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U.S. Citizenship  
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DEC 14 2010



FILE: SRC 03 234 50460 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



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.

*Robert P. Wiemann*

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 school for autistic children. In order to employ the beneficiary as a classroom assistant, 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).

It appears that the director denied the petition on two independent grounds, namely, that the petitioner had failed to establish that (1) the proffered position meets the definition of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).<sup>1</sup> The director was correct to deny the petition on each of these grounds.

The AAO based its decision upon its consideration of 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 (with its annotations by counsel), counsel's October 24, 2003 memorandum in support of the appeal and the beneficiary's attached resume, and the group of supplemental letters and documents forwarded with a October 30, 2003 cover letter.

The first issue to be addressed is the failure of the evidence to establish a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A).

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) 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;

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<sup>1</sup> It is noted that the director did not explicitly state a finding that the proffered position was not a specialty occupation. However, his full quotation of 8 C.F.R. § 214.2(h)(4)(iii)(A) and his discussion implied as much.

- (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.

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 record indicates that the petitioner is a school for children with autism that provides a model program in this field. Counsel (memorandum on appeal, at page 4) provides this description of the proffered position:

Similar to special education teachers, a Para-Professional also works with children and youths who are autistic, primarily teaching them life skills, social skills, behavioral skills, appropriate behavior, sensory sensitivity skills and basic literacy. [The beneficiary] further provides individualized instruction, problem-solving assignments, and small group work to autistic children. For the autistic children who are hearing and speech impaired, [the beneficiary] communicates with them via sign language. Other duties performed by [the beneficiary] are [the] Individualized Education Program (IEP) for each student and reviews [of] the IEP with the student’s parents, school administrator, and general education teacher. [The beneficiary] works closely with parents, administrators and therapists to address concerns, [to present] progress reports and to inform them of [the] student’s progress and suggest techniques to promote learning at home and play therapy created by [REDACTED] to develop communication skills.

The record of proceeding contains an H-1B Prevailing Wage Request form executed by counsel that identifies the proffered position as “assistant classroom teacher” and identifies these job duties:

- (1) Develop environment conducive for autistic students
- (2) Monitor student’s progress
- (3) Team work with teachers, therapist, parents & administrators to address concerns and progress report
- (4) Use play therapy by [REDACTED] to develop communication skills
- (5) Teach students appropriate behaviors, social skills, and manage[ment of] sensory sensitivity

Also, at this Prevailing Wage Request form’s section on “minimum education required,” counsel entered “Associate Degree Sign Language.”

Counsel's September 11, 2003 letter to the service center indicates that the beneficiary would be the only employee of the petitioner "certified in sign language who is also trained to work with [autistic] students," that he would perform classroom work with "a general educator who coordinates the class," and that he would be "the person interacting and working hands [sic] with the students and parents in their respective I.E.P."

Counsel in effect asserts that the classroom assistant position (which he also refers to as a "Para-Professional" position) qualifies as a specialty occupation under 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 related to the position's duties. Counsel relies especially on the information that the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* provides about the special education teacher occupation. He contends that "the duties and nature of the work" of the proffered position are "identical" with those of a special education teacher (memorandum of appeal, page 4) and that the proffered position "shares the same duties and responsibilities as a teacher in special education" (memorandum of appeal, page 4).

The *Handbook*, which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations, indicates that the special education teacher occupation is a specialty occupation by virtue of its requiring at least a bachelor's degree in a specific specialty. However, contrary to counsel's assertions, the evidence of record does not establish that the beneficiary would be serving as a special education teacher or in any capacity that would require at least a bachelor's degree or its equivalent in any specific specialty.

To the extent that they are described in the record, the proposed duties comport with the assistant teacher occupation - specifically, an assistant special education teacher - as described in the 2004-2005 edition of the *Handbook*, and the *Handbook* indicates that this particular occupation normally requires less than a bachelor's degree or its equivalent in any specific specialty.

The following excerpt from the Internet version of the 2004-2005 *Handbook's* section on teacher assistants is persuasive evidence that the beneficiary's occupation fits in this category:

Teacher assistants provide instructional and clerical support for classroom teachers, allowing teachers more time for lesson planning and teaching. Teacher assistants tutor and assist children in learning class material using the teacher's lesson plans, providing students with individualized attention. Teacher assistants also supervise students in the cafeteria, schoolyard, and hallways, or on field trips. They record grades, set up equipment, and help prepare materials for instruction. Teacher assistants also are called teacher aides or instructional aides. Some assistants refer to themselves as paraeducators or paraprofessionals.

Some teacher assistants perform exclusively noninstructional or clerical tasks, such as monitoring nonacademic settings. Playground and lunchroom attendants are examples of such assistants. Most teacher assistants, however, perform a combination of instructional and clerical duties. They generally provide instructional reinforcement to children, under the direction and guidance of teachers. They work with students individually or in small

groups—listening while students read, reviewing or reinforcing class lessons, or helping them find information for reports. At the secondary school level, teacher assistants often specialize in a certain subject, such as math or science. Teacher assistants often take charge of special projects and prepare equipment or exhibits, such as for a science demonstration. Some assistants work in computer laboratories, helping students using computers and educational software programs.

In addition to instructing, assisting, and supervising students, teacher assistants grade tests and papers, check homework, keep health and attendance records, do typing and filing, and duplicate materials. They also stock supplies, operate audiovisual equipment, and keep classroom equipment in order.

Many teacher assistants work extensively with special education students. As schools become more inclusive, integrating special education students into general education classrooms, teacher assistants in general education and special education classrooms increasingly assist students with disabilities. Teacher assistants attend to a disabled student's physical needs, including feeding, teaching good grooming habits, or assisting students riding the schoolbus. They also provide personal attention to students with other special needs, such as those from disadvantaged families, those who speak English as a second language, or those who need remedial education. Teacher assistants help assess a student's progress by observing performance and recording relevant data.

Teacher assistants also work with infants and toddlers who have developmental delays or other disabilities. Under the guidance of a teacher or therapist, teacher assistants perform exercises or play games to help the child develop physically and behaviorally. Some teacher assistants work with young adults to help them obtain a job or to apply for community services for the disabled.

As the record contains no evidence that refutes the *Handbook's* information, the petitioner has not satisfied the specialty occupation criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). The AAO also notes that the evidence of record does not establish a basis for recognizing the proffered position as a specialty occupation under any other criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director was also correct in his decision to deny the petition on the ground that the petitioner failed to establish that the beneficiary is qualified to serve in a specific specialty in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

Counsel (memorandum on appeal, at pages 5 and 6) contends that the beneficiary holds the equivalent of a bachelor's degree in a specific specialty by virtue of his "two year degree from DelGado Community College in American Sign Language," his "two year degree in Associate Arts from Delgado Community College," and a variety of training programs and work experience listed by counsel.

The AAO has considered all of the evidence in the record that relates to the beneficiary's education, training, and work experience. Unfortunately, regardless of the caliber of the beneficiary's work and how much his talents and efforts are appreciated, the evidence of record does not satisfy the beneficiary qualification criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding does not contain documentation that satisfies any of the first three criteria above. This leaves only section 4. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record contains no section 1 evaluation of the beneficiary's education, training, and experience from "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." There are no results of recognized college-level equivalency examinations or special credit programs, as addressed in section 2. A section 3 evaluation of the beneficiary's education by "a reliable credentials evaluation service which specializes in evaluating foreign educational credentials" was not presented (nor would it be appropriate, since the beneficiary's education has been obtained in the United States). The record also contains no section 4 evidence of certification or registration from a nationally-recognized professional association or society for a relevant specialty that is known to grant certification or registration to persons in that occupational specialty who have achieved a certain level of competence in the specialty.

The AAO next applied section 5 to the evidence of record. The record reflects that the beneficiary obtained an associate of arts degree from Delgado Community College in May, 2002. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. As the wording of this section clearly conveys, for the beneficiary's specialized training or work experience to merit such equivalency recognition, the petitioner must *clearly demonstrate* that the training and/or work experience possessed certain characteristics *and* that the beneficiary has achieved a certain level of recognition in the relevant specialty occupation. The petitioner has not met these requirements.

Specifically, the record's documentation does not clearly demonstrate (1) that the beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the relevant specialty occupation, and (2) that his experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Furthermore, the record of proceeding does not clearly demonstrate that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation<sup>2</sup>;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

In summary, the petitioner has not established that the proffered position meets the definition of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and the petitioner also failed to establish that the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). Therefore, the director's decision 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.

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<sup>2</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).