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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 067 50678 Office: VERMONT SERVICE CENTER Date: MAR 03 2005

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 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 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 a Montessori school. In order 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 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 on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation.

On appeal, counsel contends that the director erred by not taking into account the totality of the evidence submitted by the petitioner, which, according to counsel, meets all the specialty occupation criteria of the Act and the relevant Citizenship and Immigration Services (CIS) regulations.

The director's decision to deny the petition was correct. The AAO bases this determination upon its consideration of the totality of the evidence in the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) both of the director's requests for additional evidence (RFEs); (3) the materials submitted in response to each of the RFEs; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief. Accordingly, the appeal will be dismissed, and the petition will be denied.

Counsel was correct in asserting that the director erred in regarding part of the RFE-response material as an attempt to materially change the nature of the proffered position. The AAO finds that the petitioner's RFE response about the nature of the position was consistent with and reasonably encompassed by the job description included on the Form I-129. The AAO accordingly disregarded the director's erroneous finding of a material change in information about the proffered position, and considered all the petitioner's submissions, including all the information about the proffered position submitted as an RFE response. However, this error does not affect the outcome of the proceeding.

In determining whether a position qualifies as a specialty occupation, 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.

The addendum to the petitioner's Form I-129 includes this nontechnical description of the proffered position:

> Teach natural and social science, personal hygiene, music art & literature to promote physical, mental, and social development. Supervise field visits, group discussions & dramatic play acting, to stimulate students' interest in and broaden understanding of [the] physical and social environment. Foster cooperative social behavior. Lead singing, dancing, rhythmic activities and in use of art materials. Alternate periods of rest and or light activity

> to avoid overstimulation and fatigue. Observe children to detect signs of ill health or emotional disturbance and to evaluate progress. Conference with other teachers and parents.

Section 4 of counsel's May 1, 2003 letter of reply to the March 10, 2003 RFE explained these duties in terms of their requirements in three areas: curriculum management, child development, and family counseling. The letter also projected the approximate hours per week that the beneficiary would spend in: consulting with parents on the development of their child; developing curriculum; executing educational programs and daily lessons; evaluating each child's growth and development according to the school director's guidelines; and helping students learn and meet their needs in physical, intellectual, social, and emotional development.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

> which [1] requires *theoretical and practical application of a body of highly specialized knowledge* in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires *the attainment of a bachelor's degree or higher in a specific specialty*, or its equivalent, as a minimum for entry into the occupation in the United States. (Italics added.)

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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

Counsel relies in part on the information on teachers in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, which CIS recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations. The *Handbook* indicates that the normal hiring requirement for kindergarten teachers in public schools includes at least a bachelor's degree and state licensure to teach at that educational level. However, that information is not relevant here, as the proffered position is being offered in a private school. The *Handbook* notes that the states do not require licensure to teach in private schools, but it does not address the educational requirements for private school teachers in detail. Furthermore, the *Handbook* provides no basis for extrapolating private school requirements from its information about public schools.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) does not indicate that all teaching jobs are specialty occupations. It merely refers to education and several other occupational areas as examples of "fields of human endeavor" where the theoretical and practical application of a body of highly specialized knowledge may occur. This regulation plainly indicates that a position in any field, including education, will qualify as a specialty occupation only if that particular position requires both (1) the theoretical and practical application of a body of highly specialized knowledge, and (2) the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. The evidence of record does not satisfy these requirements, and counsel's suggestion that, by virtue of its being a teaching position, the proffered position automatically qualifies as a specialty occupation is without merit.

The DOL *O*NET* excerpt on teachers that the petitioner has submitted is not probative: it merely places teachers among a group of occupations for which it may be said that most, but not all, require a four-year degree. The

*O*NET* is not designed to assess the specialty occupation status of either occupations or particular positions within them. Rather, the *O*NET* and its Job Zone and SVP ratings are meant to indicate only the total number of years of vocational preparation required for a particular position. They do not describe how those years are to be divided among training, formal education, and experience, and they do not specify the particular type of degree, if any, that a position would require.

The four job advertisements that the petitioner submitted from other employers are not persuasive. They are too few to establish the hiring norms for either Montessori schools or private schools in general. One of the advertisements is not even for a teacher. Moreover, of the three teaching positions advertised, only one specifies a baccalaureate degree as a minimum requirement.

As the evidence of record fails to establish that the proffered position is one that normally requires at least a baccalaureate degree or the equivalent in a specific specialty, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the *Handbook* does not report that the proffered position is one for which there is an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry attesting to the hiring requirements for the type of position proffered here. Finally, for the reasons already discussed, the job advertisements in the record have no evidentiary weight.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). The evidence of record fails to establish that the particular position is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty. The evidence does not establish that the proffered position is substantially different from other private school kindergarten teaching positions, and, as indicated in the discussion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) above, the petitioner has not established that such positions require at least a baccalaureate degree in a specific specialty.

The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

Counsel's assertion that "[a]ll teachers at the school possess, at a minimum, the equivalent of a bachelor's degree in the discipline relevant to the subject to which they teach" (at section 3 of counsel's May 1, 2003 RFE reply) is not substantiated by relevant documentation. Furthermore, the assertion is inconsistent with the owner/administrator's statement (letter of April 24, 2003) that the petitioner "usually require[s] a Teacher to have a college degree and/or extensive experience in [the] Montessori method of teaching." This statement conveys that the petitioner's usual practice includes the hiring of persons with extensive Montessori-method experience but no college degree. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) because the evidence of record does not establish that the specific duties are so specialized and complex that their performance requires knowledge that is usually associated with a baccalaureate or higher degree in a specific specialty. The record establishes that the beneficiary would be performing the duties of a private school kindergarten teacher. However, not only is evidence of the requisite specialization and complexity lacking in the record, but also, as just noted, the owner/administrator's letter indicates that the petitioner has hired as teachers persons without a college degree.

Counsel contends that the petitioner has satisfied all the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). However, as indicated above, the evidence of record has established none of them. 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). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Beyond the decision of the director, it is noted that the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The educational equivalency evaluations upon which the petitioner relies depend partly upon assessment of the beneficiary's work experience. However, there is no evidence that any of the evaluators are officials authorized by a U.S. college or university to grant college-level credit for training or experience, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(*1*). For this reason also, the petition must be denied.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

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