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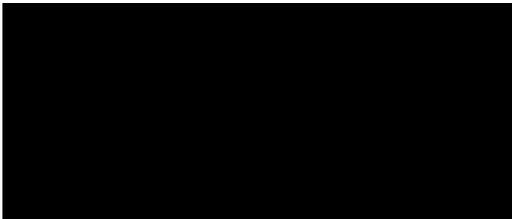
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FILE: WAC 04 129 50947 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 2005

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:



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

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 school that seeks to employ the beneficiary as a teacher. 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 the proposed position is not a specialty occupation. On appeal, counsel submits additional evidence.

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 regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) states that the H-1B classification applies to an alien who is coming temporarily to the United States to perform services in a specialty occupation.

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 Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would teach students from kindergarten through the eighth grade. In response to the request for evidence, counsel's June 11, 2004 letter stated that the beneficiary would perform duties that entail preparing and delivering lectures to students on various topics; evaluating and grading students' class work, assignments, and papers; advising students on academic and vocational curricula issues; initiating, facilitating, and moderating classroom discussions; maintaining student attendance records, grades, and other required records; and working with other teachers to plan, evaluate, and revise curricula, course content, and methods of instruction. The petitioner seeks to employ the beneficiary who holds a certificate for substitute teaching issued by the Arizona Department of Education.

The director stated that counsel's June 11, 2004 letter and the certificate from the Arizona Department of Education indicate that the petitioner seeks to employ the beneficiary as a substitute teacher; but not as a teacher as the petitioner indicated on the Form I-129 petition. According to the director, when determining whether a position qualifies as a specialty occupation, CIS considers the proposed duties along with the nature of the petitioning entity's business. Each position must be evaluated based upon the nature and complexity of the actual duties, the director stated, and the beneficiary's possession of a baccalaureate degree in a related field does not guarantee the position is a specialty occupation. Performing incidental specialty occupation duties, the director stated, is insufficient to establish that the proposed position is a specialty occupation. The director stated that the record reflects that the petitioner failed to establish that the beneficiary will perform the proposed position or that an actual employer/employee relationship will exist. The beneficiary will perform services as a substitute teacher and an employer/employee relationship will exist only if and when the beneficiary is called upon to engage in the proposed position, the director stated. According to the director, the petition cannot be approved based on a possibility that the beneficiary will perform services in the proposed position.

On appeal, counsel states that the submitted letter on appeal substantiates that the petitioner seeks to employ the beneficiary in the proposed position. According to counsel, CIS previously found similar positions to qualify as specialty occupations.

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.

Counsel's assertion that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past is not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii).

The AAO finds that the evidence in the record does not establish that the proposed position is a full-time public school teacher, which usually requires a baccalaureate degree in a specific specialty. The Form I-129 petition indicates that the petitioner seeks to employ the beneficiary as a teacher, and a July 21, 2004 letter submitted on appeal states that the petitioner intends to provide the beneficiary "with the opportunity to teach and fill the need as a bilingual teacher." However, this evidence is incongruous with counsel's June 11, 2004 letter, which states that the petitioner seeks to employ the beneficiary as a substitute teacher; and the submitted document from the petitioner showing that the Arizona Department of Education issued a certificate as a substitute teacher to the beneficiary. 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. 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). The AAO observes that no independent evidence in the record reconciles or explains this inconsistency.

The Form I-129 petition indicates that the petitioner seeks to employ the beneficiary as a full-time teacher from October 1, 2004 to September 30, 2007; the petitioner's July 21, 2004 states that it intends to employ the beneficiary as a bilingual teacher; and the document submitted by the petitioner from the Arizona Department of Education shows that the beneficiary holds a certificate as a substitute teacher. The AAO notes that the website for the Arizona Department of Education (www.ade.state.az.us) reveals that a substitute certificate for kindergarten through the 12th grade "entitles the holder to substitute in the temporary absence of a regular contract teacher," and that "the individual holding only a substitute certificate shall not be assigned a contract teaching position and shall be limited to 120 days of substitute teaching in the same school each school year." The AAO interprets this to mean that a person is limited to 120 days of substitute teaching each school year. As such, the petitioner fails to demonstrate that a full-time specialty occupation would exist from the period of October 1, 2004 to September 30, 2007, the dates of the beneficiary's intended employment as designated by the petitioner on the Form I-129 petition. Thus, the petitioner fails to demonstrate that the beneficiary is coming temporarily to the United States to perform services in a specialty occupation, as required by the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). Accordingly, the petitioner satisfies none of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO also finds that the proposed position does not qualify as a specialty occupation as the Arizona Department of Education website indicates that a substitute certificate requires a baccalaureate degree; but the

baccalaureate degree is not required to be in a specific academic field. Thus, the petitioner cannot establish any of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position; 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; the employer normally requires a degree or its equivalent for the position; or 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.

Beyond the decision of the director, the AAO notes that the beneficiary is not qualified to perform duties as a regular, full-time public school teacher as no evidence in the record reflects that the beneficiary holds licensure to perform services in this capacity.

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 on this ground.

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.