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

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ADMINISTRATIVE APPEALS OFFICE
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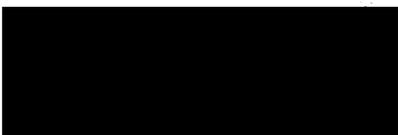
MAR 11 2003

File: EAC 02 041 54182 Office: VERMONT 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:



**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 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, Vermont Service Center, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a New York language school established in 1980 that has fourteen employees and has a gross annual income of \$467,449. It seeks to temporarily employ the beneficiary as an English language teacher for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, the petitioner asserts that the proffered position is a specialty occupation because it requires a bachelor's degree.

Section 214(i)(1) of 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 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.

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 issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation. In the original petition received by the Vermont Service Center on October 19, 2001, the petitioner stated that the beneficiary would work as an English language teacher for the petitioner. The petitioner further described itself as an English as a second language school located in the heart of the Polish diaspora community in Brooklyn, New York. The petitioner described the beneficiary's duties as follows:

The duties of an English language teacher in English as a second language curriculum is to instruct students in vocabulary, grammar and pronunciation. The teacher guides word drill exercises, class reading and class reports. Review of newspaper and magazines is also a class activity. The position requires the introduction of progressively higher and more complex levels of vocabulary and sentence structures. Preparing class plans and student progress reports is also a requirement of teaching at the school. Fluency in English as well as the native language of the students is a requirement. The duties and work of this professional position require the service of an individual who is the holder of at least a bachelor's degree in English language or literature or some closely related field.

The petitioner also submitted an educational equivalency document that indicated the beneficiary had the equivalent of a United States bachelor's degree in English language and literature. The petitioner also submitted documentation on the beneficiary's previous work in teaching English as a second language in Wroclaw, Poland.

On January 4, 2002, the director requested further evidence with regard to the petition. In particular, he requested evidence showing that in the petitioner's industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for entry in the proffered position. The director also requested evidence as to whether similarly employed individuals in the school had bachelor's degrees and in what specific fields.

The petitioner submitted documentation on New York State Education Department requirements for teachers working in teachers of English as a Second Language (ESL). The petitioner also submitted

a list of former and current instructors employed by the petitioner. A letter from the petitioner's president stated that the petitioner currently employed eighteen instructors of English as a Second Language.

On March 26, 2002, the director denied the petition stating that the petitioner's evidence did not establish that the proffered position was a specialty occupation. In examining the requirements for the New York State Education Department, the director determined that these requirements only indicated the need for a bachelor's degree, not for a bachelor's degree in a specific specialty. The director also noted that while the petitioner had submitted a list of former and current English language teachers, the list did not indicate any specific field of study for the instructors.

On appeal, counsel asserts that the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau) constructed a denial of the instant petition based upon a circuitous interpretation of the regulations. Counsel states that the petitioner is a school licensed by the New York State Education Department, and that the position of English teacher at the school requires a bachelor's degree. In addition, counsel comments on the Bureau's interpretation of the New York State Education requirements for ESL instructors and points out that the New York State Department requires more than a bachelor's degree.

Upon review of the record, a basic distinction can be made between the reasoning underlying the director's decision, the petitioner's assertions, the documentation of the New York State Education Department requirements for ESL teachers, and the petitioner's educational requirements for its instructors. 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

As stated previously, the statute establishes that the petitioner must show that the proffered position requires a baccalaureate degree or higher, or the equivalent, in a specific specialty. (Emphasis added.) To interpret the criteria in 8 C.F.R. § 214.2(h) (4) (iii) (A) as solely requiring a bachelor's degree is an incorrect interpretation.

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." See *Defensor v. Meissner* 201 F.3d 388 (5th Cir. 2000).

Upon review of the record, the petitioner has not presented a persuasive argument for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position as a specialty occupation, each of the four criteria listed at 8 CFR § 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1).

The Bureau often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position.

The 2002-2003 edition of the *Handbook* examines the field of ESL teachers within the category of teachers-adult literacy and remedial and self-enrichment education. On page 194, the *Handbook* states:

Teachers who teach literacy to non-English speaking students are called English as a Second Language (ESL) or English to Speakers of Other Languages (ESOL) teachers. Along with English, ESL teachers provide survival and life skills instruction, and lessons on math, health, citizenship, and vocation topics.

In the 2002-2003 edition of the *Handbook* on page 195, the *Handbook* states the following about the training and educational requirements for ESL/ESOL teachers:

Requirements for teaching adult literacy and remedial education, including ESL and GED preparation, vary by State and by program. Federally funded programs run by State and local governments usually have higher standards than programs run by religious, community, or volunteer organization. Most state and local government and education institutions require that adult teachers have at least a bachelor's degree and preferably a master's degree. Some require an elementary or secondary teaching certificate and a few have recently begun requiring a certificate in ESL or adult education. Teaching experience, especially with adults, also is preferred or required.

The *Handbook* commentary does not indicate that employers of ESL teachers require a degree in a specific specialty for entry into the particular position. (Emphasis added.) It only specifies that a bachelor's or master's degree is required. Thus the *Handbook* information does not establish that the petitioner requires a bachelor's degree in a specific specialty as a minimum requirement for entry into the ESL position.

II. 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 - 8 C.F.R. § 214.1(h)(4)(iii)(A)(2)

A. Degree Requirement is Common to the Industry

Factors often considered by the Bureau when determining the industry standard include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) reports that the industry requires a degree, whether the industry's professional association has made a degree a minimum entry requirement, and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The *Handbook's* conclusions about a degree requirement for an ESL teaching position were discussed in the previous section, and shall not be repeated here. In the instant petition, the petitioner submitted documentation for the State of New York's mandatory educational requirements for ESOL teaching permits. This documentation indicates that the ESOL teachers must have a bachelor's degree along with completion of either 30 hours of coursework from a school association or three semester hour credits in teaching ESOL. This documentation does not indicate that ESOL instructors must have a bachelor's degree in a specific specialty. To the extent that the State of New York does not require a bachelor's degree in a specific specialty, the petitioner has not established the second criterion of 8 C.F.R. § 214.1(h)(4)(iii)(A). The petitioner did not place any further documentation on the record with regard to any professional ESOL association's requirement for a specific specialty, nor did it provide any affidavits from individuals within the industry to attest that only persons with degrees in specific specialties are hired. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform it. In the instant petition, the petitioner has submitted no documentation that the position of an ESOL teacher in a bicultural neighborhood in New York would involve duties seen as either so unique or complex that only an individual with a degree in a specific specialty could perform them.

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)

The petitioner submitted a list of twenty-five current or former employees. The petitioner identified twenty of these employees as ESL instructors with either a bachelor of arts or a master of arts degree. The petitioner did not identify the particular bachelor of arts degree earned by the employees. Without more compelling testimony, such as the identification of the specific degrees received by the petitioner's employees, along with copies of diplomas, the record is not sufficient to establish that the petitioner requires a bachelor's degree in a specific specialty for the ESL teaching position.

IV. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree - 8 C.F.R. § 214.2(h)(4)(iii)(4)

To date the petitioner has placed no information on the record with regard to the specialized and complex nature of the proffered position at the Greenpoint English School. The job description in the original petition contains work duties that are similar to any ESL or ESOL teaching position. No further documentation as to any specialized or complex duties within this description has been placed on the record. Without more persuasive evidence as to the nature of the ESL position at The Greenpoint English School, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii).

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.