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FILE: WAC 04 014 54642 Office: CALIFORNIA SERVICE CENTER Date: **AUG 09 2005**

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:  
[Redacted]

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

**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 nursery school and kindergarten that seeks to employ the beneficiary as a kindergarten teacher. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 kindergarten teacher. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's October 1, 2003 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 students natural and social science, mathematics, music, arts, literature, and personal hygiene; instilling good manners and right conduct and promoting physical, mental, and social development; using games, music, artwork, films, slides, computers, and other tools to teach basic skills; designing classroom presentations to meet the children's needs and abilities; reading children stories and literature in preparation for elementary education; and observing children's behavior and social development, detecting and monitoring ill health or emotional disturbance, and discussing observations with parents. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in elementary education, education, or business administration.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director found further that the record contains the following inconsistencies; the petitioner's organizational chart does not reflect any nursery teachers, though the petitioner identifies itself as a nursery and kindergarten school; Form 941 filed for the petitioner's Employer Identification Number (EIN) listed on the petition reports no wages; two of the petitioner's other H-1B employees were not reported on the petitioner's Form DE-6; and only one W-2 form, which was illegible, was submitted for the petitioner's other H-1B employees. The director also found that the petitioner had not demonstrated that there is a bona fide position that can be considered a specialty occupation.

On appeal, counsel states, in part, that the proffered position is that of a kindergarten teacher, a position that qualifies as a specialty occupation, and is not an accountant position, as erroneously stated in the director's decision. In response to the director's finding of inconsistencies in the record, counsel states that all of the petitioner's teachers hold a bachelor's degree in elementary education or education. Counsel states further that the petitioner actually has two Forms 941, one for each of the petitioner's branches located on [REDACTED] [REDACTED] respectively, thereby necessitating two EINs. Counsel also states that the two H-1B teachers did not appear on the 2003 Form DE-6 because of the delay in processing their social security numbers.

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 Department of Labor's *Occupational Outlook Handbook (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. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Counsel's statement that the director erroneously considered the proffered position as an accountant position is noted. The AAO disagrees. A thorough review of the director's decision finds that he properly considered

the proffered position as a kindergarten teacher, and not as an accountant. The director inadvertently uses the word "accountant" rather than "kindergarten teacher" in the third paragraph on the second page. The director, however, also states in the sixth paragraph as follows: "the petitioner has not established that it is employing the beneficiaries of two approved petitions for *the same position* . . ." (Emphasis added.) Upon review of the director's entire decision, it is clear that the director properly considered the proffered position as a kindergarten teacher, and not as an accountant.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Although a review of the *Handbook* finds that a kindergarten teacher may qualify as a specialty occupation, the AAO does not concur with the petitioner that the proffered position is a specialty occupation. In its October 1, 2003 letter, the petitioner's owner/director states that all of the petitioner's teachers hold a bachelor's degree in elementary education, education, or business administration. As the petitioner has not demonstrated that business administration is a "related" degree, it has not been established that the position requires a degree in the specialty as required by the first criterion. Furthermore, this information conflicts with counsel's statement on appeal that all of the petitioner's teachers hold a bachelor's degree in elementary education or education. It is also noted that although information on the petition, which was signed by the petitioner's owner/director on October 1, 2003, reflects that the petitioner is a nursery and kindergarten school with four employees and a gross annual income of \$192,000, the record contains no documentation in support of these claims. The petitioner's 2002 Schedule C, Profit or Loss from Business, however, reflects the petitioner's gross annual income as \$75,636 and its wages as \$8,694. The record contains no explanation for these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for kindergarten teachers that specify a degree requirement. As previously indicated, a review of the *Handbook* finds that a kindergarten teacher may qualify as a specialty occupation. As discussed above, however, the record does not demonstrate that the proffered position is a specialty occupation. Thus, the advertisements have no relevance.

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, therefore, has 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. On appeal, the petitioner states that all of the petitioner's teachers hold degrees. The record, however, does not contain any evidence of the petitioner's past hiring practices and, therefore, the petitioner has not met its burden of proof in this regard. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.

To the extent that they are depicted in the record, the duties 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. 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.