

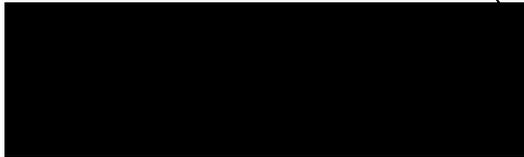
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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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

D2



**JUL 18 2003**

File: LIN 01 233 56065 Office: NEBRASKA 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)

ON BEHALF OF PETITIONER:



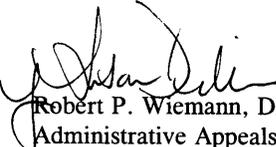
**INSTRUCTIONS:**

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a Cleveland Montessori school with seven employees and a gross annual income of \$183,000. It seeks to temporarily employ the beneficiary as a Montessori teacher for a period of three years. The director determined that the petitioner had not submitted sufficient proof of the school's eligibility for a waiver of the \$1000 filing fee or a certified Labor Condition Application (LCA) and denied the petition.

On appeal, counsel asserts that the petitioner, as a primary school institution, is an exempt organization and submits further documentation from the U.S. Internal Revenue Service as to the petitioner's tax-exempt status. The petitioner does not submit a certified LCA.

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.

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.

With regard to the submission of Labor Condition Applications

(LCAs), 8 C.F.R. § 214.2 (h) (4) (i) (B) (1) states:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

With regard to submitting the wrong filing fee, 8 C.F.R. § 103.2 (a) (7) (1) states in part:

An application or petition . . . shall be regarded as properly filed . . . if it is signed and executed and the required filing fee is attached or a waiver of the filing fee is granted. An application or petition which is not properly signed or is submitted with the wrong filing fee shall be rejected as improperly filed.

In addition, 8 C.F.R. § 103.2(b) (12) states the following with regard to failure to provide sufficient evidence in response to a request for further evidence:

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.

With regard to eligibility for a waiver of the additional \$1000 filing fee, 8 C.F.R. § 214.2 (h) (19) (iii) states in part:

The following exempt organizations are not required to pay the additional fee:

- (A) An institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965;
- (B) An affiliated or related nonprofit entity. . . .
- (C) A nonprofit research organization or governmental research organization.

With regard to nonprofit organizations, 8 C.F.R. § 214.2(H) (19) (iv) states that a nonprofit organization or entity is:

- (A) Defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c) (3), (c) (4) or (c) (6), 26 U.S.C. 501(c) (3), (c) (4) or (c) (6), and
- (B) Has been approved as a tax-exempt organization for research or educational purposes by the Internal Revenue Service.

The American Competitiveness in the Twenty-First Century Act

expanded this list of exempt organizations.<sup>1</sup>

The first issue in this proceeding is whether the petitioner properly filed the H-1B petition. In the original petition received by the Nebraska Service Center on July 20, 2001, the petitioner submitted the I-129 petition with an accompanying filing fee of \$110. The Service Center rejected the petition and informed the petitioner that it had to file Form I-129W to be considered exempt from paying the full \$1,110 filing fee. The petitioner then submitted the I-129W waiver application and indicated that it was a primary education institution.

In a request for further evidence, the director stated that the I-129W application filed by the petitioner did not establish that the petitioner was a public primary or secondary educational institution because the requested documentation had to include the U.S. Internal Revenue Service's (IRS) approval of the petitioner's tax-exempt status.

In response, the petitioner submitted four documents with regard to the educational status of the Villa Montessori School. These documents were: 1) a State of Ohio Sales and Use Tax Blanket Exemption Certificate issued to the school; 2) the charter for the school from the Ohio State Board of Education that described the school as an elementary school (kindergarten); 3) a document from the Ohio Catholic School Accrediting Association that provided associate membership to the petitioner; and 4) a State of Ohio Department of Human Services document that provided a child day care license to the petitioner for preschool and school age children.

On February 16, 2002, the director denied the petition stating that the petitioner had failed to submit sufficient evidence to establish its eligibility for a waiver of the \$1,000 fee. On appeal, counsel, who was retained by the petitioner after the filing of the petition, submits a letter from the IRS to the Associate General Counsel of the United States Catholic Conference and a letter from the Chancellor of the Cleveland diocese. These documents establish that the petitioner is included in a blanket waiver of tax exempt status given to entities of the Roman Catholic Church that are listed in the 1995 Official Catholic Directory. Counsel also submits a notarized affidavit from the finance office of the Roman Catholic diocese of Cleveland that states the

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<sup>1</sup> The American Competitiveness in the Twenty-First Century Act (AC21), which was signed into law on October 17, 2000, added two other types of exempt organizations: a primary or secondary education institution and a non-profit entity which engages in an established curriculum-related clinical training program for students registered at any such institution. Public Law 106-311 (HR 5362) amended Section 214(c)(9) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(9)) to add these two institutions to the list of exempt organizations to the Act.

petitioner is a tax-exempt organization under Section 501(c)(3) of the 1954 Internal Revenue Code. Counsel submits no certified LCA to the record.

In examining whether the director's decision with regard to waiver eligibility, it should be pointed out that the final regulations for AC21, and any ensuing definition of terms, have yet to be promulgated. In determining whether the petitioner, chartered by the State of Ohio as an elementary/kindergarten educational institution, is exempt from the \$1,000 filing fee, *Webster's New College Dictionary* defines primary school as "a school usually including the first three or four grades of elementary school and occasionally kindergarten". Within the context of this definition, the petitioner appears to be a primary school institution and therefore exempt from the \$1,000 filing fee. Accordingly, the director's decision with regard to the petitioner's fee waiver eligibility does not appear correct. Pursuant to 8 C.F.R. § 103.2 (a)(7)(1), the petitioner did submit the proper filing fee and the petition should not have been denied on that basis.

The second issue in this proceeding is whether the petitioner established H-1B eligibility for the petition. As noted previously, in the original petition, the petitioner submitted no certified Labor Condition Application (Form ETA 9035) or any documentation that such a document had been submitted to the Department of Labor for certification. In his request for further evidence, the director requested a detailed description of the duties to be performed by the beneficiary, and evidence that the beneficiary was qualified to perform the duties of the proffered position. He also requested a certified LCA.

In response the petitioner provided a description of the job duties of the Montessori teacher that listed educational qualifications as "certified Montessori teacher training credentials on Pre-Primary 3-6 age level. Maintain current First Aid, Child Abuse and Communicable Disease teacher updates." The petitioner also submitted documents with regard to Montessori training that the beneficiary had completed in Sri Lanka. The petitioner did not provide a certified LCA. Pursuant to 8 C.F.R. § 214.2(h)(4)(i)(B)(1), the petitioner shall submit a certified LCA with the initial petition. The petitioner provided no certified LCA during the entire adjudication of the instant petition. Accordingly, the instant petition shall be denied.

Beyond the decision of the director, the petitioner has not established that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation. With regard to the beneficiary's qualifications, the petitioner submitted the following: a diploma from the Marian Training Centre in Sri Lanka that stated that the beneficiary had passed the Centre's training program, the beneficiary's resume, and a letter of recommendation from a former employer in [REDACTED]. Pursuant to 8 C.F.R. § 214.2

(iii)(C)(2), the petitioner provided no educational equivalency document to establish that the beneficiary had a baccalaureate degree in a specific specialty that was the equivalent of a baccalaureate degree from an accredited U.S. academic institution.

In the alternative, pursuant to 8 C.F.R. § 214.2 (h) (4)(iii)(D), the petitioner has not established that the beneficiary, by means of education or work experience or other specialized training, possesses the equivalent of a U.S. baccalaureate degree in a specific specialty. As the appeal will be denied on other grounds, these issues will not be discussed 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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.