

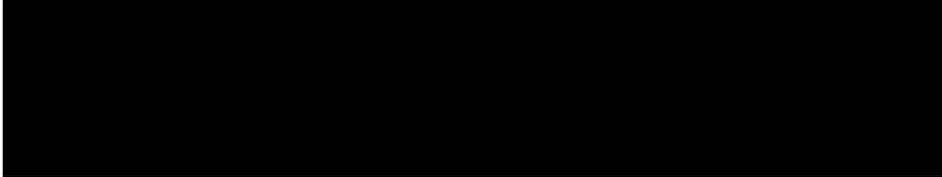
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U.S. Citizenship
and Immigration
Services

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FILE: EAC 06 138 51622 Office: VERMONT SERVICE CENTER Date: JAN 03 2007

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 Vermont Service Center denied the nonimmigrant visa petition and 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 child care facility, with two employees. It seeks to hire the beneficiary as a kindergarten teacher 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 he determined that the record did not establish the proffered position as a specialty occupation or the beneficiary as qualified to perform the duties of a specialty occupation.

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

The AAO first turns to the issue of whether the record establishes the proffered position as a specialty occupation.

To meet its burden of proof in establishing that its proffered position is a specialty occupation, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner states that it is seeking the beneficiary’s services as a kindergarten teacher to instruct children between four and six years of age in various disciplines. Evidence of the beneficiary’s duties includes: the Form I-129; counsel’s April 3, 2006 letter in support of the petition; and an evaluation of the proffered position prepared by the American Evaluation and Translation Service (AETS) in Miami Beach, Florida. This evidence, however, fails to offer a consistent description of the proffered position’s duties. Moreover, it is not supported by the petitioner’s May 3, 2006 affidavit submitted by counsel in response to the director’s request for evidence.

In his letter supporting the petition, counsel states that the beneficiary would be responsible for teaching elemental social and natural science, personal hygiene, music, art and literature to the petitioner’s students in order to promote their physical, mental and social development. He also indicates that she would be in charge of supervising the children’s activities, such as field trips, group discussions and dramatic play acting. Counsel contends that the performance of these duties would require the beneficiary to hold a baccalaureate degree in education or a related field.

The AETS evaluation of the proffered position’s duties states that the beneficiary would be employed by the petitioner as a kindergarten teacher and reiterates the duties set forth in counsel’s letter of support. However, the AETS evaluation supplements counsel’s job description, adding the following duties it indicates are typically performed by kindergarten teachers:

- Teach the concepts of numbers, including addition and subtraction by using board games and other tools;
- Introduce scientific and mathematical concepts to the children; and
- Provide children with the tools to interact with others and adapt to new technologies, as well as help them think through problems logically.

The AETS concludes that the performance of the duties of a kindergarten teacher would require knowledge that may be obtained by acquiring a bachelor's degree in education or a related subject.

While the AAO notes that the additional duties described by the AETS may typically be performed by kindergarten teachers, it will not accept them as included within the proffered position's duties. As noted above, CIS does not rely on a position's title to establish its duties. Instead, it is the duties of the offered employment that establish the nature of the position. *Cf. Defensor v. Meissner, supra*. The AETS' identification of the proffered position as that of a kindergarten teacher does not, therefore, establish that the beneficiary would perform duties that have not been described by the petitioner. In that counsel's letter of support does not indicate that the beneficiary would be responsible for teaching the concepts of numbers and scientific and mathematical principles, or for helping the petitioner's students adapt to new technologies, these duties will not be considered by the AAO.

The record also fails to establish the AETS and its evaluator, a professor at Florida Metropolitan University, as authorities on the early childhood education provided by day care facilities. The AETS is a business with an expertise in evaluating foreign educational credentials, not employment; the evaluator is a professor with expertise in adult education and academic programs at the university level. For this reason, as well, the AAO will discount the AETS opinion. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept it or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Moreover, neither counsel's nor the AETS' description of the proffered position's duties is supported by the petitioner's May 3, 2006 affidavit. The affidavit states that the petitioner employs teachers on a contract basis to provide instruction in the areas of "music, science, gymnastics, arts, etc." Although the petitioner states that its current business needs require the addition of an "in-house" teacher, it does not indicate that the beneficiary would assume responsibility for the instruction in music, science and the arts provided by contract teachers or that such contracted instruction would supplement the science and arts instruction provided by the beneficiary. Therefore, the record does not establish that the beneficiary's duties would include instruction in the sciences, music, literature or art to the children enrolled in the petitioner's child care programs. It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence. Doubt cast on any aspect of a petitioner's proof may 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. 582, 591-92 (BIA 1988). Accordingly, the AAO will consider only those duties described by counsel that are unrelated to those that the petitioner indicates it provides through contract – personal hygiene and the supervision of the children's activities, such as field trips, group discussions and dramatic play acting.

To make its determination whether the duties just described qualify as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and 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. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

The previously identified May 3, 2006 affidavit from the petitioner states that, although designated as a day care center, it is, more accurately, a kindergarten providing pre-school education to 13 children.¹ The AAO notes that the petitioner's expired Massachusetts license authorizes it "to provide large family child care services." The licensure, operation and staffing of large family child care homes is governed by section 102, chapter 8 of the Code of Massachusetts Regulations (CMR).

Section 102 CMR 8.02 defines a large family child care home as:

A private residence that, on a regular basis, receives for temporary custody and care during part or all of the day, children up to and through age twelve or children under sixteen years of age if such children have special needs and receives for temporary custody and care for a limited number of hours, children of school age in accordance with regulations promulgated by the Office A large family child care home must have at least one additional approved caregiver present when the total number of children participating in such child care exceeds six.

Providers of large family child care services, i.e., those individuals licensed to operate a large family child care home, must have three years of full-time experience as a licensed family child care provider or certified assistant, or at least three years of full-time experience caring for unrelated children in a group setting, including at least one year of full-time experience as a licensed family child care provider or certified assistant. In addition, they must have completed a five-hour training on large family child care approved by the Massachusetts Office of Child Care Services within the year preceding application and, within the previous three years, have completed 30 hours of training in topics related to child care. See 102 CMR 8.30.

Individuals who work for providers of large family child care services must be certified under Massachusetts law, either as:

¹ The petitioner's expired license issued by the Commonwealth of Massachusetts for large family child care services limits its capacity to ten children. The regulation at section 102 Code of Massachusetts Regulations 8.31 states that a provider of large family child care services may not be licensed for more than ten children.

- Certified Assistants: Persons who hold certified assistant certificates issued by the Office of Child Care Services, who meet the qualifications of the provider for whom they work, and who work with or substitute for the child care provider in a licensed child care home; or as
- Regular Assistants: Persons who hold regular assistant certificates issued by the Office of Child Care Services, but whose qualifications are not equal to those of the provider and who must work under the supervision of the large family child care provider. [102 CMR 8.92].

In applying for a license or license renewal, a large family child care provider must submit the name and certificate number of the assistant who will work in the large family child care home. *See* 102 CMR 8.03 and 8.30(4).

The Commonwealth of Massachusetts also requires large family child care providers to develop and implement a curriculum that supports “school readiness through a developmentally and culturally appropriate learning environment.” This curriculum must be one that “engages children in developmentally appropriate activities by planning specific learning experiences.” It must include: learning self-help skills fostering independence; opportunities to gain problem-solving and decision-making competencies and leadership skills; opportunities to experiment, create and explore concepts in math, science, art, music, movement, language and literacy, opportunities to learn about proper nutrition, good health and personal safety; and learning social skills, such as kindness, empathy, responsibility and respect for self and for the feelings and rights of others. *See* 102 CMR 8.11.

The petitioner has stated that it operates as a kindergarten, even though it was previously licensed as a large family child care home. Accordingly, the AAO has reviewed the record for information regarding its educational programs. The petitioner, however, has offered no evidence that would distinguish its educational activities from those of large family child care homes providing learning experiences for the children in their care. It has submitted no copy of the curriculum that would be taught by the beneficiary. Neither has it provided the ages of the 13 children attending its child care program as an indicator of the level or range of its educational activities. Accordingly, the petitioner has not proved that its educational program is comparable to that of a kindergarten or that it is different from that typically offered by a large family child care home provider, as described above. Going on record without supporting documentation is not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the information provided by Massachusetts regulation, the curriculum provided by large family child care homes is taught by licensed day care providers or assistants who have been certified by the Commonwealth of Massachusetts. While certification requires that these day care providers and assistants have training in the field of child growth and development, it does not require them to hold a baccalaureate degree in any academic field, including education. Therefore, as the petitioner has failed to prove that its day care curriculum is other than the curriculum required to qualify it as a large family day care home, which may be taught by certified day care assistants, it has not established the proffered position as a specialty occupation

under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO notes that the record contains a copy of the discussion of kindergarten teachers from the Department of Labor's *Occupational Information Network (O*Net)*, which assigns the occupation a Specific Vocational Preparation (SVP) rating of 7 to 8 and finds it to fall within Job Zone Four, i.e., requiring considerable preparation. However, as previously discussed, the record does not establish that the proffered position is that of a kindergarten teacher. Moreover, the *O*Net* is not 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. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education and experience, and it does not specify the particular type of degree, if any, that a position would require. The Job Zone rating of four given to the position of kindergarten teacher does not indicate that a bachelor's degree in a specific specialty is required.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that a proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant case, the record includes the previously discussed AETS evaluation of the proffered position, which asserts that a degree requirement for the proffered position is common to the day care industry, and a promotional flyer and four job advertisements from private organizations providing childcare and/or early childhood education. This evidence does not, however, establish the proffered position as a specialty occupation.

The AETS opinion evaluates the occupation of kindergarten teacher, rather than the proffered position. Accordingly, its finding that a degree requirement is common for kindergarten teachers is not relevant to these proceedings. Further, as previously discussed, the record does not establish the authority of the AETS, an educational credentials evaluation service, or the professor who signed the evaluation to speak to hiring practices in the private day care industry in the United States. Where an opinion is not in accord with information or is in any way questionable, CIS is not required to accept it or may give it less weight. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The promotional flyer and four job announcements also fail to establish an industry standard for degreed day care assistants. Neither the flyer nor the announcements appear to have been published by organizations similar to the petitioner. All five come from early childhood learning centers, rather than a large family day care home licensed to care for no more than ten children. Further, the flyer and the announcements do not establish that the positions they describe are parallel to the proffered position. Either they offer insufficient descriptions of the duties of the positions advertised or outline duties that do not appear parallel to those of the proffered position. This evidence also fails to establish an industry-wide degree requirement in a specific specialty, as required for classification as a specialty occupation. The flyer does not state that the learning

center's teachers are required to hold degrees in specialties directly related to their employment and only two of the job announcements indicate that the employer requires a degree requirement in a specific specialty.

To qualify the proffered position as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must demonstrate that the position is so complex or unique that it can be performed only by an individual with a degree. While the AAO notes that the AETS evaluation of the occupation of kindergarten teacher finds the proffered position to require a degree, it, for reasons previously discussed, does not establish the proffered position as a specialty occupation. Accordingly, the record does not demonstrate that the petitioner's degree requirement is common within its industry or that the proffered position may be distinguished from similar but non-degreed employment on the basis of its complexity or unique nature.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. At the time of filing, counsel indicated that the petitioner, in business since 1998, already employed an individual in a position parallel to the proffered position, stating that the petitioner wished to "continue its growth through hiring another kindergarten teacher." The record, however, offers no evidence related to the petitioner's employment of this individual, including whether he or she holds a baccalaureate degree in the field of education. The petitioner has also failed to document that the teachers it employs under contract to provide music, science and arts education hold degrees in their subject areas. Absent any evidence demonstrating that it requires its current in-house or contract employees to hold degrees, the petitioner may not establish the proffered position as a specialty occupation based on its normal hiring practices.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Although both counsel and the AETS evaluation describe the position as that of a kindergarten teacher, the record does not, as already discussed, establish the proffered position as that of a kindergarten teacher. Instead, the position is that of an assistant in a large family day care home, employment that may be obtained through certification, based on qualifying experience and training that is not equivalent to a baccalaureate degree in a specialty. Accordingly, to establish the proffered position as a specialty occupation under the specialized and complex threshold of the fourth criterion, the petitioner must distinguish its duties from those performed by certified assistants in large family home day care operations.

The record, however, does not establish that the duties of the proffered position, which are limited to the teaching of personal hygiene and the supervision of such activities as field trips, group discussions and play acting, would require a greater level of knowledge or skill than that normally possessed by certified day care assistants. Neither do these duties represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a certified day care assistant. In the absence of duties that would somehow set the proffered position apart from typical day care employment, the petitioner has failed to demonstrate that the proffered position may be established as a specialty occupation based on the specialization and complexity of its duties. Therefore, the record does not establish the proffered position as a specialty occupation under any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason as well, the appeal must be dismissed.

The AAO next considers whether the record establishes the beneficiary as qualified to perform the duties of the proffered position were it a specialty occupation.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (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.

The record contains documentation of the beneficiary's teaching degree in the specialty of physics from the Chuvash State Pedagogical Institute in Russia and an evaluation of her academic record by the Center for Educational Documentation (CED), Inc., which finds her to hold the equivalent of a U.S. Bachelor of

Education degree, as well as a U.S. Master of Education degree in physics. The beneficiary's degree equivalencies do not, however, establish her qualifications to perform the duties of the proffered position.

The record indicates that the proffered position is that of an assistant in a large family day care home in Massachusetts. Accordingly, to qualify to perform the proffered position's duties, the beneficiary must be certified by the Massachusetts Office of Child Care Services. The record, however, does not indicate that the beneficiary holds the certification necessary to work in a large family day care home in Massachusetts. Accordingly, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the record does not establish the petitioner as a child care facility at the time it filed the instant petition.

The record contains a copy of a license (License Number [REDACTED] issued to the petitioner by the Office of Child Care Services, Commonwealth of Massachusetts on July 28, 2001, which authorizes the petitioner to provide "large family child care services." The expiration date on the license is July 27, 2004 and the record does not indicate that the petitioner has renewed its license or has applied for renewal. Accordingly, the petitioner has not established that it was licensed to operate a child care facility when it filed the Form I-129, Petition for a Nonimmigrant Worker, on April 8, 2006. The petitioner has, therefore, failed to prove that it would employ the beneficiary to perform the duties of the proffered position and, consequently, has not established that the beneficiary would be coming to the United States to perform services in a specialty occupation. An H-1B alien must be coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B). For this additional reason, the appeal must be dismissed.

For the reasons related in the preceding discussion, the record does not establish that the duties of the proffered position are those of a specialty occupation, that the beneficiary is qualified to perform the duties of the proffered position or that the petitioner is a licensed child care facility that would employ the beneficiary to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial.

The AAO notes that the basis for its decision differs from that relied upon by the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 sustained that burden.

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