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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



15 OCT 2007

File: WAC-01-296-54724 Office: California 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:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a parochial school system with 200 employees and an approximate gross annual income of \$13,847,480. It seeks to employ the beneficiary as a teacher assistant at a parochial elementary school for the 2001-2002 school year. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and supporting documentation.

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 established that the proffered position of teacher assistant requires a bachelor's degree in a specific field of study.

On appeal, counsel asserts that the petitioner normally requires a baccalaureate or higher degree for its teacher assistants. Counsel further asserts that the specific duties of the teacher assistant position are so specialized and complex that the knowledge required to perform the duties is normally associated with the attainment of a baccalaureate degree.

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

Be available for the students and lead teacher throughout the day. Form a special bond with the lead teacher and also participate in all school activities as faculty members.

In response to a Service request for additional evidence, the petition submitted a formal job description of the teacher assistant position. The duties are listed in pertinent part as follows:

1. Be fully available to the students and lead teacher during school hours as well as during professional workdays. Times when children are not present are used for lesson preparation.
2. During the days before the school year begins, the assistant needs to be available to help with classroom set-up and preparation for the school year.
3. Attend and participate in team grade level planning meetings.
4. Assist in the preparation of teaching materials.
5. Assist in the review and filing of completed student work.
6. Assist in the creation/up-keep of an inviting, organized educational environment.
7. Assist with dismissal of students.
8. Substitute for the lead teacher when s/he is absent. The Dean and lead teacher will assess when the assistant teacher is ready for this responsibility.
9. Familiarize oneself with the Goals and Criteria of Sacred Heart Schools.
10. Attend school Liturgies, assemblies and meetings.
11. Facilitate instruction by teaching small or large groups as determined by lead teacher.
13. Supervise assigned recess/lunch duties each week. Arrive promptly for all surveillance assignments.
17. Share observations of children with lead teacher in preparation for parent conferences.

* * *

18. Attend parent conferences, supporting the lead teacher.

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 failed to establish that any of the four factors enumerated above are present in this proceeding.

The Service does not agree with counsel's argument that the proffered position of teacher assistant requires a baccalaureate degree in a specialized area. The Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 edition, describes the duties of teacher assistants at pages 192-193 as follows:

Teacher assistants provide instructional and clerical support for classroom teachers, allowing teachers more time for lesson planning and teaching. Teacher assistants tutor and assist children in learning class material using the teacher's lesson plans, providing students with individualized attention. . . .

Some teacher assistants perform exclusively noninstructional or clerical tasks, such as monitoring nonacademic settings. . . . Most teacher assistants, however, perform a combination of instructional and clerical duties. They generally instruct children, under the direction and guidance of teachers. They work with children individually or in small groups -- listening while students read, reviewing or reinforcing classwork, or helping them find information for reports.

The duties of the proffered position parallel those of a teacher assistant as that job is described in the Handbook.

According to the Handbook at page 193, educational requirements for teacher assistants range from a high school diploma to some college training. Increasingly, employers prefer teacher assistants who have some college training. Many schools require previous experience in working with children. A number of 2-year and community colleges offer associate programs that prepare graduates to work as teacher assistants. However, most teacher assistants receive on-the-job training.

The petitioner has not provided any evidence to show that the degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner's Human Resources Coordinator, Juli Devincenzi, stated in a letter dated September 1, 2001: "The successful applicant must hold a college degree and have experience teaching elementary students in a similar setting." Ms. Divincenzi subsequently stated in a letter dated October 16, 2001: "To maintain our high standards consistent with our teaching philosophy, the school will only consider individuals with college degrees and/or teaching experience."

In response to a Service request for additional evidence, the petitioner submitted a list of the teaching staff of Sacred Heart Elementary School and their educational credentials. The petitioner employs eight teacher assistants. According to the list, all of the school's teacher assistants hold at least a bachelor's degree. However, the list provides no information regarding the area of specialization of the degrees held by these individuals, with the exception of the art assistant, who holds a bachelor's degree in fine arts. Without this information, it is not possible to make a determination that the school employs only teacher assistants who hold a bachelor's degree in a specific field of study. Furthermore, as noted above, the petitioner's human resources coordinator has specifically stated that the school requires a bachelor's degree, but there was no stated requirement of a bachelor's degree in a specific field of study for these positions.

Counsel asserts, on appeal, that the duties of the proffered position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. However, as noted above, the duties of the proffered position do not appear to be any more complex than those normally required of teacher assistants as that job is described in the Handbook. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a

specialized area is the minimum requirement for positions as teacher assistants. Thus, the petitioner has not shown that the nature of the specific duties is so specialized and complex that knowledge required to perform such duties is usually associated with the attainment of a baccalaureate or higher degree in a specialized area.

Counsel's argues that the Service erred in relying on the minimum educational requirements for teacher assistant positions as that job is described in the Handbook. Specifically, counsel argues that this standard applies to state schools and not to private independent schools such as Sacred Heart. However, the Handbook specifically states at page 193:

Teacher assistants held almost 1.3 million jobs in 2000. About 80 percent worked in public and private education, mostly in the elementary grades. Approximately half assisted special education teachers in working with children with disabilities. Most of the others worked in child daycare centers and religious organizations.

Clearly, the DOL took into consideration the various settings in which teacher assistants are employed in describing the duties of the position. Therefore, counsel's argument is not persuasive.

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.