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U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC-01-047-52260 Office: Vermont Service Center

Date: AUG - 6 2009

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:



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 and subsequent motion to reconsider were denied by the director. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a childcare facility with 14 employees and a gross annual income of \$360,618. It seeks to extend its authorization to employ the beneficiary as a preschool instructor for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner submits a brief.

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 persuasively established that a preschool teacher requires a baccalaureate degree. On appeal, the petitioner states, in part, that due to the complexity of the proposed duties, it normally requires a baccalaureate degree for the proffered position. The petitioner also states that the guidelines of the State of New Jersey and the accreditation requirements of the National Association for the Education of Young Children (NAEYC), of which the petitioner is a member, also require such degree.

The petitioner'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, in part, as follows:

As head pre-school teacher, [the beneficiary] supervises one pre-school teacher and three assistants. She meets biweekly with the staff to identify issues that need to be addressed to plan activities for the children. She meets biweekly with the

Director or assistant to report needs, problems, and accomplishments of the team. In addition, [the beneficiary] is responsible for planning and implementing the curriculum for the four year old class.

(a) curriculum development and selection of appropriate educational materials for each of the 8 levels of instruction;

(b) training and supervising 3 part-time subordinate teacher associates;

(c) diagnostic screening of enrollees for class placement level;

(d) performing administrative duties in connection with (a), (b) and (c). For the next three years, [the beneficiary] will continue her professional duties while developing new, up-to-date preschool curriculum. In addition [the beneficiary] will continue professional development to assure her skills remain current with the latest research.

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, the Service does not agree with the petitioner's argument that the proffered position would normally require a bachelor's degree in early childhood education or a related field. A review of the Department of Labor's 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. It 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.

The record indicates that the petitioner is a daycare facility for 60 children. Although the petitioner argues that the New Jersey Administrative Code (NJAC) requires that head teachers hold a baccalaureate degree or an equivalent thereof in an education-related field, information from the NJAC's website describes its requirements for a group teacher as less than a baccalaureate degree. It is also noted that in a letter dated February 19, 2001, the petitioner states that the beneficiary is also a group teacher for a pre-kindergarten classroom. As such, the proffered position appears to be primarily that of a preschool teacher. In its February 19, 2001 letter, the petitioner also states that its current staff of three teachers with bachelor's degrees and four teachers with associates degrees may not be competitive with centers employing more teachers with bachelor's degrees. In view of the foregoing, it appears that the petitioner has already met the State requirements of hiring a sufficient number of staff with baccalaureate degrees in a education-related field, but prefers to hire more employees with baccalaureate degrees to become more competitive in the childcare market. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, although the petitioner states 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 states that a baccalaureate degree or its equivalent is normally the minimum requirement for its instructor/head 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, although the petitioner has submitted numerous letters from individuals involved in childcare, such letters are insufficient evidence of an industry standard. One executive director indicates that although all of her current group teachers hold baccalaureate degrees, her previous group teachers did not hold such degrees because she could not afford to hire them. Another director states that half of her staff hold bachelor's degrees because she "chooses to hire above the minimum requirement for the state of NJ." Another director states that two of her five staff hold degrees. The writers of such letters indicate that a baccalaureate degree for positions such as the proffered position is preferred rather than required.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that

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.

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.

Beyond the decision of the director, the petitioner's labor condition application was certified on January 11, 2001, a date subsequent to November 28, 2000, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.