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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-98-031-52007 Office: Vermont Service Center

Date: OCT 01 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 U.S.C. 1101(a)(15)(H)(i)(b)

PUBLIC COPY

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. A subsequent motion to reopen was approved by the Associate Commissioner, and the previous decisions of the director and the Associate Commissioner were affirmed. The matter is now before the Associate Commissioner for Examinations on a second Service motion to reopen and reconsider. The motion will be granted. The previous decisions of the Associate Commissioner will be affirmed.

The petitioner is a pre-school day care and teaching center with 46 employees and a gross annual income of \$2,100,000. 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, the petitioner had provided additional information in support of the appeal.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not established that a baccalaureate degree is the minimum requirement for the proffered position. The Associate Commissioner further found that a review of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) did not find a requirement of a baccalaureate or higher degree in a specialized area for employment as a preschool teacher.

On first motion, the petitioner stated, in part, that it has always required that its group teachers hold a bachelor's degree in teaching, and that the day care centers in New York City generally require prospective applicants to have at least a bachelor's degree in teaching. The petitioner further stated that the duties of a group teacher are more complex than those of a preschool teacher and childcare worker, and that the proffered position is that of a kindergarten group teacher.

The Associate Commissioner affirmed his previous decision reasoning that the petitioner had not established that a baccalaureate degree is the minimum requirement for the proffered position. The Associate Commissioner further found that the petitioner had not provided proof of the complexity of the proffered position.

On second motion, the petitioner provides job descriptions for a group teacher prepared by a joint union-management committee and by the Archdiocese of New York Head Start Program, and proof that its five group teachers hold at least bachelor's degrees. The petitioner states, in part, that the proffered position is that of a kindergarten group teacher and therefore has the same requirements as a school teacher as described in the DOL's Handbook. The petitioner also submits several job postings for

group teachers that state that a baccalaureate degree or higher is required.

The petitioner's statement on motion 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:

Classroom head teacher of pre-school children. Prepares lesson plans and implements them. Takes care of the children during school hours. Confers with the parents for any children's problems. Reports to Adm. Director any problems or potention [sic] problems about the classroom and the the [sic] children, and advises corrective actions.

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 teaching or a related field. A review of the DOL's Handbook, 2002-2003 edition, at pages 201-202, 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.

In this case, the record contains a letter dated April 21, 1998, in which the petitioner's administrative director states, in part, as follows:

However, for lack of certified group teachers, we are allowed under the ACD [The City of New York, Administration for Children's Services, Agency for Child Development] guideline (again, in implementation of The New York City Health Code) to employ certification-candidate group teachers, or "Group Teacher Study Plan." We quote below ACD's qualification requirements for group **teacher study plan**:

"A group teacher (study plan) shall be someone who is working towards certification and who has an official study plan to meet the qualifications outlined in **Article 47.13 (b) (1) a or b or c 1 and 2**.

"Academic and Experience Requirements

* BA/BS degree
OR

* At least 90 college credits and one year of satisfactory experience as an Assistant or Teacher Aide in a licensed preschool program
OR

* Be within 32 credits of provisional certification and one year of satisfactory experience as an Assistant or Teacher Aide in licensed preschool program

AND

* Submit a plan for completing courses mandated by New York Health Code **Article 47.13 c 1 and 2 . . .**

AND

* for completing a [sic] least 2 parts of the New York State Teacher Certification Examination (NYSTCE) series, LAST AND ATS-W."

In view of the qualification requirements of the "Group Teacher Study Plan," 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 claims to have hired only individuals with a bachelor's degree for its group teacher/preschool 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

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.

past, the position still does not require a bachelor's degree in a specific specialty.

Third, the job postings submitted by the petitioner are noted. As previously discussed, however, the record demonstrates that individuals without baccalaureate degrees or higher may be hired as group teachers. 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.

Beyond the decision of the director, the record does not contain an evaluation of the beneficiary's credentials from a service which specializes in evaluating foreign educational credentials as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(3). 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 decisions of the Associate Commissioner dated May 20, 1998 and February 8, 1999, are affirmed.