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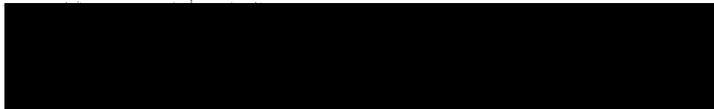


**U.S. Citizenship
and Immigration
Services**



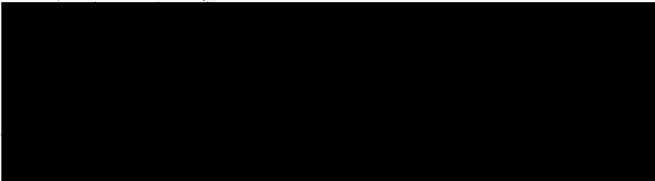
DA

FILE: EAC 03 098 53134 Office: VERMONT SERVICE CENTER Date: **11 23 2004**

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.

Mari Johnson
for 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 Christian academy for pre-school through twelfth grade. It seeks to employ the beneficiary as a pre-school teacher.¹ The petitioner, therefore, 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 he determined that the proffered position is not a specialty occupation. On appeal, counsel asserts that the position is a specialty occupation and the petitioner's need for such a position is determinative of whether the position is 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.

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.

¹ Although the petitioner submitted documentation on the beneficiary's husband as a second beneficiary in the instant petition, multiple beneficiaries may not be included in an H1-B petition. *See* multiple beneficiaries section at 8 C.F.R. § 214.2 (h)(2)(ii).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for additional evidence, dated February 18, 2003; (4) the petitioner's letter that respond to the director's request; (5) the director's denial letter; and (6) 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 preschool teacher. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter of support; the director's request for further evidence; and counsel's letter in response to the director's request for further evidence. According to the job description submitted by the petitioner, the beneficiary's duties would involve using a Christian curriculum provided by the [REDACTED]. The teacher would be responsible for following the daily schedule and the weekly developmental goals in phonics and reading. The petitioner stated that a candidate for the position should have a bachelor of science degree in education, or general sciences or a related field. In addition, the candidate had to have at least two years teaching experience in preschool and elementary in a fundamentalist Christian school.

The director found that the proffered position was not a specialty occupation and referred to the classification of teachers in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. Based on the *Handbook* information on academic credentials for preschool teachers, the director determined that a baccalaureate degree in a specific specialty was not required for entry into the position. 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, the petitioner states that the position of preschool teacher is a specialty occupation. Counsel states that the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a bachelor's degree is normally required for a position, rather than mandated by state law. Counsel asserts that the evidence presented clearly demonstrates that the normal requirement for preschool teachers in both public and private schools is at least a bachelor's degree. Counsel submits a document entitled "Implementing the Provisions of ESEA in 12 States," written by the Educational Commission of the States (ECS).² The commission report looks at the readiness of twelve states to implement the major provisions and requirements of the new law. In doing so, the document lists educational requirements for state teachers. Based on this document, counsel states that every state requires all teachers to obtain at least a bachelor's degree for any teaching position, including preschool teachers.

With regard to parallel positions in similar schools, counsel submits a brochure that contains biographies for some of the preschool teachers at [REDACTED] in College Station, Texas. Counsel states he is submitting this documentation since accurate statistics for qualifications of private school teachers are very difficult to obtain. Although counsel states that the petitioner submitted profiles from private schools around the country that demonstrated the requirement for baccalaureate degrees for preschool teachers, only the brochure from St. Thomas is found in the record. The St. Thomas document lists seven individuals as pre-kindergarten teaching aides or teachers and provides biographies for four individuals that list their academic credentials. They are as follows: [REDACTED] pre-kindergarten teaching aide, B.S. in education; [REDACTED] beginners teacher, bachelor's degree and master's degree with no specific fields of study noted; [REDACTED]

² ESEA stands for the Elementary and Secondary Education Act, which was revised in 2001 and is also known as the No Child Left Behind (NCLB) Act of 2001.

McKneely, pre-kindergarten teacher, bachelor of science in elementary education with emphasis in language and learning disabilities; [REDACTED] kindergarten teaching aide, pre-kindergarten teaching aide, college graduate with no specific field of study noted; and Jinsoo Sagong, pre-kindergarten teacher, master of education in early childhood education, with a minor in multicultural teaching. The three remaining individuals, identified in the brochure as beginners teaching aide, pre-kindergarten teacher or aides, do not have their academic credentials listed.

Counsel also states that with regard to establishing the normal academic requirements for the proffered position, the appropriate focus would be on educational institution as a whole, rather than focusing on private schools. Counsel submits a one-page sheet of data written by the Department of Education (DOE), National Center for Education Statistics (NCES), entitled "Teachers in elementary and secondary schools, and senior instructional staff in degree-granting institutions, by control of institution: Fall 1970 to fall 2011." The NCES data provides figures for elementary and secondary teachers in local public school systems and also provides estimates of teachers in private schools, religiously affiliated and nonsectarian. Counsel states that the NCES documentation demonstrates that private school teachers in 1999 comprised only twelve percent of the nation's teachers. In addition, counsel then asserts that the NCES data demonstrate that at least 88 percent of preschool teaching positions nationwide in public schools require at least a bachelor's degree as a job qualification. Counsel also states that since the standards for regional accreditation require that all teachers maintain at least a bachelor's degree, it can be assumed that any school achieving regional accreditation must require a degree of all its preschool teachers.

Counsel submits the initial page of an Internet search done using the website for the International Registry of Accredited Schools. Counsel states the data registry is produced by the Commission on International and Trans-regional Accreditation (CITA). The search criteria are identified as "private types of any schools belonging to any organization, in any city, in any state, in any zip code, in any country." According to the initial page, 1551 accredited private schools matched these criteria. Schools listed on the first page of the search document include an international Christian academy in Caracas, Venezuela, an elementary and secondary school in Tampa, Florida, a private elementary school in New Orleans, Louisiana, and a kindergarten through twelfth grade private academy in Grand Coteau, Louisiana.

Finally, counsel submits a new five-page job description for the proffered position and identifies the relevant academic qualifications as follows: "The teacher shall be a college graduate, with a minimum of a bachelor's degree in education, or science or math."

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. With regard to the proffered position, the director cited to the *Handbook's* classification of teacher, preschool, kindergarten, elementary, middle and secondary. With regard to training for a teaching position, the *Handbook* states that the requirements for regular licenses to teach kindergarten through grade twelve classes vary by State, and also states that private school teachers are not required to be licensed. With regard to training requirements for preschool teaching positions, the 2004-2005 edition of the *Handbook* states:

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, others require an associate's degree, and still others require certification by a nationally recognized authority. The Child Development Associate (CDA) credential, the most common type of certification, requires a mix of classroom training and experience working with children, along with an independent assessment of an individual's competence.

The fact that some states would only require an associate's degree, while others would only require certification for preschool teachers supports the director's determination that the proffered position of preschool teacher usually does not require a baccalaureate degree in a specific specialty for entry into the position. Counsel's assertion that the ESEA documentation establishes that all teachers, including preschool teachers, in the State of Massachusetts, are required to have a baccalaureate degree is not found persuasive. First, the ESEA documentation that counsel submits is not found relevant to the present proceedings. The ESEA legislation concerns elementary and secondary school education systems in the United States, whereas the instant petition concerns preschool education. The academic requirements outlined in the ECS article only appear to identify the qualifications for teachers at the elementary, middle and secondary level. Second, the State of Massachusetts is profiled in the National Institute of Early Education Research's report "The State of Preschool: 2003 State Preschool Yearbook." This reports looks at state-financed preschool programs in public and private settings. The report states that preschool teachers in public schools in Massachusetts are required to have a bachelor's degree, while preschool teachers in non-public settings are not required to have a baccalaureate degree. A footnote to the profile further explains that non-public preschool teachers must be at least 21 years old and adds that, in 2003, standards were passed that require all non-public preschool teachers to have a minimum of an associate degree in seven years and a baccalaureate degree in 14 years. See state profiles section of the NIEER report at <http://www.ecs.org/html/offsite.asp?document=http%3A%2F%2Fnieer%2Eorg%2Fyearbook%2F>. (Available as of July 15, 2004.) Thus, it does not appear that the State of Massachusetts requires its private preschool teachers to have a baccalaureate degree in a specific specialty to enter into the position.

It should also be noted that the petitioner has stated that it would accept candidates for the proffered position with baccalaureate degrees in three areas of studies, namely, education, science and math. As previously stated, 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. With regard to the proffered position, none of the three areas appear to be directly related to the duties of the proffered position that primarily involves early childhood education.

With regard to the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), namely, academic requirements for parallel positions in similar private schools, on appeal, counsel submits academic level information on the preschool teaching staff of [REDACTED] Texas. This documentation is not seen as persuasive. First, the Internet document does not provide information on the academic credentials of all of the individuals who apparently work with preschool children in St. Thomas. Second, some teachers with academic profiles do not have their specific area of study listed. For example, the profiles for [REDACTED] and [REDACTED] list no particular baccalaureate degree for either teacher. The documentation is not sufficient to establish that all the preschool teachers or teaching aides at St. Thomas are required to have a baccalaureate degree in a specific specialty. Furthermore, staffing information from one religious-affiliated school is not sufficient to establish a nationwide standard.

In addition, the same NIEER report previously cited also noted that only about one-third of the preschool programs operating in private settings that it surveyed required their teachers to have bachelor's degrees. See personnel requirements section of same report. Thus it does not appear to be a nationwide standard to require that private preschool teachers have a baccalaureate degree for entry into the position. 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. Furthermore, the documentation that counsel submits from the National Center for Education Statistics, and the one page printout from the CITA International Registry of Accredited Schools are not found relevant to the present proceedings. The percentage of public schools versus private schools in the United States or the number of private church-related schools in the United States and overseas are not applicable data for determining the minimum academic requirements or the industry wide standard for 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. The petitioner stated in its response to the director's request for further evidence that it was a small school and only had two preschool teachers. The petitioner submitted no documentation as to the academic credentials for these two employees or any other previous preschool teachers that it had employed. Therefore the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(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. The petitioner provided an initial job description that provided minimal information as to the duties to be performed in the proffered position. On appeal, counsel submits a five-page document that provided more specific details on the duties, both in teaching and in spiritual education realms of a preschool teaching position. In addition, the petitioner adds another baccalaureate degree to its academic requirements by adding a third area of studies, math, to its academic requirements. It should be noted that the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978) Upon review of the job descriptions, the duties of the position appear routine to any Christian preschool program. The petitioner provided no further detail as to any specialized or complex duties that the beneficiary would perform. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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.