

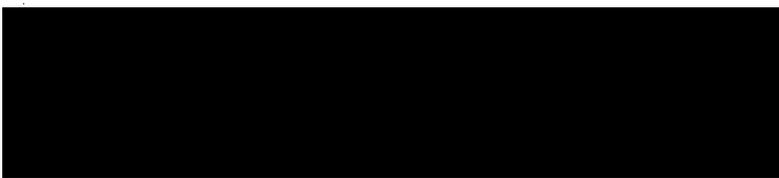


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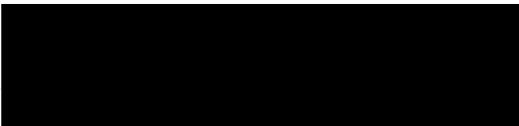
*D2*



FILE: EAC 04 017 53620 Office: VERMONT SERVICE CENTER

Date: SEP 21 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*

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 childcare facility that seeks to employ the beneficiary as a teacher (preschool). 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. 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 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 (preschool). Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail creating lesson plans and implementing them in the classroom; following the activity schedule; developing parent/teacher interactions; changing and creating bulletin boards and decorating the classroom; maintaining developmental progress records and assessments of children; and complying with the Department of Social Service regulations governing classroom teachers. The petitioner seeks to employ the beneficiary because she possesses the equivalent to a U.S. bachelor's degree in education, has one year of graduate-level credit in education from an accredited college or university in the United States, and has experience teaching.

The director determined that the proffered position is not a specialty occupation. According to the director, counsel's assertion that the petitioner offers meaningful education to preschoolers through fifth graders is not supported by the record as no independent evidence establishes that the petitioner's clientele includes students beyond preschool age. The director found the degree certificates of former and present employees unpersuasive in establishing that the petitioner normally requires a bachelor's degree for the proposed position, and discussed the court's decision in *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) and the *Dictionary of Occupational Titles (DOT)*, the director stated that they reveal that employers do not require a bachelor's degree in a specific specialty for a preschool teacher.

On appeal, counsel states that the proffered position is a specialty occupation as it is fundamentally a teaching position; that the petitioner normally requires a bachelor's degree for the proposed position; and that the state of Virginia requires at least a bachelor's degree for a teacher (preschool). Counsel submits a February 26, 2004 letter from the petitioner.

Upon review of the record, the petitioner has not established that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO first considers 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)).

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 Form I-129 petition describes the proposed position of "teacher preschool," and the petitioner's February 26, 2004 letter submitted on appeal expands the beneficiary's job duties by stating that in addition to teaching the beneficiary will serve as a back-up program director. Counsel's January 23, 2004 letter, submitted in response to the request for evidence, also expanded the proposed duties by stating that the beneficiary will serve as a back-up program director. Counsel claims that a back-up program director requires a bachelor's degree.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the analysis of the proposed duties will be based on the job description described in the Form I-129 petition.

In addition, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided in the response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but added a new duty to the job description. Consequently, the analysis of the proposed duties will be based on the job description submitted in the initial petition.

In the February 26, 2004 letter, the petitioner states that it seeks the beneficiary's services to primarily teach and supervise children in kindergarten through the fifth grade; that of its 120 students, it has 55 to 60 children in kindergarten through the fifth grade; that it has licensure for this grade spread; that it is required to follow the same teaching standards that the Chesapeake public schools have for kindergarten through the fifth grade; and that the state of Virginia requires a bachelor's degree for teaching school levels beyond kindergarten.

The evidence does not support the petitioner's claim that the beneficiary will teach and supervise children in kindergarten through the fifth grade. Although the petitioner holds a license for a child day center for the ages of 16 months through 11 years, the evidence in the record reflects that the petitioner primarily serves

preschool children and that the beneficiary will be a preschool teacher. On the cover of the petitioner's submitted brochure describing its services, it is identified as a "pre school/day care." The Form I-129 petition indicates that the petitioner seeks to employ a "teacher preschool." In a January 23, 2004 letter, counsel references a chart describing a typical day for the beneficiary when teaching a "pre-school class." Counsel states that the beneficiary will teach skill sets, and counsel references exhibits 6, 7, 8, and 9 to demonstrate what will be taught. These exhibits, the AAO observes, relate to preschool children as the skills to be taught include fine motor skills such as shaking and grasping; language skills such as identifying the names of common objects and describing action in pictures; and describing a picture with three statements. Consequently, the evidence does not substantiate the petitioner's claim that the beneficiary will teach children in kindergarten through the fifth grade. 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)).

A review of the *Handbook*, a resource that the AAO routinely consults, discloses that the proposed position resembles a preschool teacher, and that the director correctly determined that the *Handbook* reports that employers do not require a bachelor's degree in a specific specialty for a preschool teacher. The *Handbook* conveys:

Preschool children learn mainly through play and interactive activities. *Preschool teachers* capitalize on children's play to further language and vocabulary development (using storytelling, rhyming games, and acting games), improve social skills (having the children work together to build a neighborhood in a sandbox), and introduce scientific and mathematical concepts (showing the children how to balance and count blocks when building a bridge or how to mix colors when painting). Thus, a less structured approach, including small-group lessons, one-on-one instruction, and learning through creative activities such as art, dance, and music, is adopted to teach preschool children. Play and hands-on teaching also are used in kindergarten classrooms, but there academics begin to take priority. Letter recognition, phonics, numbers, and awareness of nature and science, introduced at the preschool level, are taught primarily by *kindergarten teachers*.

With regard to educational requirements of a preschool teacher, the *Handbook* reports:

Licensing requirements for preschool teachers also vary by State. Requirements for public preschool teachers are generally higher than those for private preschool teachers. Some States require a bachelor's degree in early childhood education, others require an associate's degree, and still others require certification by a nationally recognized authority. The Child Development Associate (CDA) credential, the most common type of certification, requires a mix of classroom training and experience working with children, along with an independent assessment of an individual's competence.

The *Handbook* states that the educational requirements of public preschool teachers is generally higher than of private school teachers, and that some states require a specific baccalaureate degree while others accept an associate's degree. The petitioner is a private childcare facility. Thus, according to the *Handbook's* information, the proposed position would not require a baccalaureate degree in a specific specialty. Consequently, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

In the January 23, 2004 letter, counsel asserts that all pre-school teaching facilities in Virginia must adhere to statutorily required standards. However, the record reflects no independent evidence showing that the state of Virginia requires that a facility such as the petitioner employ preschool teachers with a bachelor's degree in a specific specialty such as early childhood development. 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)).

The petitioner submits no evidence to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a degree. As discussed earlier in this decision, the proposed position is similar to a preschool teacher, which is an occupation that the *Handbook* reveals does not require a baccalaureate degree.

Counsel asserts that the petitioner establishes the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position. The record contains the following: a master of arts in severe disabilities; two bachelor's degrees in early childhood education; three bachelor's degrees with an undisclosed major; bachelor's degrees in theatre, hospitality management, psychology, combined studies, elementary education, and early childhood education; an associate degree with an undisclosed major; associate degrees in education and early childhood; two associate degrees in early childhood development; a certificate from the Maryland State Department of Education indicating that the conferee of the certificate held a bachelor of science in early childhood nursery; an employment application indicating the applicant held a bachelor's degree in secondary art education; a transcript for a general studies major in the college of education and psychology at The University of Southern Mississippi; a partial transcript from the Tennessee Technical University; and a standard certificate from the Department of Public Instruction from the State of Delaware presenting the conferring with a license to hold the position of teacher of secondary social studies.

In a February 26, 2004 letter, the petitioner refers to submitted degrees from former and present employees that occupied teacher positions, and states that the employees that held bachelor's degrees unrelated to teaching were assigned exclusively to pre-kindergarten children. The petitioner alleges that the beneficiary

will teach students in kindergarten through the fifth grade, thus she requires a bachelor's degree. However, the AAO has already conveyed that the evidentiary record reflects that the beneficiary will not occupy a position that involves teaching kindergarten through the fifth grade. The evidence shows that the beneficiary will be employed as a preschool teacher, which is an occupation that does not require a bachelor's degree. Accordingly, the petitioner fails to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. As discussed earlier in this decision, the proposed position is similar to a preschool teacher as that occupation is described in the *Handbook*, and the *Handbook* reveals that this occupation does not require a specific baccalaureate degree.

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.