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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: LIN 02 209 54163 Office: NEBRASKA SERVICE CENTER Date: JAN 21 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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 Citizenship and Immigration Services (CIS) 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 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 an independent contractor to the Detroit Public Schools and an adult community and outreach school that provides English as a Second Language (ESL), adult basic education (ABE) programs and General Educational Development (GED) programs. The petitioner seeks to employ the beneficiary as a teacher and 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 because the proffered position is not a specialty occupation. On appeal, counsel asserts that Citizenship and Immigration Services erred in not approving the petition based on its prior approval of similar petitions.

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.

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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a professor of chemistry within an adult education and ESL teaching facility. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's June 11, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: teaching chemistry. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in English. Furthermore the petitioner initially stated that it had 75 teachers, and then submitted further information on fifteen teachers, nine of whom possess bachelor's degrees in English or linguistics. With regard to chemistry instruction to be performed by the beneficiary, a document entitled "AACCOS Charting the Course to 2002" mentions chemistry curriculum in its science classes in the following manner: "earth science includes space science; physical science includes physics and chemistry; focus on environmental and health topics."

The director found that the proffered position was not a specialty occupation because the job did not require a baccalaureate degree in a specific specialty for entry into the teaching position. Citing to the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), 2002-2003 edition, for ESL and adult education teachers, the director noted that federally funded programs run by State and local governments usually had higher standards than programs run by religious, community, or volunteer organizations. The director also stated that the previous approval of other H-1B petitions submitted by the petitioner did not establish the eligibility of the beneficiary in the instant petition. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the petitioner had submitted sufficient evidence to establish that the proffered position required a baccalaureate degree for entry into the position. Counsel also cites to the *Handbook*. Finally counsel states that there is no basis for the denial of the petition as CIS has previously approved petitions submitted by the petitioner for other teachers.

Counsel asserts that Citizenship and Immigration Services (CIS) has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Nebraska Service Center in the prior cases. In the absence of all of the corroborating evidence contained in these records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the other H-1B petitions were approved in error.

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). Although the AAO may attempt to hypothesize as to whether the prior approvals were granted in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied,* 485 U.S. 1008 (1988).

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the ESL job description in the *Handbook* confirms the accuracy of the director's assessment that the academic requirements for a community-based adult education teaching position in chemistry would not require a baccalaureate degree in a specific specialty. While counsel also correctly cites to the *Handbook*, which states that the requirement for teaching adult literacy including ESL and GED is at least a baccalaureate degree and preferably a master's degree, it should be noted that this *Handbook* excerpt still does not establish a requirement for a baccalaureate degree <u>in a specific specialty</u>. (Emphasis added.) The record also is not clear as to what extent the proffered position would entail teaching English as opposed to teaching basic chemistry concepts.

Regarding parallel positions in the petitioner's industry, the petitioner submitted no information on parallel adult education teaching positions at other community-based ESL/GED/ABE facilities. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) or (*2*).

The AAO now turns to 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. In its response to the director's request for further evidence, the petitioner provided names of fifteen employees and listed the academic degrees for fourteen employees. One employee was simply listed as having a baccalaureate degree. The petitioner identified the subjects that these teachers are teaching as English, English literature, computer, GED, and ABE. There is no information submitted on any existing or former chemistry teachers. There are three problem areas presented by this documentation. First, since the petitioner noted in its initial I-129 petition that it had 75 teachers, it is not clear from the record if all ESL/GED/ABE teachers are identified on this list. Second, all the teachers that are listed

do not appear to have a baccalaureate degree in a specific specialty, nor does the petitioner submit any evidentiary documentation, such as copies of diplomas, to establish the academic credentials of the listed employees. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Third, with the exception of the teacher of computer studies, none of the teachers listed appears to be teaching specific topics, such as science or chemistry. The academic credentials of teachers hired by the petitioner for subject area studies would have much more relevance to the instant petition than the listing of credentials for ESL/GED/ABE instructors.

Finally, the AAO turns to the criterion 8 C.F.R. § 214.2(h)(iii)(A)(*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.

To the extent that they are depicted in the record, the duties of the proffered position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The description of the chemistry instruction contained in the science coursework listed in the petitioner's brochure appears to be very limited and generic. In addition, the petitioner also has provided no documentation on the complexity or specialized nature of adult education instruction in chemistry. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the beneficiary does not appear to be qualified to perform the duties of the proffered position, if the job had been determined to be a specialty occupation. While the petitioner identified the proffered position as professor of chemistry, the petitioner required a baccalaureate degree in English for entry into the position. The beneficiary has the equivalent of a baccalaureate degree in chemistry from an accredited U.S. institution of higher education. The petitioner submitted no evidence as to the beneficiary's academic or work experience in the instruction of English, ESL, or chemistry. However, as the AAO is dismissing the appeal because

the job is not a specialty occupation, it will not discuss the beneficiary's qualifications.

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.