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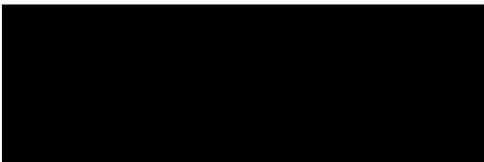


FILE: EAC 02 119 52767 Office: VERMONT SERVICE CENTER Date: MAR 30 2006

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, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 language school that seeks to employ the beneficiary as an English teacher. The petitioner 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 does not qualify as a specialty occupation. On appeal, the petitioner submits a brief stating that the offered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 are 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) the 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) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as an English teacher. Evidence of the beneficiary’s duties includes the Form I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would spend 90 per cent of her time teaching students English as a second language, and 10 per cent of her time translating documents and other materials from Polish to English.

The petitioner states that it requires a minimum of a bachelor’s degree, plus either completion of an English as a second language training program or one year of teaching experience in English as a second language for entry into the proffered position.

Upon review of the record, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the offered position, or that a degree requirement is common to the industry in parallel positions among similar organizations, as asserted by the petitioner. Factors often considered by CIS when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether an industry 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 information about the duties and educational requirements of particular occupations. The majority of the duties of the proffered position fall within those noted for teachers of adult literacy, remedial and self-enrichment education. The *Handbook* notes that educators who work with adult English-language learners are usually called teachers of English as a second language (ESL) or teachers of English to speakers of other languages (ESOL). ESOL teachers help adults to speak, listen, read, and write in English, often in the context of real-life situations to promote learning. More advanced students may concentrate on writing and conversational skills or focus on learning more academic or job-related communications skills. ESOL teachers teach adults from varied cultural and educational backgrounds. The *Handbook* states that requirements for teaching adult literacy and basic and secondary education vary by State

and by program. Most State and local governments and educational institutions require that adult teachers have at least a bachelor's degree and, preferably, a master's degree. A few States require a certificate in ESOL or adult education. Teaching experience is also preferred or required. In this instance, the State of New York requires that ESOL teachers have a baccalaureate degree and have completed either an English as a second language training program or have one year of teaching experience in an English as a second language program. A degree in a specific specialty is not required. The petitioner has not, therefore, established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) with respect to the teaching responsibilities of the position.

Ten per cent of the beneficiary's duties would involve translating documents from Polish to English. The record does not describe the type or purpose of the material to be translated. There is no requirement in the *Handbook* that a translator have a degree in a specific specialty to work as a translator. The petitioner has also failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) with regard to these duties.

The petitioner states that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations, and in support of that assertion submits copies of job advertisements and a teacher handbook from a competitor company. The advertisements and the handbook indicate that a bachelor's degree is required for ESL/ESOL teachers. They do not, however, indicate that a degree in any particular discipline is required. This is consistent with the *Handbook's* statements concerning the educational requirements for the position. The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner states that it normally requires a degree for entry into the proffered position. In support of that assertion the petitioner lists 30 degreed teachers employed by it. The degrees listed for those teachers include: English; education; history; science; psychology; economics; linguistics; East Asian studies and literature; political science; philosophy; anthropology; civil engineering; communications; communicative disorders; human communicatio; Yugoslav literature and Serbo-Croat language; German; mass communications; and literature. Thus, it is clear that the petitioner does not require a degree in any specific discipline to teach at its facilities. The petitioner states, on appeal, that its teachers of advanced English courses have degrees in linguistics or TESOL, pedagogy, or education. The record does not establish, however, that these teachers are the only two teachers who teach advanced level English courses. The petitioner states that it offers nine levels of ESL courses and courses in TOEFL preparation, as well as translation services, and that each year it teaches more than 15,000 students from over 75 countries the English language. Further, 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 or 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

with a bachelor's degree could be brought into the United States to perform menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id* at 388. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The duties to be performed by the beneficiary are not so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor are the duties so complex or unique that they can be performed only by an individual with a degree in a specific specialty. The duties are routine for the position in the industry and regularly performed by individuals with education in a wide range of educational disciplines. The petitioner has failed to establish the referenced criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) or (4).

Finally, the petitioner notes that the *Dictionary of Occupational (DOT)* classifies the position as "professional and kindred." This designation does not establish that the positions classified require a degree in any specific specialty.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.