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U.S. Citizenship
and Immigration
Services

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FILE: WAC 06 253 51647 Office: CALIFORNIA SERVICE CENTER Date: OCT 05 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:

SELF-REPRESENTED

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
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 privately funded learning institution with 22 employees, a gross annual income of \$700,000, and a net annual income of \$50,000. The petitioner seeks to extend the employment of the beneficiary as a teacher/senior staff member. 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 Form I-129 filed August 16, 2006 and supporting documents; (2) the director's August 24, 2006 request for further evidence (RFE); (3) the petitioner's September 29, 2006 response to the director's RFE; (4) the director's October 13, 2006 denial decision; and (5) the Form I-290B and the petitioner's letter in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On October 13, 2006, the director denied the petition, determining that the petitioner had failed to establish that the proffered position is a specialty occupation. On appeal, the petitioner asserts the director's denial is in error as Citizenship and Immigration Services (CIS) had previously approved an H-1B visa classification for the beneficiary.

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.

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 for a "teacher/senior staff." In an August 1, 2006 job offer to the beneficiary, the petitioner indicated:

As a Teacher/Senior Staff, you will be required to introduce your students to the basic concepts of social science, culture, language, and physical education using instructional games, equipment, books, art and music. Concepts instrumental to learning and instruction emphasizing social, emotional, physical and intellectual development are to be utilized. In addition, you will plan individual and group activities to stimulate learning and growth. Each child's performance and potential will be observed and evaluated and will be discussed with parents as well as other school officials. Also you will assist in the preparation of classes and teaching and will report to the Center Director.

In a September 29, 2006 response to the director's RFE, the petitioner repeated the above description and stated that its standard minimum educational requirement for the proffered position was a bachelor's degree with some experience. The petitioner also provided a list of goals for children to attain and the amount of time that would be spent addressing those goals. The list did not indicate the age or class level of the children under supervision. The petitioner included a copy of its pamphlet showing classes for infants through kindergarten, as well as a school-age after school program.

On October 13, 2006, the director denied the petition, determining that the proffered position reflected the duties of a preschool teacher and childcare worker. The director referenced the Department of Labor's *Occupational Outlook Handbook (Handbook)* and noted that such a position is open to individuals with no formal training and that training requirements vary from a high school diploma to a college degree. The director found that the record did not establish an industry-wide minimum requirement of a baccalaureate or higher degree for the occupation and that an experienced individual whose educational training fell short of a baccalaureate degree could perform the duties of the proffered position.

On appeal, the petitioner references the previously approved petition, states that a bachelor's degree is always required by the petitioner for the proffered position, and that the denial of a routine request for an extension petition, based on a finding that the position is not a specialty occupation, is arbitrary.

The AAO acknowledges that the beneficiary was previously approved for H-1B status on the basis of a petition filed by the same petitioner. This record of proceeding does not, however, contain all of the supporting evidence submitted to the California Service Center in the prior matter. Moreover, 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, as discussed below, 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).

In this matter, the petitioner does not provide sufficient information to identify the class level under the beneficiary's supervision. The petitioner's initial description of the duties of a "teacher/senior staff" suggests that the beneficiary would be involved in caring for preschool children as the position includes "introducing" basic concepts to children. The record, however, is inconclusive regarding the instruction associated with the proffered position and whether the beneficiary would be involved in teaching preschool children or providing childcare. The AAO acknowledges the lengthy list of goals submitted in response to the director's RFE, but notes that the petitioner does not identify the class or the level of childcare/teaching associated with these goals. In this instance, even if the proffered position is a preschool teaching position, and not simply childcare, the AAO observes that the *Handbook 2006-2007* edition does not report that private school preschool teachers must have a baccalaureate degree in a specific specialty. Rather, the *Handbook* indicates that private institutions prefer candidates who have a bachelor's degree in childhood education for elementary school teachers, but does not mention preschool 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 petitioner has not established that the duties of the proffered position satisfy 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 preschools and childcare facilities, 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 with such uniqueness or complexity 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 or childcare worker. 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 reiterates on appeal that it always requires a bachelor's degree for the proffered position. However, the petitioner does not indicate that it requires its teachers to have a bachelor's degree in a specific discipline. 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). Moreover, the petitioner has not provided documentary evidence substantiating its claim that it always hires teachers who have bachelor's degrees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting 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)). 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. In addition, as observed above, the petitioner has not provided sufficient information to demonstrate that the position is either a preschool teacher or a childcare worker. Without more accurately disclosing the duties of the particular position and the nature of the specific duties as those duties relate to the petitioner's childcare/preschool operations, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 reason. 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.