

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

D1

PUBLIC COPY



FILE: WAC 04 200 50396 Office: CALIFORNIA SERVICE CENTER Date: **SEP 07 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 of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

The petitioner operates health care facilities for developmentally disabled adults that seeks to employ the beneficiary as a teacher, developmentally disabled adults. The petitioner, therefore, 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 director denied the petition because the evidence does not establish that the beneficiary is qualified to perform services in a specialty occupation. On appeal, counsel submits a brief and additional documentation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of 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)(iii)(C), in order to qualify to perform services in a specialty occupation, a beneficiary must:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

The petitioner is seeking the beneficiary's services as a teacher, developmentally disabled adults. Evidence of the beneficiary's qualifications includes: an education evaluation report indicating that the beneficiary has the equivalent of a U.S. degree of bachelor's of science in elementary education awarded by a regionally accredited university in the United States.

The director issued a request for evidence that the beneficiary has a license to teach or to perform the job duties as a teacher, developmentally disabled adults. In response, the petitioner stated that as a private non-educational institution, its teachers are not subject to teacher credentialing or licensure requirements. The petitioner noted that it is not an education institution within the California Department of Education. The petitioner explained that it solely serves adult clients. The petitioner asserted that the licensure provisions that may apply to state sponsored educational programs under the authority of the California Department of Education, or those pertaining to the education of children, are not applicable. The petitioner referred to the Department of Labor's *Occupational Handbook Outlook (Handbook)* which indicates that teachers in private institutions are not required to be licensed by the state.

The director determined that a teacher in a private school may not need a license; however, if her or she is to provide teaching services to an individual with disabilities, he or she must be licensed. The director referred to the memorandum CL-808C (Updated 4-2003) of the California Commission on Teacher Credentialing, as indicating that all Special Education teachers who provide instructions to student with "mild/moderate disabilities" in the settings such as "special day classes, special school" are required to hold an Educational Specialist Credential. The director noted that the beneficiary does not hold such a credential and as such she is not qualified to perform services in a specialty occupation.

On appeal, counsel asserts that the director misunderstood the law and applied an incorrect standard to the beneficiary in the proffered position. Counsel asserts that Section 44202 of the California Education Code indicates that the commission for teacher preparation and licensing "shall exercise authority over all services provided to pupils in grade 12 or below." As asserted above, counsel notes that the petitioner is not an educational institution within the jurisdiction of, nor under any contracts with the California Department of Education. Counsel attests that the petitioner provides services solely to adults. Counsel notes that the disabled adults under the petitioning organization's care are not mandated to receive any academic instruction and are beyond California's mandatory education age limits.

The AAO reviewed the memorandum CL-808C issued by the California Commission on Teacher Credentialing entitled Education Specialist Instruction Credential which notes the area of specialization referred to by the director as stating: "Mild/Moderate Disabilities (M/M) includes specific learning disabilities; mild to moderate mental retardation; attention deficit and attention deficit hyperactivity disorders; serious emotional disturbance; and authorizes service in grades K-12 and in classes organized primarily for adults through age 22." The AAO agrees with the petitioner that this memorandum does not refer to teachers in settings such as the petitioner.

Upon review of the record, the AAO finds that the petitioner satisfactorily explained that the beneficiary is not required to have a license or any specific credentials in order to be employed as a teacher, developmental disabled adults.

However, the petition may not be approved at this time. Upon review of the record, there is insufficient evidence in the record to determine whether the proffered position is a specialty occupation. As noted in the information provided by the petitioner from the California Employment Development Department, Adult Day

Care Operation, under the heading “teachers/trainers” “a bachelor’s degree in a human services field, OR at least one year previous teaching experience with adults,” is required for entry into the occupation. As the minimum for entry into the field is one year teaching experience with adults, the position does not appear to be a specialty occupation.

As the director did not address the issue of whether the position is a specialty occupation, the director’s decision will be withdrawn and the matter remanded for entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proffered position is a specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s March 10, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.