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U.S. Department of Justice

Immigration and Naturalization Service

Redaction: Not needed to present clearly unwarranted invasion of persons' privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



24 APR 2002

File: EAC-00-269-51750 Office: Vermont Service Center Date:

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)

IN BEHALF OF PETITIONER:
[Redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The petitioner is a day care center with 15 employees and a gross annual income of \$4.8 million. It seeks to employ the beneficiary as a group teacher for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits additional information.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director denied the petition because the petitioner had not demonstrated that it normally requires a baccalaureate degree for the proffered position. On appeal, counsel states, in part, that the proffered position normally requires a baccalaureate degree, and submits copies of degrees from the petitioner's other employees and a letter from the petitioner's assistant director in support of his claim.

Counsel's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

The duties of the proffered position are described as follows:

- * Teaches elemental natural and social science, personal hygiene, music, art and literate [sic] to children.
- * To promote their physical[,] mental, and social development.

- * Supervise the activities such as field visits, group discussions, and dramatic play acting.
- * To stimulate students['] interest in and broaden understanding of their physical and social environment.
- * Fosters co operative social behavior through games and group projects to assi[s]t children in forming satisfying relationships with other children and adults.
- * Encourages students in singing, dancing, rhythmic activities.
- * Alternates periods of strenuous activity with periods of rest or light activity to avoid over stimulation and fatigue.
- * Observes children to detect signs of ill health or emotional disturbance and to evaluate progress.
- * Discuss students['] problems and progress with parents.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, although counsel argues that the proffered position would normally require a bachelor's degree, it does not appear that such degree must be in a specialized field of study. A review of the Department of Labor's (DOL) Occupational Outlook Handbook, 2002-2003 edition, finds no requirement of a baccalaureate or higher

degree in a specialized area for employment as a preschool teacher. In its Handbook, the DOL states, in part, that:

Most States have established minimum educational or training requirements. Training requirements are most stringent for directors, less so for teachers, and minimal for childcare workers and teacher assistants. In many centers, directors must have a college degree, often with experience in childcare and specific training in childhood development. Teachers must have a high school diploma and, in many cases, a combination of college education and experience. Assistants and childcare workers usually need a high school diploma, but it is not always a requirement. Some employers prefer to hire workers who have received credentials from a nationally recognized childcare organization, including the Council for Professional Recognition.

Many States also mandate other types of training for staff members, such as health and first aid, fire safety, and child abuse detection and prevention. In nearly all States, licensing regulations require criminal record checks for all childcare staff.

In this case, the record contains a permit from the City of New York's Department of Health issued on August 25, 1998, indicating that the Partners with Parents Day Care Center, where the beneficiary is to be employed, is subject to the provisions and regulations of the New York City Health Code. In a letter dated June 15, 2001, the petitioner's assistant director states in part that New York City Health Code requires that teachers of early childhood classes in daycare services be licensed by the New York Board of Education. The assistant director submits a copy of the board's procedures which demonstrates that a baccalaureate degree, among other criteria, is required to obtain such license. The record, however, does not demonstrate that such degree must be in any specific field of study. Rather, it appears that a degree in any field of study is acceptable. Thus, the petitioner has not shown that a bachelor's degree in a specialized area is required for the position being offered to the beneficiary.

Second, although the petitioner's past hiring practices indicate that it normally requires a baccalaureate degree for the proffered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Service 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 or 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, although the petitioner claimed to have hired only individuals with a bachelor's degree for its group teacher positions, the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

Third, the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.

¹ The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.