

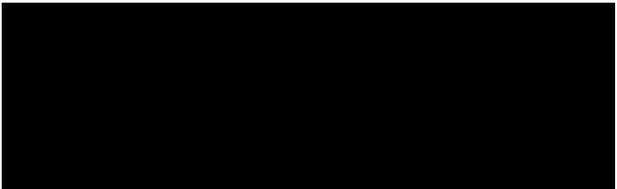
**identifying data deleted to
prevent disclosure of unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

D2



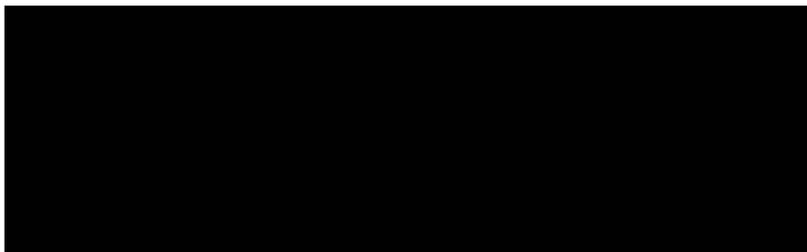
FILE: WAC 04 067 50267 Office: CALIFORNIA SERVICE CENTER Date: MAR 27 2006

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.

for Michael F. Kelly
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 residential care facility that seeks to employ the beneficiary as a teacher (self-enrichment). 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 states that the proffered position qualifies as a specialty occupation.

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 (self-enrichment). 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 perform duties that entail educating adult residents according to their individual needs and abilities using simple everyday subjects and tasks, and evaluating the educational capacity of residents and instructing them according to their ability level. Residents may have reading instruction or simple lessons in arts and crafts math. Specifically, the beneficiary will prepare lesson plans and establish goals; demonstrate methods and procedures to residents; observe and evaluate residents' work to determine their progress or suggest improvements; meet with the family members of a resident; assist counseling staff in resolving behavior or social issues; and evaluate the educational capacity of residents. Counsel's July 28, 2004 letter elaborated on the proposed duties. The petitioner stated that the proposed position requires a bachelor's degree in education or a related field.

The director stated that the proposed position resembles a self-enrichment teacher as that occupation is portrayed in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* conveys that this occupation does not require a baccalaureate degree in a specific specialty. The director found the submitted three job postings unpersuasive in establishing that the proposed position requires a baccalaureate degree in education or a related field, and also found the proposed duties generic in nature, providing no detail as to the unique or complex nature of the proposed position or showing how it differs from similar positions within the same industry. According to the director, the petitioner submitted no evidence showing that the industry requires a baccalaureate degree in education or a related field for the proposed position. The petitioner submitted a list of former employees and their corresponding degrees and employment dates; however, the director found that there was no evidence to corroborate the list. The director discussed *Defensor v. Meissner*, 201 F. 3d 384, 387 (5th Cir. 2000). According to the director, the petitioner failed to show how the proposed position is more specialized and complex than that of a self-enrichment teacher, which is an occupation that does not require a baccalaureate degree in a specific specialty.

On appeal, counsel states that the beneficiary will teach basic skills and tasks to elderly residents who have health-related ailments and that the proposed duties involve more than the *Handbook's* description of a self-enrichment teacher. Counsel states that the proposed position is analogous to a kindergarten teacher and a special education teacher; and further states that the proposed position requires a baccalaureate degree because a kindergarten teacher and a special education teacher require a baccalaureate degree. Counsel states that the submitted job postings also demonstrate that the proposed position requires a baccalaureate degree. According to counsel, the petitioner did not submit letters from other facilities because the petitioner does not have access to the proprietary information of competitors, and other facilities do not offer the services of a self-enrichment teacher. Only a person with formal education in the field of education can teach residents with mental and physical disabilities and behavioral issues, counsel asserts. According to counsel, a kindergarten teacher, although similar to the proposed position, would lack the skills that are required for the proposed position. Counsel states that the proposed position is more complex than a general education

teacher; but it uses knowledge of general education in teaching basic skills to Alzheimer's patients and war veterans. Counsel maintains that the proposed position is newly created.

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 a specialty occupation.

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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The *Handbook* discloses that the proposed duties parallel those of a self-enrichment teacher in a private school, and a recreation worker or an activity specialist for a nursing home. The *Handbook* describes a self-enrichment teacher as follows:

Self-enrichment teachers provide instruction in a wide variety of subjects that students take for personal enrichment or self-improvement. Some teach a series of classes that provide students with useful life skills, such as cooking, personal finance, and time management classes. Others provide group instruction intended solely for recreation, such as photography, pottery, and painting courses. Many others provide one-on-one instruction in a variety of subjects, including dance, singing, or playing a musical instrument. The instruction self-enrichment teachers provide seldom leads to a particular degree and attendance is voluntary, but dedicated, talented students sometimes go on to careers in the arts. Teachers who conduct courses on academic subjects in a non-academic setting, such as literature, foreign language, and history courses, are also included in this occupation.

Self-enrichment teachers provide instruction on a wide range of subjects, so they may have styles and methods of instruction that differ greatly. Most self-enrichment classes are relatively informal and not demanding of instructors. Some classes, such as pottery or sewing, may be largely hands-on, with the instructor demonstrating methods or techniques

for the class, observing students as they attempt to do it themselves, and pointing out mistakes to students and offering suggestions to improve techniques. Other classes, such as those involving financial planning or religion and spirituality, may be more similar to a lecture in nature or rely more heavily on group discussions. . . .

Many of the classes that self-enrichment educators teach are shorter in duration than classes taken for academic credit; some finish in 1 or 2 days to several weeks. These brief classes tend to be introductory in nature and generally focus on only one topic—for example, a cooking class that teaches students how to make bread. Some self-enrichment classes introduce children and youths to activities such as piano or drama, and may be designed to last anywhere from 1 week to several months.

Many self enrichment teachers provide one-on-one lessons to students. The instructor may only work with the student for an hour or two a week, but direct the student what they should practice in the interim until their next lesson. . . .

All self-enrichment teachers must prepare lessons beforehand and stay current in their fields. . . .

The beneficiary will educate adult residents using simple everyday subjects and tasks. Residents may have reading instruction or simple lessons in arts and crafts and math. The beneficiary will prepare lesson plans and establish goals, demonstrate methods and procedures to residents, and observe and evaluate their work. A self-enrichment teacher prepares lessons; provides one-on-one lessons to students; and instructs in a wide variety of subjects such as pottery, painting, sewing, cooking, and personal finance.

A recreation worker or an activity specialist is depicted in the *Handbook* as follows:

Recreation workers hold a variety of positions at different levels of responsibility. *Recreation leaders*, who are responsible for a recreation program's daily operation, primarily organize and direct participants. They may lead and give instruction in dance, drama, crafts, games, and sports; schedule the use of facilities; keep records of equipment use; and ensure that recreation facilities and equipment are used properly. Workers who provide instruction and coach groups in specialties such as art, music, drama, swimming, or tennis may be called *activity specialists*.

The beneficiary will provide lessons in arts and crafts. Recreation leaders and activity specialists give instruction in areas such as crafts and dance, and ensure that the recreation facilities and equipment are used properly. The *Handbook* conveys that 15 percent of recreation workers were employed by nursing and other personal care facilities.

The *Handbook* conveys that a bachelor's degree in a specific specialty is not required for a self-enrichment teacher, a recreation worker, or an activity specialist. The *Handbook* states:

The main qualification for self-enrichment teachers is expertise in their subject area, but requirements may vary greatly with both the type of class taught and the place of employment. In some cases, a portfolio of one's work may be required. For example, to secure a job teaching a photography course, an applicant would need to show examples of previous work. Some self-enrichment teachers are trained educators or other professionals who teach enrichment classes in their spare time. In many self-enrichment fields, however, instructors are simply experienced in the field, and want to share that experience with others.

The *Handbook* does not convey that a bachelor's degree in a specific specialty is required for a recreation leader or an activity specialist in a nursing home; it states:

Educational requirements for recreation workers range from a high school diploma—or sometimes less for those seeking many summer jobs—to graduate degrees for some administrative positions in large public recreation systems. Full-time career professional positions usually require a college degree with a major in parks and recreation or leisure studies, but a bachelor's degree in any liberal arts field may be sufficient for some jobs in the private sector. . . .

Thus, based on the *Handbook's* information and the evidence in the record, 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 the normal minimum requirement for entry into the particular position.

The submitted job postings do not 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. None of the job postings are from employers that are similar in nature to the petitioner, a small residential care facility. Florida Institute for Neurologic Rehabilitation, Inc. provides rehabilitation, education, and vocational services to children and adult survivors of brain injury. TheraCare provides rehabilitative, developmental, and educational services within five boroughs of New York. Overlake Hospital is a hospital. Further, there is no evidence to establish that the limited number of postings in the record are representative of recruiting and hiring practices common to the industry. For these reasons, the job postings fail to establish 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 a combination of those of a self-enrichment teacher and a recreation leader or an activity specialist in a nursing home. According to the *Handbook*, these occupations do not require a baccalaureate degree in a specific specialty.

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. The proposed duties resemble those of a self-enrichment teacher and recreation leader or an activity specialist, and the *Handbook* relates that these occupations do not require knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific field of study. Accordingly, the petitioner fails to establish the fourth criterion at 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 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.