



U.S. Citizenship
and Immigration
Services

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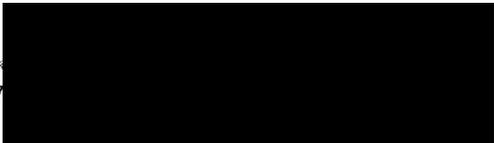
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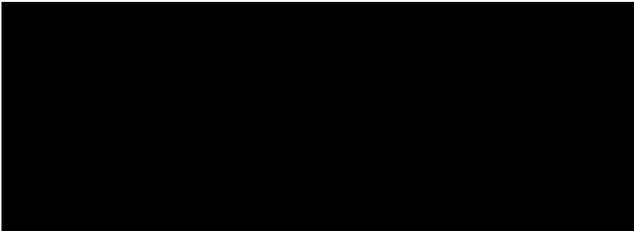
FILE: WAC 04 077 50530 Office: CALIFORNIA SERVICE CENTER Date: OCT 27 2005

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.

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 non-profit school that seeks to employ the beneficiary as an assistant 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 proffered position is not a specialty occupation. Counsel submits a brief and 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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an assistant teacher. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail working with small groups of kindergarten students to reinforce reading and math concepts; supervising recess and lunch for the kindergarten students and integrate art into the curriculum with projects; supervising fifteen kindergarten students and be a lead teacher in the after school program; planning and implementing the program for after school program for kindergarten summer camp; acting as lead teacher and responsible for closing the facility during the summer; supervising extra curriculum activities and accompanying students on field trips; and participating in education conferences and workshops. The petitioner indicated that it was its policy to actively seek individuals with excellent academic credentials in analytical, communication, and interpersonal skills. The petitioner stated that the beneficiary had a bachelor's degree in psychology.

The director issued a request for evidence that the proffered position meets one of the above listed criteria. The director requested a more detailed description of the work to be done, including specific duties. The director requested evidence that the school has filed a statement or affidavit with the Superintendent of Public Instruction pursuant to Section 33190 of the California Education Code.

In response, the petitioner stated that using the daily schedule, the percentage of time breakdown is as follows: 43% of time as assistant teacher in kindergarten; 15% of time as lunch supervisor; and 40% of time as lead kindergarten teacher in the after school program. The petitioner stated that it filled out the private school affidavit online for the fall 2002. The petitioner stated that it filed another affidavit in April 2003.

The director denied the petition and found that the proffered position of teacher assistant was not a specialty occupation. The director found the position reflects the duties of a teacher assistant as listed in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*). The director found that the proffered position did not meet any of the above listed criteria and therefore was not a specialty occupation.

On appeal, counsel contends that the petitioner has clearly demonstrated that 80% of its assistant teachers have a college degree. Additionally, counsel contends that the job duties are of such a complex or unique nature and they are so specialized that knowledge required to perform such duties is usually associated with the attainment of a baccalaureate or higher degree and it can be performed only by an individual having said qualification.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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. CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With reference to teacher assistants, the *Handbook* does not indicate that such teacher assistant are required to have a baccalaureate degree in a specific specialty. The *Handbook* indicates that teaching assistant duties include:

Teacher assistants provide instructional and clerical support for classroom teachers, allowing teachers more time for lesson planning and teaching. Teacher assistants tutor and assist children in learning class material using the teacher's lesson plans, providing students with individualized attention. Teacher assistants also supervise students in the cafeteria, schoolyard, and hallways, or on field trips. They record grades, set up equipment, and help prepare materials for instruction. . . .

Some teacher assistants perform exclusively noninstructional or clerical tasks, such as monitoring nonacademic settings. Playground and lunchroom attendants are examples of such assistants. Most teacher assistants, however, perform a combination of instructional and clerical duties. They generally provide instructional reinforcement to children, under the direction and guidance of teachers. They work with students individually or in small groups—listening while students read, reviewing or reinforcing class lessons, or helping them find information for reports.

The *Handbook* reveals the following about training for teacher assistants:

Educational requirements for teacher assistants vary by State or school district and range from a high school diploma to some college training, although employers increasingly prefer applicants with some college training. Teacher assistants with instructional responsibilities usually require more training than do those who do not perform teaching tasks. In addition, as a result of the No Child Left Behind Act of 2001, teacher assistants in Title 1 schools—those with a large proportion of students from low-income households—will be required to meet one of three requirements: have a minimum of 2 years of college, hold a 2-year or higher

degree, or pass a rigorous state and local assessment. Many schools also require previous experience in working with children and a valid driver's license. Some schools may require the applicant to pass a background check.

Thus, the *Handbook* does not establish that the proffered position requires a baccalaureate degree in a specific specialty for entry into the position.

The petitioner has not established the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Counsel asserts that the duties of the position are complex. Again, the *Handbook* reveals that the proffered position is performed by teacher assistants, positions that do not require a bachelor's degree in a specific specialty

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. The petitioner indicated that 80% of its teachers have degrees. However, as previously stated, 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. In addition, the petitioner did not submit any documentation to establish the academic credentials of other teachers in its employ. 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)). Therefore the petitioner has not met this criterion.

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. The petitioner provided no further detail as to any specialized or complex duties that the beneficiary would perform as a teacher assistant. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.