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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

NOV - 7 2002

File: SRC-01-237-58475 Office: Texas Service Center

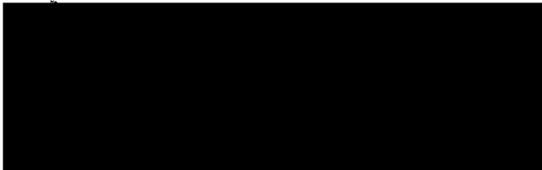
Date:

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, who certified his decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

The petitioner is a private resident with two employees and a gross annual income of \$700,000. She seeks to employ the beneficiary as a Spanish language teacher for her three children, who are three years old, one year and a half, and two months old, respectively, for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

In response to the notice of certification, counsel submits a letter.

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 duties described by the petitioner appeared to relate to the job of a preschool teacher. The director did not find the duties described by the petitioner to be so complex as to require a baccalaureate degree. In his letter, counsel states, in part, that the proffered position is comparable to that of a Spanish language teacher rather than a preschool teacher or nanny. Counsel further states that the proposed duties are so complex that a bachelor of arts degree in primary education is required.

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 position that is being offered to [the beneficiary] is that of Spanish Language Teacher. In this position,

the beneficiary will establish, develop and maintain a daily, structured learning environment in which to instruct small children in the Spanish language and in Latin American culture. She will work with each child individually and will develop individual lesson plans based on each child's capacity, language skills and learning development. This will require that she use her experience and education in primary education to work with several stages of child development and education. She will work approximately 2-3 hours every day teaching the children, including 45 minutes of individual work with each child and at least 30 minutes each day of group study. She will spend at least one hour every day preparing lesson plans and daily learning activities.

The petitioner's employment contract with the beneficiary also describes the proposed duties, in part, as follows:

The [redacted] hereby hire [the beneficiary] to assist them in the education of the [petitioner's] children, not only in written and spoken Spanish, but also in other aspects of education such as cultural and behavioral. [The beneficiary's] work shall be carried out at the [petitioner's] home . . . and in places where the [redacted] may travel with their children, in which instances [the beneficiary] may be asked to accompany the family.

For the effects of this contract, it is very important that [the beneficiary] observes [sic], since the beginning, the rules and disposition of [the petitioner] towards her children, especially with regard to communication, attitude, discipline, rewards, etc. and that [the beneficiary] follow the same rules and disposition of [the petitioner]. In this way, both [the petitioner] and [the beneficiary] will be able to send consistent signals to the children, enabling them to clearly understand what is expected from them. In the event that [the beneficiary] has any doubt or question about a certain situation, especially regarding discipline, she shall consult with [the petitioner] in order to decide how best to respond or handle the situation.

The children's education in Spanish shall have a formal and an informal aspect. For the formal education, each child will have a 45-minute to 1 hour lesson with either [the petitioner] or [the beneficiary]. The informal education will take the form of daily conversation, which will be exclusively in Spanish. During the evenings and weekends when Mr. McCormack is present the conversation will be in English. This will benefit [the beneficiary] and her English studies, which is an important issue for her integration and well being . . .

The [petitioner's] family travels on occasion and may request that [the beneficiary] accompany them. On these trips, [the beneficiary] will share a room with the [petitioner's] children. [The petitioner] will pay for all travel expenses. This does not include [the beneficiary's] personal expenses for which she will be responsible.

[The beneficiary] will be entitled to a 2-week paid vacation, which she may take during the [petitioner's] yearly family trip to Peru. During this time in Peru, [the petitioner] reserve[s] the right to hire another person to help them with the children.

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 counsel's argument that the proffered position would normally require a bachelor's degree in primary education or a related field. The proffered position appears to be primarily that of a childcare worker and/or nanny. In its Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 328-329, the Department of Labor (DOL) describes the job of a childcare worker, in part, as follows:

Childcare workers nurture and teach children of all ages in children centers, nursery schools, preschools, public schools, private households . . . These workers play an important role in a child's development by caring for the child when parents are at work or away for other reasons . . . In addition to attending to children's basic needs,

these workers organize activities that stimulate the children's physical, emotional, intellectual, and social growth. They help children explore their interests, develop their talents and independence, build self-esteem, and learn how to behave with others.

Nannies generally take care of children from birth to age 10 or 12, tending to the child's early education, nutrition, health, and other needs.

In its Handbook at page 330, the DOL finds that State requirements for childcare workers often are minimal. Childcare workers generally can obtain employment with a high school diploma and little or no experience. 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, the petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area such as primary education, for the offered position. Third, the petitioner did not present any documentary evidence that other households 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.

It is additionally noted that although counsel states in his letter dated September 18, 2001, that the petitioner already employs a nanny, this information conflicts with the information provided by the petitioner in the position description signed and dated by her on July 30, 2001, in which she states that she currently has two employees who are both housekeepers. There is no evidence in the record demonstrating that at the time of the filing of the instant petition, the petitioner employed a nanny. 8 C.F.R. 103.2(b)(12) states that an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. It was held in Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988) and Matter of Ramirez-Sanchez, 17 I&N Dec. (BIA 1980) that the assertions of counsel do not constitute evidence.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective

evidence pointing to where the truth, in fact, lies will not suffice. Matter of Ho, 19 I&N Dec. 582. (Comm. 1988).

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 decision of the director denying the petition is affirmed.