employment under the second prong of the criterion. In this matter, a baccalaureate or higher degree or its equivalent is not the normal minimum requirement for entry into the position of a preschool teacher. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Upon review of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) the AAO finds that the petitioner has not established that it normally requires a bachelor's degree or its equivalent in a specific discipline for the proffered position. The petitioner's normal hiring practices demonstrate that it hires teachers with bachelor's degrees in a variety of disciplines. When a job can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). The AAO acknowledges that the petitioner prefers to hire teachers with the equivalent of a four-year degree; however, the degrees are not in a specific discipline, such as early childhood education or related fields. Moreover, the petitioner had not provided documentary evidence that its teachers who have degrees from foreign institutions have degrees that are equivalent to a four-year degree at an accredited U.S. institution. The petitioner has not established the proffered position as a specialty occupation under the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) which requires that the petitioner establish that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner does not submit a description of any specialized or complex responsibilities that would distinguish the proffered position from that of a private preschool teacher; employment the *Handbook* indicates does not impose a degree requirement. Without such evidence, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the record contains evidence that the beneficiary was previously approved for H-1B status on the basis of a petition filed by the same petitioner. However, prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decision. However, if that record contained the same evidence as submitted with this petition, CIS would have materially erred in approving the previously filed petition. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Upon review of the totality of the record, the record fails to reveal any evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. Therefore, the AAO will not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving

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

**ORDER:** The appeal is dismissed. The petition is denied.