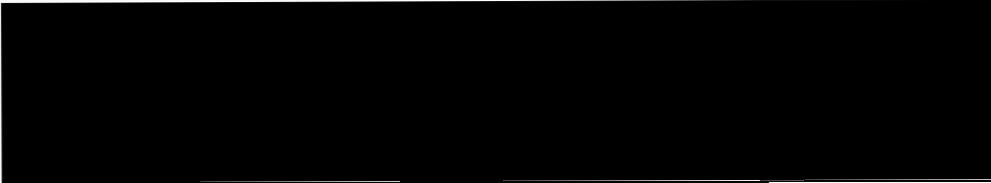


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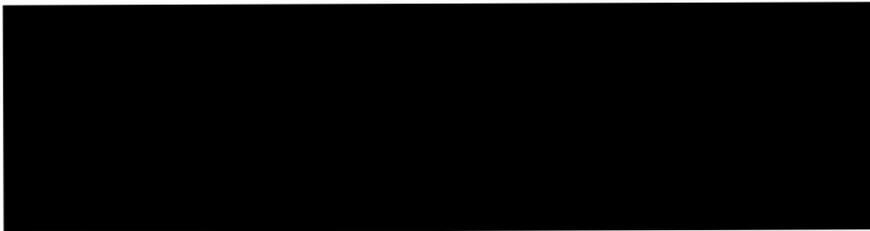
FILE: WAC 04 206 51766 Office: CALIFORNIA SERVICE CENTER Date: JUL 21 2006

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, Chief  
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 pre-school and kindergarten that seeks to employ the beneficiary as a kindergarten 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 finding that the proffered position is not a specialty occupation. Counsel submits a timely appeal.

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 the brief. 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 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 the petitioner's July 14, 2004 letter, the beneficiary would perform duties that entail teaching kindergarten students whose curriculum includes literacy, mathematics, science, art, process skills, and technology. The beneficiary will observe children and guide their learning, direct activities, interact with children to promote learning, and teach children who are gifted. The petitioner's response to the request for evidence elaborated on the proposed duties. The petitioner seeks to employ the beneficiary because she possesses the equivalent of a U.S. bachelor's degree in early childhood education and has over 15 years of experience in early childhood education.

The director determined that the proffered position is not a specialty occupation. Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director stated that it reveals that the proposed duties reflect those of a preschool teacher, which is an occupation that does not require a specific baccalaureate degree. The director questioned whether the petitioner operates an approved private school in California, and he found that the evidence of record suggests that the petitioner operates a childcare center. The director stated that if the petitioner operates a childcare center, the beneficiary's duties correspond to those of a childcare worker, as that occupation is depicted in the *Handbook*, and that the *Handbook* reports that a childcare worker does not require a bachelor's degree in a specific specialty. The director found the submitted job postings unpersuasive in establishing the offered position as a specialty occupation. According to the director, the proposed job duties are generic in nature and fail to provide detail showing the unique or complex nature of the offered position. The director stated that although the petitioner asserts that it normally requires a baccalaureate degree in education for the proposed position, the position does not require a baccalaureate degree in a specific specialty. The director found the evidence failed to establish how the proposed duties are complex and specialized.

On appeal, counsel states that the proffered position is that of a kindergarten teacher and that it qualifies as a specialty occupation. Counsel asserts that the *Handbook* and the *Occupational Information Network (O\*NET)* indicate that a kindergarten teacher continues the social skills taught to children at the preschool level, and is primarily responsible for instructing children in academia. A preschool teacher, counsel states, "capitalizes on how children play in order to introduce them to language and vocabulary development, social skills, and basic scientific and mathematical concepts." According to counsel, preschool teachers do not instruct in academia. He maintains that the evidence reflects that the beneficiary will instruct students in academia, thus requiring a bachelor's degree. According to counsel a kindergarten teacher in a Montessori-style learning environment must provide instruction equivalent to instruction provided to kindergarten-aged children in public schools. Counsel refers to a prior AAO decision involving a preschool teacher in a private school. Counsel asserts that the petitioner operates as a private school and that other than the filing of the private school affidavit, private schools do not require licensure. Counsel refers to the previously submitted

job postings stating that they show it is common in the private school industry to require a bachelor's degree for a kindergarten teacher.

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 2006-2007 edition of 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 evidence of record reveals that the proposed duties reflect those of a preschool teacher as that occupation is described in the *Handbook*:

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 by *kindergarten teachers*, but academics begin to take priority in kindergarten classrooms. Letter recognition, phonics, numbers, and awareness of nature and science, introduced at the preschool level, are taught primarily in kindergarten.

The director correctly noted that the submitted Private School Affidavit, which is to be filed annually by the petitioner with the California Department of Education,<sup>1</sup> is not current as it does not reflect the petitioner's

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<sup>1</sup> California private schools serving kindergarten through grade twelve are required by state law to file an informational affidavit with the Specialized Programs Division of the California Department of

enrollment from October 1-15, 2003; the affidavit describes the enrollment of 14 kindergarten pupils from October 1-15, 2002. Moreover, the curriculum in the record reflects that of a pre-school education. The beneficiary will teach language and vocabulary such as shaping a heart and the letters G and H; motor skills of painting, cutting, and coloring; perception such as drawing a person; gross motor skills of eye tracking, working on snaps and buttons; and pre-math. The curriculum activities do not include academics, which correspond to a kindergarten education. Consequently, the evidence of record reveals that the proffered position is similar to a preschool teacher.

With regard to educational requirement for a preschool teacher, the *Handbook* reports:

All 50 States and the District of Columbia require public school teachers to be licensed. Licensure is not required for teachers in private schools in most States. Usually licensure is granted by the State Board of Education or a licensure advisory committee. Teachers may be licensed to teach the early childhood grades (usually preschool through grade 3); the elementary grades (grades 1 through 6 or 8); the middle grades (grades 5 through 8); a secondary-education subject area (usually grades 7 through 12); or a special subject, such as reading or music (usually grades kindergarten through 12).

Requirements for regular licenses to teach kindergarten through grade 12 vary by State. However, all States require general education teachers to have a bachelor's degree and to have completed an approved teacher training program with a prescribed number of subject and education credits, as well as supervised practice teaching. Some States also require technology training and the attainment of a minimum grade point average. A number of States require that teachers obtain a master's degree in education within a specified period after they begin teaching.

...

Private schools are generally exempt from meeting State licensing standards.

...

Preschool teachers usually work their way up from assistant teacher, to teacher, to lead teacher—who may be responsible for the instruction of several classes—and, finally, to director of the center. Preschool teachers with a bachelor's degree frequently are qualified to teach kindergarten through grade 3 as well. Teaching at these higher grades often results in higher pay.

The *Handbook* does not indicate that a preschool teacher in a private school requires a bachelor's degree or teacher certification in a specific specialty.

The submitted AAO decision dated August 13, 1998, found that a Montessori preschool teacher is a specialty occupation. This record of proceeding does not, however, contain all of the supporting evidence submitted to the California Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the submitted AAO decision is not sufficient to determine whether the H-1B petition that was approved is parallel to the one which is submitted here.

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).

For the foregoing reasons, the petitioner fails to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) as the *Handbook* does not indicate that a preschool teacher in a private school requires a bachelor's degree or teacher certification in a specific specialty.

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, counsel refers to three job postings. The postings are not persuasive as they either relate to kindergarten teachers, or the educational requirements are for a state other than California, or both. The evidence of record indicates that the duties of the position that is offered here correspond to those of a private pre-school teacher, which is an occupation that the *Handbook* does not indicate requires a bachelor's degree in a specific specialty. As such, the petitioner fails to establish the first alternative prong, 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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. The evidence of record, including the curriculum, indicates that the proposed duties parallel those of a preschool teacher, which is an occupation that the *Handbook* reveals does not require a baccalaureate degree. Consequently, the petitioner fails to establish the second alternative prong, 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence in the record establishes the regulation 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.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must 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. Although the petitioner asserts that the proposed position is that of a kindergarten teacher, the evidence of record, including the curriculum, indicates that the proposed duties are analogous to those of a preschool teacher, which is an occupation that the *Handbook* reveals does not require a baccalaureate degree. No evidence of record demonstrates that the proposed duties entail primarily teaching academics. Thus, the nature of the proposed duties is not so

specialized and complex as to require knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Accordingly, the petitioner fails to establish the criterion at 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. 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.