



U.S. Citizenship
and Immigration
Services

02



FILE: WAC 03 035 54174 Office: CALIFORNIA SERVICE CENTER Date: 4/11/2014

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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 of the Administrative Appeals Office 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.

Mari Johnson

to Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a preschool that seeks to employ the beneficiary as a teacher. In order to do so, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).¹

The director denied the petition on the basis that the petitioner had not established that the proffered position meets any definition of a specialty occupation as outlined in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the director's decision was arbitrary, capricious, and not supported by the evidence in the record. Counsel also maintains that the director had denied the petitioner due process by not issuing a request for additional evidence (RFE) to give the petitioner to provide evidence about the educational credentials that preschools similar to the petitioner require for their teachers

In reaching its decision, the AAO reviewed the entire record, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B, counsel's brief, and the additional evidence submitted on appeal. Upon consideration of the entire record, the AAO has concluded that the director was correct in denying the petition, as the evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the appeal will be dismissed and the petition will be denied.

Counsel's assertion of error in the fact that the director did not issue a request for additional evidence (RFE) (brief, at pages 3; 4) is without merit. Although an RFE was not issued, the petitioner has had the opportunity to submit additional evidence on appeal. All the evidence submitted on appeal was considered by the AAO, but it does not overcome the sound foundation of the director's decision.

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.

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 Counsel cites and relies upon a version of the Act that provided benefits for an alien of "distinguished merit and ability." As amended in 1990, only certain fashion models are eligible for nonimmigrant temporary worker classification as a person of distinguished merit and ability.

- (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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). This provision assigns specialty occupation status to those positions for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position’s duties.

In its letter filed with the Form I-129, the petitioner described the proposed duties as follows:

Under general supervision, plan and implement learning and enrichment experiences for children age 3 to 6, mainly from Chinese speaking families. Develop and conduct proper curriculum to enhance children’s fully [sic] developments in physical (gross and fine motor); social (awareness, respect, ability to share and cooperate); communication (verbal and non-verbal); self-esteem and cognitive (comprehension, problem solving, and skill acquisition). Organize class and outdoor environment and assure safety of children. Prepare and conduct parent conferences. Observe and assess children’s behavior and learning.

As described in the record, the proposed duties comport with the preschool teacher occupation as addressed in the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations.

Counsel is correct in asserting that the director misapplied the *Handbook*. The director’s decision excerpted from and relied upon an irrelevant section of the 2002-2003 edition of the *Handbook* – the section dealing with childcare workers. The relevant information, to which the director did not refer, is at the section entitled “Teachers – Preschool, Kindergarten, Elementary, Middle, and Secondary.” This relevant section, however, indicates that a bachelor’s degree, or the equivalent, in a specific specialty is not a normal requirement for preschool teachers at either private or public schools:

Licensing requirements for preschool teachers also vary by State. Requirements for public preschool teachers are generally higher than those for private preschool teachers. Some States require a bachelor's degree in early childhood education and others require an associate's degree, while others may require certification by a nationally recognized authority. The Child Development Associate (CDA) credential is the most common type of certification. It requires a mix of classroom training and experience working with children, along with an independent assessment of an individual's competence.

The job vacancy advertisements submitted into the record corroborate the *Handbook's* information, in that they specify a variety of educational requirements, from a bachelor's degree in early childhood development or early childhood education, to only a certain amount of semester units in such areas.

Counsel's citation to the *O*Net* Job Zone 4 rating of preschool teachers has no persuasive value, as it only indicates that DOL has placed preschool teachers in a group of occupations of which most, but not all, require college degrees. The DOL does not contradict its *Handbook* findings, as the Job Zone information does not establish that preschool teachers must have a bachelor's degree in a specific specialty or even a bachelor's degree at all.

Furthermore, counsel misinterprets the 2000-2001 *Handbook* section which he submits into the record, "School Teachers – Kindergarten, Elementary, and Secondary" - for it does not deal with preschool teachers at all.

Finally, counsel's discussion of *Full Gospel Portland Church v. Thorburgh*, 730 F. Supp. 441 (D.D.C. 1988) is not persuasive, as the facts are different than those presented in this proceeding. *Full Gospel* involved the *revocation* of a previously approved petition, and the court's consequent imposition of a higher evidentiary standard upon CIS's predecessor, the Immigration and Naturalization Service. The instant appeal is not from a revocation. *Full Gospel* also did not involve the statutory and regulatory framework that applies to the petition at hand. Rather, the court dealt with a type of petition – third preference for professionals – that no longer existed when the instant petition was filed, and the court applied a statute, 8 U.S.C. § 1101(a)(32) (defining the "profession" category of positions that qualified for third preference petitions) that had been superceded by the time the instant petition was filed. Furthermore, *Full Gospel* involved not a preschool teacher position, as here, but rather duties as the director of a church's choir and musical program and as the church's piano teacher. The court specifically noted that the beneficiary's position required knowledge of Korean music and teaching of "music, theory, harmony, score, sight reading, composition, and music appreciation at the beginner, intermediate, and advanced stages." (730 F. Supp., at 446.) Also, the *Full Gospel* court specifically found that, due to the Korean music aspect of the beneficiary's position it was "highly unlikely that similar programs could be run by an American without baccalaureate and professional qualifications." (730 F. Supp., at 447.)

The AAO finds that the evidence of record does not effectively refute the *Handbook's* information, and, accordingly, it also finds that the petitioner has not satisfied section 1 of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the petitioner has not satisfied either of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong assigns specialty occupation status if the evidence establishes that there is a degree requirement which is common to the industry in positions which are both (1) parallel to the proffered position, and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *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." *See 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)).

As already discussed, the *Handbook* does not report that the proffered position requires a degree in a specific specialty. Also, there are no submissions from individuals, other firms, or professional associations in the petitioner's industry.

The job vacancy advertisements submitted into the record are too few to establish the types of educational credentials normally required by employers of private preschool teachers. Furthermore, as mentioned earlier in this decision, the advertisements do not reflect a uniform educational standard for hiring.

Next, the evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner has not demonstrated that "its particular position is so complex or unique that it can be performed only by an individual with a degree."

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position – is not a factor in this proceeding, as the evidence of record does not address this provision.

Finally, the petitioner did not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which qualifies a position as a specialty occupation if its specific duties are so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. To the extent that they are portrayed in the record, the duties do not appear so specialized or complex that they could not be performed by someone with less than a bachelor's degree in a specific specialty.

Because the proffered position does not qualify as a specialty occupation by application of any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's denial of the petition shall not be disturbed.

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. The petition is denied.