



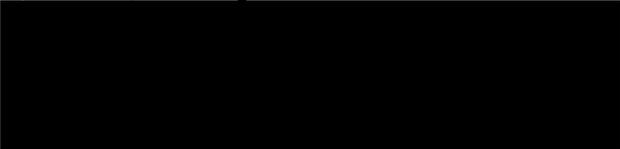
DA

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to
protect clearly unwarranted

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

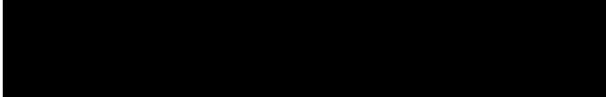


FILE: WAC 01 274 55698

OFFICE: CALIFORNIA SERVICE CENTER

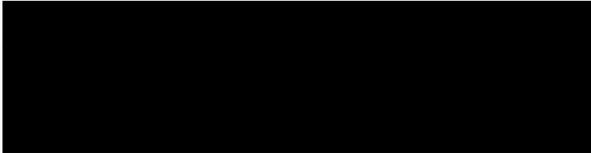
DATE: DEC 18 2002

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 USC 110(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 Acting Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The director's decision shall be withdrawn and the case remanded for entry of a new decision.

The petitioner is a non-profit public charter school with more than 20 employees. It seeks to employ the beneficiary as an elementary school teacher for a period of three years.

The director denied the petition because he found that the beneficiary is not qualified to work in a specialty occupation. On appeal, the petitioner asserts that the beneficiary is qualified to perform the duties of the proffered position.

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), provides in part for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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 knowledge 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.

8 C.F.R. 214.2(h)(4)(ii) further 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.

In the petition, counsel for the petitioner emphasized that the applicant would be employed as an elementary school teacher. The petitioner stated that the minimum requirements of the position in question are a bachelor's degree in education or the equivalent and elementary school teaching experience. The petitioner also stated that a professional teaching certificate was preferred but not required. The petitioner did not state whether those minimum requirements were the minimum for teaching in all elementary schools, the minimum for teaching in charter elementary schools, or

the petitioner's own requirements. Further, the petitioner did not submit any evidence that all of the petitioner's current and recent elementary school teachers possessed those alleged prerequisites when hired.

The petitioner noted that the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) states that all 50 states and the District of Columbia require that elementary school teachers in public schools be certified, though private school teachers need not be certified, and that, although the requirements for certification vary from state to state, all states require a minimum of a bachelor's degree, an approved teacher training program with a prescribed number of subject and education credits, and supervised teaching experience.

The petitioner further stated that the applicant has a degree in "Biology and Education" from St. John's University in New York and that he has elementary school teaching experience. The petitioner did not mention whether or not the beneficiary has a teaching certificate.

With the petition, the petitioner submitted a copy of the beneficiary's transcript from St. John's University. That transcript clearly states that the applicant graduated with a bachelor of science degree with a major in biology.

Applying the standards appropriate to the position of teacher in a public elementary school, the director requested the petitioner to submit additional evidence pertinent to the applicant's qualifications. Specifically, the director requested evidence that the beneficiary had the requisite teaching certificate.

In response, counsel submitted a letter from the petitioner's Chief Administrative Officer, who stated ". . . that although the Hawaii State Department of Education does not require teaching certification (for teachers in Charter Schools), Mr. Pandit has completed his professional training for teacher certification." That letter did not state whether the beneficiary had been awarded a teaching certificate.

The director, pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C) denied the petition on the basis that the beneficiary was unqualified to perform the duties of a specialty occupation. Specifically, the director found that the beneficiary did not possess proper licensure to teach elementary school in the state of Hawaii.

On appeal, counsel admits that the beneficiary does not have a teaching certificate but states that a teaching certificate is not required to teach in a charter school. In support of that proposition, counsel provides a copy of section 302A-1184 of the Hawaiian codes, exempting charter schools from requirements

applicable to public schools. Counsel maintains that the position of elementary school teacher in a public charter school ought to be analyzed differently from that of elementary school teacher at an ordinary public school.

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), provides in part for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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 are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Counsel has demonstrated that the requirements for entry into the position of charter school teacher are different from the requirements for entry into the position of public school teacher. Because a teaching certificate is not a requirement for a teaching position at a charter school, to deny this petition because the beneficiary does not have such a certificate was in error. However, the case may not be approved at the present time. As presently constituted, the record does not support a finding that the proffered position is a specialty occupation. As the director did not address this issue, the case will be remanded for further action.

The record contains no evidence that charter schools normally require a degree in education or a related specialty or that the proffered position is unique or complex. The petitioner states that it normally requires a degree in education. Other than that conclusory statement, however, the record contains no evidence that the proffered position, elementary school teacher at a charter school, requires a bachelor's or higher degree, let alone a degree

in a specific specialty. Based upon the evidence in the record, the petitioner has not established that the proffered position is a specialty occupation.

The director may request any evidence he deems necessary in order to assist him in making a determination of this issue. As always, the burden of proof remains with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

In addition, the record does not indicate whether the director found the beneficiary has a degree in education or the equivalent. Should the evidence indicate that the proffered position requires a degree in education or the equivalent, the director must also make that determination.

ORDER: The director's decision is withdrawn. The case is remanded for entry of a new decision, which, if adverse to the petitioner, is to be certified to the Associate Commissioner for review.