

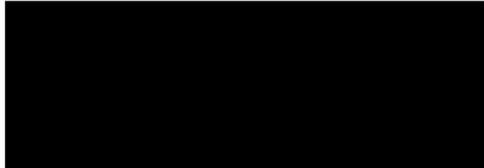
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U.S. Citizenship
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Services

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FILE: LIN 04 252 51292 Office: NEBRASKA SERVICE CENTER Date: OCT 05 2007

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

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:
[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.

for *Michael T. Kelly*
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 operates a preschool and seeks to employ 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 director denied the petition determining that the proffered position is not a specialty occupation. On appeal, counsel asserts that the position is a specialty occupation and submits a brief.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's February 10, 2005 request for additional evidence (RFE); (3) prior counsel's April 26, 2005, letter in response to the RFE and supporting documentation; (4) the director's June 6, 2005 denial letter; and (5) the Form I-290B and counsel's brief. 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)(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.

When determining whether a particular job qualifies as a specialty occupation, CIS does not only 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 is seeking the beneficiary's services as a preschool teacher. The petitioner submitted its offer of employment as evidence of the beneficiary's duties. The petitioner's August 25, 2004 offer of employment indicated the beneficiary would perform the following duties:

1. Team-teach in an urban, diverse school setting of [sic] offering exemplary education and life experiences to young children[.]
2. Communicate and interact effectively with parents, staff, children, health care workers, and state licensing officials[.]
3. Prepare lesson plans, child progress reports, and parent conferencing[.]
4. Plan daily, weekly and monthly lessons with long range goals and plans[.]
5. Prepare daily activities for the students[.]
6. Record observations of all the students frequently[.]
7. Socialize and model for the students[.]
8. Plan and execute a program for the children which take[s] into account the educational, social, developmental, and health needs of the group, as well as the individual child.
9. Promote sound parent relationship and interaction.
10. Provide a safe environment for children to explore and be challenged[.]

The petitioner attached three prior approvals of the beneficiary's classification as an H-1B nonimmigrant worker.

In response to the director's RFE, counsel for the petitioner referenced the beneficiary's prior approvals as a preschool teacher and noted that the present petition is a petition to transfer the beneficiary from H-1B status in New York to the petitioner's preschool in Seattle, Washington. Counsel further noted that the beneficiary's H-1B classification is valid to August 25, 2006.

The petitioner provided: (1) a January 16, 2003 opinion letter by [REDACTED] professor at Indiana University who opines that the position of "kindergarten teacher" requires at least a bachelor's of arts degree from an accredited institution of higher learning; (2) a statement by the petitioner's director indicating that it aimed to hire teachers with exceptional experience and education within the field of early education,

that four of its teachers had graduate degrees, and that many of its teachers held bachelor's degrees in related fields, such as history, psychology, science, and European studies; and (3) four job announcements for the position of preschool teacher.

On June 6, 2005, the director denied the petition noting that the petitioner had hired teachers with less than a bachelor's degree and in unrelated fields and that the information in the job announcements provided did not show the organizations to be similar in size and scope to the petitioner. The director determined that the petitioner had not provided evidence to establish that the proffered position qualifies as a specialty occupation.

On appeal, counsel for the petitioner asserts that the beneficiary is a specialist; that the expert opinion of [REDACTED] establishes that employers require kindergarten teachers to have obtained a bachelor's of arts degree; that the job announcements submitted establish that a bachelor's degree in early childhood education or a related field is the normal requirement to qualify as a preschool teacher; that the petitioner requires that its teachers have a bachelor's degree in education or if the bachelor's degree is in another field, have extensive experience as preschool teachers; and that the variety of skills and aptitudes required of a preschool teacher show that the nature of the position is specialized and complex. Counsel also references the Department of Labor's *Dictionary of Occupational Titles (DOT)*, and contends that the *DOT* establishes that the position of preschool teacher is a professional occupation.

Counsel's assertions are not persuasive. When evaluating whether the proffered position is a specialty occupation, the AAO will consider each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), 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 Department of Labor's *Occupational Outlook Handbook (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 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; and indicates that generally private schools associated with religious institutions desire candidates who share the values that are important to the institution. 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 acknowledges counsel's reference to *DOT* however, the AAO does not consider the *DOT* 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. *DOT* 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. Again, the record does not demonstrate that the occupation

of preschool teacher would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

The petitioner has not provided evidence substantiating that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position of preschool teacher. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO next turns to the criteria 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)). As observed above, the *Handbook* does not indicate that a private preschool teacher requires a baccalaureate degree.

With regard to parallel positions in similar private schools, counsel submitted four job advertisements for the position of preschool teacher. Two of the four advertisements indicated that a bachelor's degree was preferred in elementary education or early childhood development. Two of the advertisements, although indicating that a bachelor's degree was preferred, did not indicate that the degree should be in a specific specialty. None of the advertisements provided sufficient information regarding the duties of the advertised position to establish that the positions advertised were parallel to the duties of the proffered position. Further, the petitioner submitted no documentation that any professional educational association had determined that a bachelor's degree is required for entry into the field nor did the petitioner submit letters or affidavits from other private preschools that attest and substantiate that such preschools "routinely employ and recruit only degreed individuals." Although the petitioner submitted letters of reference in support of the beneficiary's qualifications, these letters do not demonstrate that the beneficiary's prior positions were parallel to the proffered position or that the organizations employing the beneficiary were similar to the petitioner. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations pursuant to the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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. The record does not demonstrate that the duties of the proffered position are of such complexity or of such a unique nature that it is distinguishable from similar but non-degreed employment under the second prong of the criterion. The petitioner has failed to establish the second prong of the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO acknowledges counsel's reference on appeal to the January 16, 2003 opinion of [REDACTED]. However, the AAO observes that [REDACTED] limits his opinion to the position of

"kindergarten teacher." The proffered position is for a preschool teacher; thus the pertinence of the opinion is in question. Moreover, [REDACTED] does not indicate that he reviewed company information about the petitioner, visited the petitioner's preschool, or interviewed the petitioner.¹ While some organizations may require that a kindergarten teacher or a preschool teacher obtain a bachelor's degree in elementary education, the professor's opinion in this matter fails to provide sufficient details about the complexity of the duties in relation to the petitioner's preschool business to substantiate his conclusions. There is thus an inadequate factual foundation established to support the opinion. The AAO may, in its discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The proposed duties of the proffered position in this matter do not exceed the scope of a typical private preschool teacher. The opinion of [REDACTED] is not sufficiently specific to establish the referenced, or any, criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not established that a degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) which provides that an employer establish that it normally requires a degree or its equivalent for the position. In this matter, the petitioner provides the academic credentials of other preschool teachers in its employ. However, the individuals holding bachelor's degrees who are employed in the preschool hold bachelor's degrees in a variety of disciplines, including, history, psychology, science, and European studies. Moreover, the petitioner acknowledges that not all of its preschool teachers hold bachelor's degrees. The petitioner has not established that it normally requires a degree in a specific discipline or its equivalent for the position of preschool teacher.

Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The record is insufficient to establish 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

¹ The date of [REDACTED] opinion (January 16, 2003) suggests that the opinion was prepared for a previously filed petition for a petitioner requesting consideration of a kindergarten teacher position and not for this petition filed September 10, 2004 requesting consideration of a preschool teaching position.

the duties is usually associated with the attainment of a baccalaureate or higher degree. As observed above, the duties of the proffered position are routine for any preschool teaching position. The AAO does not consider the opinion of [REDACTED] regarding the educational requirements of a kindergarten teacher relevant to this proceeding. Moreover, the petitioner has provided no 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Counsel's assertion that the variety of skills and aptitudes required of a preschool teacher shows that the nature of the position is specialized and complex is not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO acknowledges that the beneficiary has previously been approved for H-1B classification. However, this record of proceeding does not contain all of the supporting evidence submitted to the Vermont Service Center in the prior cases. In the absence of all of the corroborating evidence contained in the record of their proceedings, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the petitions were parallel to the offered position. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In 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). If the other nonimmigrant petitions were approved based on identical facts that are contained in the current record, those approvals would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material error on the part of the director. The AAO 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).

The AAO notes that counsel lists several unpublished decisions to substantiate that a preschool teacher is a specialty occupation. However, as noted above, each nonimmigrant petition is a separate proceeding with a separate record. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Upon review of the totality of the record, the record fails to establish 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 appeal will be dismissed and the petition will be denied.

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.