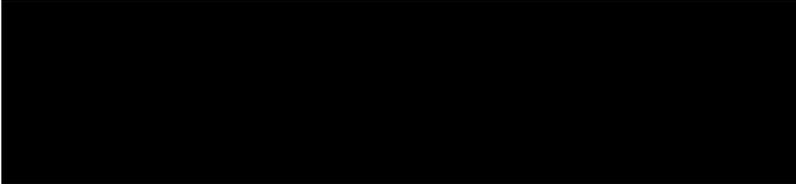




U.S. Citizenship
and Immigration
Services



FILE: EAC 02 254 53457 Office: VERMONT SERVICE CENTER Date: **OCT 26 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

Identifying data deleted to
prevent [Redacted] granted
[Redacted]

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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 pre-school/learning center that seeks to employ the beneficiary as a 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

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 teacher. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's May 29, 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, in part: seeking to role model in attitude, speech and actions a consistent daily walk with Jesus Christ; showing by example the importance of Scripture memorization and study, prayer, witnessing and unity in Christian fellowship; motivating students to accept God's gift of salvation and grow in their faith; recognizing the role of parents as primarily responsible before God for their child's education and assisting them in the task; teaching classes as assigned following prescribed scope and sequence as scheduled by the administrator; planning broadly the use of semester and quarterly plans and objectives through the use of a lesson plan book; integrating Biblical principles and the Christian philosophy of education throughout the curriculum; affecting student learning through mastery of the subject material by utilizing valid teaching techniques to achieve curriculum goals within the framework of the school's philosophy; planning a program of study that meets the individual needs, interests, and abilities of the students; employing a variety of instructional aids, methods, and materials that will provide for creative teaching to reach the whole child; planning through approved channels the balanced use of field trips, guest speakers and other media; using homework effectively for drill, review, enrichment or project work; assessing the learning of students on a regular basis and providing progress reports as required; keeping proper discipline in the classroom; cooperating with the Board and administration in implementing all policies, procedures, and directives governing the operation of the school; maintaining regular and accurate attendance and grade records; keeping students, parents, and the administration informed of progress or deficiencies and giving sufficient notice of failure; maintaining a clean, attractive classroom; utilizing educational opportunities and evaluation processes for professional growth; and providing input and recommendations for administrative and managerial functions of the school. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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 proffered position combines the duties of a pre-school teacher with head teacher responsibilities. According to the petitioner, all of its pre-school teachers with similar responsibilities have had bachelor's degrees. The petitioner further asserts that the duties of the position are so specialized and complex that only an individual with a bachelor's degree could perform them. The AAO notes that the position description submitted on appeal varies from that submitted in response to the director's request for evidence. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The purpose of a Request for Evidence (RFE) is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

Further, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner submitted a position description as requested, and now submits a different description on appeal. The AAO will not consider this new evidence

for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

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. The AAO does not concur with the petitioner that the proffered position encompasses head teacher duties. Counsel and the petitioner have provided no evidence to substantiate this assertion. 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). The duties listed appear to be the duties of any classroom teacher. A review of the job description for teachers in the *Handbook* confirms the accuracy of the director's assessment to the effect that a baccalaureate or higher degree, or its equivalent, is not necessarily required for a pre-school teacher job.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry, nor does the record include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner referenced the Manual of Requirements for Child Care Centers of the State of New Jersey (10:022-4.6) as a means of establishing industry standards. In reviewing this regulation, it is clear that a head teacher in a pre-school in New Jersey is required to have a bachelor's degree; however, it is not clear that the proffered position is that of a head teacher. 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 the director's request for evidence, he asked the petitioner to submit "historical evidence to support your claim" that it has required preschool teachers to hold bachelor's degrees in a specific specialty. The petitioner submitted an undated classified advertisement for an "Admin Head Teacher," which required a bachelor's degree in early childhood education. It is unclear whether this advertisement was placed for the current position or for previous positions, or whether it may have been placed in response to the director's request for evidence. Additionally, it does not address the question of the petitioner's actual past hiring practices. On appeal, the petitioner lists four individuals who previously held the proffered position, and states

that each has a bachelor's degree. This does not establish the area of specialty, nor can such a statement replace documentary evidence in establishing the petitioner's hiring practices. 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). Again, the AAO notes that the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now attempts to submit it on appeal. As noted above, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Finally, the AAO turns to the criterion at 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.

CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require a baccalaureate or higher degree, or its equivalent, in a specific specialty. 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.

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.