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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 MASS. 3/F
Washington, D.C. 20536



AUG 25 2003

File: LIN 02 026 54732 Office: NEBRASKA 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)

ON BEHALF OF PETITIONER:
[Redacted]

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

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a daycare/preschool center located in Chicago, Illinois. It has seven employees and a gross annual income of \$280,127. The petitioner seeks to employ the beneficiary as a kindergarten teacher for a period of three years. The director denied the petition on the ground that the proffered position was not a specialty occupation.

On appeal, counsel asserts that the beneficiary will be employed as a kindergarten teacher, and that the position of kindergarten teacher is a specialty occupation.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 initial petition, the petitioner classified the proffered position as a "Kindergarten Teacher for Daycare/Preschool". The job responsibilities associated with that position were detailed as follows:

. . . to teach children art, music, numbers and basic ready [sic] appropriate for their age; review and revise daily lesson plans, prepare activity schedules, meet with other staff members to discuss children's progress, and adjust lessons for the individual child's needs.

The director requested additional evidence from the petitioner. Specifically, the petitioner was asked to provide a photocopy of the beneficiary's I-94, more information regarding the petitioning entity, an endorsed labor condition application and evidence that the proffered position qualified as a specialty occupation.

In response to the director's request for more information about the petitioning entity, the petitioner provided a copy of its policy manual. The manual provides, in part, information about admission requirements, operating hours, illness/accident management, discipline and teaching philosophy. The policy manual does not state however, the educational requirements of the petitioner's teaching staff, nor does it indicate that the facility offers a kindergarten program.

The petitioner further responded to the director's request for evidence, with a more detailed job description. The description provided as follows:

Primary Duties:

1. Supervise assigned students at all times; assume responsibility for children during lunch and rest periods.
2. Provide instructional materials and aids; prepare and create educational materials.
3. Create and implement lesson plans tailored to the individual class or student(s).
4. Participate in all school/center related activities.
5. Recommend and implement positive behavioral programs for specific students.
6. Maintain communication with parents concerning student's progress.
7. Plan and outline daily scheduled activity.
8. Execute safety procedures for classroom.
9. Use and maintain instructional materials and

equipment.

Secondary Duties:

1. Attend and participate in workshops, in-service training, and other continuing education programs.
2. Assume other related activities and duties as assigned.

The Bureau does not simply rely on a position's title 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 Bureau considers. The Director denied the petition on June 12, 2002, on the ground that the proffered position was not a specialty occupation. The director found that the position described reflected the duties of a Preschool Teacher or Child Care Worker.

Counsel states on appeal that the beneficiary will be employed as a kindergarten teacher, not as a childcare worker or preschool teacher, and that a minimum of a bachelor's degree is required for employment as a kindergarten teacher. It should be noted however, that the minimum education requirement for **licensed** teachers in all 50 States is a bachelor's degree, and completion of an approved teacher training program with a prescribed number of subject and education credits, as well as supervised practice teaching. *Id* at 201. (emphasis added.) There is no corresponding licensing requirement to teach in private preschool or daycare centers, nor is there any requirement that an individual have a minimum of a bachelor's degree for entry into teaching positions at those facilities.

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 qualify the offered position as a specialty occupation. In the *Occupational Outlook Handbook, 2002-03, (Handbook)* at pages 328-329, the Department of Labor describes, in part, the duties of a childcare worker as follows:

Childcare workers nurture and teach children of all ages in childcare centers, nursery schools, preschools, public schools, private households, family childcare homes and before-and after- school programs. 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. . . .

. . . .

Childcare workers spend most of their day working with children. However, they do maintain contact with parents or guardians through informal meetings or scheduled conferences to discuss each child's progress and needs. Many childcare workers keep records of each child's progress and suggest ways that parents can increase their child's learning and development at home. . . . Most childcare workers perform a combination of basic care and teaching duties

The duties described by the petitioner are similar to those listed in the *Handbook*, that require teaching and caregiver skills. The training and qualifications of childcare workers vary widely. Each State regulates licensing and caregiver training, with requirements ranging from a high school diploma to a college degree in child development or early childhood education. Childcare workers generally can obtain employment, however, with a high school diploma and little or no experience. *Id.* at 330. The petitioner has therefore, failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Second, the petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty for the offered position. Third, the petitioner failed to present any evidence to establish that parallel positions among similar organizations in the industry

commonly require a bachelor's degree or its equivalent, or that the subject position is so complex or unique that it could be performed only by an individual with a bachelor's degree. On appeal, counsel did provide copies of telephone directory advertisements for several child care centers indicating that "kindergarten" aged children were accepted in those facilities. Those advertisements do not, however, indicate that teachers of the kindergarten aged children at those facilities are required to hold bachelor's degrees. If the petitioner has a telephone directory advertisement for its facility, counsel did not provide it. 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 those duties is usually associated with the attainment of a baccalaureate or higher degree, or its equivalent.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is, therefore, 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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed.