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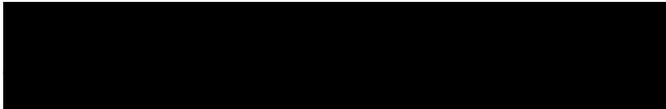
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DEC 14 2004



FILE: EAC 02 235 51026 Office: VERMONT 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 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center 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 private, nonprofit, cooperative children's center established to serve children's developmental and educational needs and to provide support systems for families. In order to employ the petitioner as a preschool teacher, 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).

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submits a brief and additional documentary evidence to support his contention that the director's denial of the petition was erroneous.

The director's decision to deny the petition was correct. The AAO based this decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional information (RFE); (3) the documents that counsel submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documents submitted as the brief's exhibits.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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.” (Italics added.)

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.

Citizenship and Immigration Services (CIS) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The AAO did not accede to counsel’s request that it consider his documentary evidence at Exhibit E as precedential. These CIS forms relating to approval of some H-1B visa petitions for preschool positions have no precedential value. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, the AAO is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff’d* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Furthermore, it would have been erroneous for a director to have approved any of the referenced petitions on the basis of evidence that was substantially similar to the evidence contained in this record of proceeding.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position 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.

The AAO recognizes the Department of Labor’s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. Accordingly,

the AAO reviewed the information on preschool teachers in the 2004-2005 edition of the *Handbook*. The *Handbook* indicates that, for the licensing of preschool teachers for public schools, some states require only an associate's degree or certification by a nationally recognized authority. The *Handbook* does not report that private employers normally impose higher standards for their entry-level preschool teachers, and it even states that "[r]equirements for public school teachers are generally higher than those for private school teachers." (2004-2005 edition, at page 234.)

The AAO has discounted the opinion rendered by Joseph Silny and Associates, Inc. (JS&A) that "[a] person with a minimum of a Bachelor's degree would typically fill the position of Pre-School Teacher" and that a preschool teacher "should have a Bachelor degree in early childhood education or the equivalent." This advisory opinion is inconsistent with the *Handbook*, and it provides neither any explanation for this difference nor any foundational data, studies, surveys, or particularized experience with the hiring practices of preschool teachers.

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

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's 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 discussed above, the *Handbook* does not report an industry-wide requirement for a bachelor's degree in a specific specialty. Furthermore, there are no submissions from professional associations or from firms or individuals in the industry that attest to routine and exclusive employment and hiring practices.

The AAO also found that 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). This provides that, instead of proving a degree requirement that is common in the industry, "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."

The petitioner's December 17, 2002 letter of reply to the RFE asserts that it is "one of Virginia's recognized leaders in the field of Early Childhood Education," was "one of the first programs in Northern Virginia to be accredited by the National Association for Education of Young Children (NAEYC)", and has been NAEYC accredited continuously since 1988. Likewise, counsel asserts that the "petitioner distinguishes itself from an ordinary preschool in Northern Virginia." (Brief, at page 2.) However, the record does not contain evidence as to how, if at all, the petitioner's asserted leadership position or its NAEYC accreditation establish that its preschool teacher positions require a bachelor's degree in a specific specialty because they are either so

unique from preschool teacher positions in general or so much more complex than usual preschool positions. Furthermore, it is not evident in the information provided about the petitioner's preschool teacher's curriculum and typical schoolday that this position is either unique or especially complex in comparison to preschool teacher positions in general.

Next, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

In light of the statutory and regulatory definitions of specialty occupation (cited earlier in this decision), this criterion has several evidentiary elements. First, the petitioner must demonstrate that it has an established history of hiring for the proffered position only persons with at least a bachelor's degree or equivalent. Second, this bachelor's degree or equivalent must be in a specific specialty that is characterized by a body of highly specialized knowledge. Third, the petitioner must also establish that both the nature and the level of highly specialized knowledge that the bachelor's degree or equivalent signifies are actually necessary for performance of the proffered position.

It should be noted at the outset that the petitioner has not established the degrees of its teachers by merely listing them. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, based on the absence of substantiating evidence, it has not been established that the 12 preschool teachers presently employed by the petitioner hold the degrees listed for them. To establish such degrees would require the submission of diplomas that clearly indicate the U.S. degree or equivalent level and major. Where the major or academic concentration is not clearly stated on the diploma, transcript copies would also have to be provided to substantiate whatever academic emphasis the petitioner asserts. In the case of foreign degrees, the record should include copies of the degrees, transcripts, and educational evaluations of U.S. equivalency.

Next, to satisfy this criterion, the petitioner would have to establish not just that it presently employs only persons with at least a bachelor's degree in a specific specialty, but also that it has a history of employing only individuals with such a degree. The copies of the petitioner's employment advertisements indicate that the petitioner has not recruited only persons with at least a bachelor's degree in a specific specialty related to preschool teaching.

Furthermore, the evidence of record does not demonstrate that the petitioner's requirement for a specialty degree is compelled by the performance requirements of the position, rather than by a preference for qualities that are usually characteristic of a person with a higher education. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the

theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

It is not sufficient for counsel to state that the "petitioner firmly believes that the degree is necessary to ensure professionalism and quality of work, especially for a Center that has been recognized in Virginia as a leader in early childhood development." (Brief, at page 5.) The record must demonstrate the belief is justified by the actual performance requirements, and it has not.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties 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. The record does not establish that the duties are more specialized and complex than those that should be expected in the preschool teacher occupation in general, which the *Handbook* indicates does not normally require a degree in a specific specialty.

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.

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 id.* at 387.