

DL

U.S. Department of Homeland Security
20 Mass. N.W. Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: LIN 03 119 51522 Office: NEBRASKA SERVICE CENTER

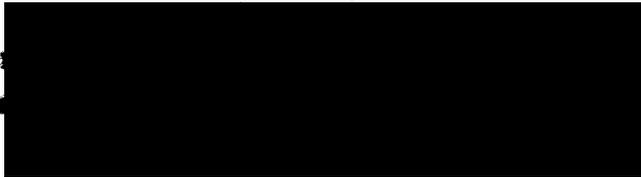
Date: NOV 09 2004

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 an organization providing remedial education in reading and mathematics to school age children. It seeks to employ the beneficiary as an assistant instructor of reading and mathematics. The director denied the petition because he determined that the beneficiary is not qualified to perform the services in the specialty occupation.

On appeal, counsel for the petitioner submits a brief, as well as new and previously submitted evidence. Counsel states, in part, that the director erred in his decision as he failed to recognize that the beneficiary's training and experience in civil engineering qualify him for the position, and that the beneficiary has completed training to perform the duties of 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 an instructor of reading and mathematics. Evidence of the beneficiary's qualifications to perform the proffered position includes: the Form I-129; the February 27, 2003 support letter and educational certificates submitted with the Form I-129; and counsel's response to the director's request for evidence, including a second letter of support from the petitioner. According to this evidence, the petitioner is seeking the beneficiary's services because his degree in engineering provides him with the expertise in mathematics and reading needed to perform the duties of instructor, and his previous employment as a supervisor will assist the petitioner in implementing day-to-day operations, as well as guiding students in their daily activities.

On April 22, 2003, the director requested further evidence from the petitioner, specifically the submission of a Labor Condition Application (LCA) valid for the dates of intended employment and a detailed description of the duties to be performed by the beneficiary. Questioning whether the beneficiary possessed an educational background that qualified him to perform the duties of an instructor of mathematics and reading, the director requested the petitioner provide additional documentation to establish that the beneficiary had received training in the field of elementary or secondary education in the specific subject areas required of the position, or documentation that the beneficiary qualified to perform the duties of the position based on employment experience. In documenting the beneficiary's training, the petitioner was to ensure that the submitted evidence reflected the periods of attendance and courses of study; that proof of relevant employment experience was submitted on the employer's letterhead, signed by a representative of the firm, and stated the periods of employment, positions held, and duties performed; and clearly indicate that the beneficiary's experience was gained while working with individuals possessing degrees (or the equivalent) in the specialty occupation.

On July 14, 2003, counsel for the petitioner responded to the director's request for evidence, noting the Form I-129's compliance with the period of employment in the LCA and providing a description of the duties to be performed by the beneficiary:

- Correction and recording of students' worksheets during class hours;
- Assisting in advance planning and pulling out of the students' worksheet for the week;
- Orientation and diagnostic testing of new enrollees to the program;
- Assisting students to do their work during class hours;
- Checking of ungraded students' take-home work;
- Recording students' take-home work in the computer;
- Conferring with the employer for new programs and implementation of center's policy;
- Center preparation before students' arrival;
- Recording NCLB students' attendance and preparation of their progress reports for submission to Chicago Public Schools and Kumon Headquarters; and
- Preparation of absent students' work for instructions and pick-up/follow-up through phone.

In response to the director's request for evidence of training and employment experience that would qualify the beneficiary to perform the duties of the proffered position, counsel stated that the beneficiary's educational records had already been submitted. He further asserted that the petitioner had determined that the proffered position required a bachelor's degree with an emphasis on engineering and was not limited to a professional in the field of elementary or secondary education.

The director denied the petition on September 25, 2003, finding that the beneficiary had not completed a specific course of education or training, nor had he work experience, with a direct correlation to the duties of the proffered position. He was, therefore, found not qualified to perform the duties of a specialty occupation. In his denial, the director remarked upon the failure of the petitioner to address any of the concerns raised about the beneficiary's qualifications and noted the petitioner's preference to hire an instructor with an engineering degree.

On appeal, counsel submits a brief, and new and previously-submitted evidence. Counsel states, in part, that: (1) the director failed to appreciate that the beneficiary's training in engineering, which requires both a theoretical and practical application of mathematics and reading, provides him with the necessary educational background to perform the duties of the proffered position; and (2) the beneficiary holds the degree required by the petitioner for the position. Counsel also notes that the beneficiary has held progressively more responsible engineering positions that have required the practical application of mathematics, logic and reading, and asserts:

An individual with a practical perspective, ability to effectively manage time and strong base in logic and application of logic is a rare commodity that is essential to the implementation of the Kumon method....

He further notes that the proffered position, as it is a remedial education teacher in the private sector, does not require state licensing, as would be the case with a teaching position in the public school system.

Counsel's brief also contains new information. He asserts that prior to the petitioner's filing of the Form I-129, the beneficiary was examined and trained by the petitioner, and that the beneficiary continued his training subsequent to the date of filing. Based on the copies of certificates submitted by counsel, the beneficiary was trained in the [REDACTED] and Reading Centers Management System on March 5, 2003 and completed his [REDACTED] Assistant Training on October 18, 2003.

The issue before the AAO is whether the beneficiary whom the petitioner seeks to employ is qualified to perform the duties of the proffered position – a remedial education instructor of mathematics and reading.

In determining whether an alien is qualified to perform the duties of a specialty occupation, Citizenship and Immigration Services (CIS) looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or 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.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (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 AAO first considers the first two criteria under 8 C.F.R. § 214.2(h)(4)(iii)(C) -- whether the beneficiary has a degree required by the specialty occupation from an accredited U.S. college or university, or a foreign degree that has been determined to be the equivalent of a U.S. baccalaureate or higher degree required by the specialty occupation.

No evidence has been submitted to establish that the beneficiary has a U.S. baccalaureate degree from an accredited U.S. college or university in the specialty. To establish the beneficiary's eligibility based on the attainment of a degree in the specialty occupation, the petitioner has submitted copies of a translated certificate from the Central Philippines University in Iloilo City, The Philippines identifying the beneficiary as holding a Bachelor of Science in civil engineering, and a transcript detailing those courses taken and credits earned by the beneficiary in satisfying the University's degree requirements. The record does not, however, include an evaluation of this material by a credentials evaluation service specializing in the evaluation of foreign educational credentials. As a result, the documentation provided by the Central Philippines University cannot serve as evidence that the beneficiary possesses a foreign degree that is equivalent to a U.S. baccalaureate or higher degree required by the specialty occupation. The AAO must, therefore, conclude that the petitioner has not established that the beneficiary meets either of the first two criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C).

Further, as noted by the director in his denial, the beneficiary's degree is in civil engineering and without a direct correlation to the duties of the proffered position of mathematics and reading instructor. Even if submitted with the appropriate credentials evaluation, a degree in civil engineering would not meet the second criterion, as it does not constitute a foreign degree equivalent to a U.S. baccalaureate or higher degree required by the specialty occupation. Although the petitioner has emphasized that it requires an applicant with an engineering degree to perform the duties of the proffered position, it is not the petitioner's preference that dictates the educational and employment requirements imposed on the beneficiary by 8 C.F.R. § 214.2(h)(4)(iii)(C), but the duties of the specialty occupation. The proffered position is that of a remedial education teacher and the duties described by the petitioner are those commonly required of teachers. Accordingly, the position requires that the petitioner, to meet the requirements of 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1) and (2), establish that the beneficiary has the appropriate education or education-related degree.

The AAO next turns to the third criterion -- whether the beneficiary holds a license to perform the proffered position. The director's denial, which references the Department of Labor's *Occupational Outlook Handbook*

(*Handbook*), correctly notes that the proffered position is that of a remedial education teacher at a private educational institution and does not require a license, as would a similar teaching position in the U.S. public school system.

Finally, the AAO considers the fourth criterion -- whether the beneficiary has the education, specialized training, and/or progressively responsible experience that would be the equivalent of a U.S. baccalaureate or higher degree in the specialty occupation and the recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In his denial, the director concluded that the beneficiary had not completed a specific course of education, training or work experience that directly correlated to the duties of the proffered position of instructor in mathematics and reading. He specifically noted that the petitioner had failed to provide any evidence that the beneficiary had ever completed a teacher-training program, had ever undertaken any supervised practice teaching in the areas of reading or mathematics, or completed any academic credits in the field of education or teaching techniques.

On appeal, counsel asserts that the beneficiary's training and experience do meet the requirements for the issuance of an H-1B nonimmigrant visa and that the beneficiary received three separate trainings from the petitioner related to duties of the proffered position. He submits copies of two training certificates as documentation.

The AAO does not, however, find the information provided by counsel on appeal to be persuasive. First, counsel's assertions regarding the beneficiary's qualifications for the proffered position, including that regarding the training of the beneficiary prior to the filing of the petition, do not constitute evidence and will be disregarded. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, the certificates provided by counsel to document training that occurred subsequent to the filing of the Form I-129 cannot be relied upon to establish the beneficiary's eligibility. Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the beneficiary is qualified to perform a particular specialty occupation. The petitioner must establish eligibility for the benefit at the time of filing. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Accordingly, the AAO will not consider the training the beneficiary received in March and November 2003 in making its evaluation of the beneficiary's qualifications to perform the duties of the proffered position.

The AAO further notes that information regarding the initial training of the beneficiary, which counsel asserts occurred prior to the filing of the petition, was not provided until the time of appeal. When the director requested further evidence to establish the beneficiary's qualifications for the proffered position, the petitioner was specifically asked to provide documentation that the alien had received training in the field of elementary or secondary education in the specific subject areas required of the position. Therefore, the petitioner was informed of the need for additional evidence regarding training and given a reasonable opportunity to provide it for the record before the petition was adjudicated. When a petitioner has been put on notice of a deficiency

in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept such evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The failure of the petitioner to submit evidence of the beneficiary's initial training prior to the adjudication of the petition provides another reason why the AAO will not consider this particular piece of information and will rely solely on the record that was before the director.

When a beneficiary is determined to lack the specific degree required by a specialty occupation, the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D) to determine whether the individual may still qualify to perform the proffered position. A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant based on:

- (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 before the AAO contains no documentation that meets the evidentiary requirements of the first four criteria. Therefore, only 8 C.F.R. § 214.2 (h)(4)(iii)(D)(5) is relevant to this proceeding – whether the equivalent of a degree in 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 beneficiary has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In

addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Following its review of the beneficiary's training and employment history in the record, the AAO concludes that the petitioner has failed to establish that the beneficiary meets the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The record shows the beneficiary to have been trained and employed as a civil engineer. There is no indication that he has had any education-related training or employment. As a result, the petitioner is unable to demonstrate that the beneficiary's employment included the theoretical and practical application of specialized knowledge required by the specialty occupation, that he worked with others who have degrees or its equivalent in the specialty occupation, or that his expertise in the specialty has been recognized.

Therefore, for reasons related in the preceding discussion, the petitioner has failed to establish that the beneficiary meets the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(C) and is qualified to perform the duties of the proffered position. 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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.