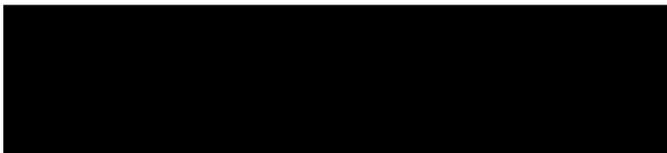


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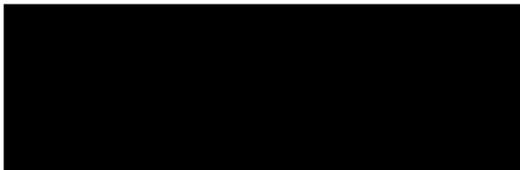
FILE: EAC 06 176 53713 Office: VERMONT SERVICE CENTER Date:

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 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 private preschool education center that seeks to employ the beneficiary as a preschool 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; (3) the director's request for evidence; (4) the petitioner's response to the director's request for evidence; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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:

An 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 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 proposed position.

In its May 9, 2006 letter of support, the petitioner stated that the duties of the proposed position will be as follows:

- Instruct children in activities designed to promote social, physical, and intellectual growth;
- Plan individual and group activities to stimulate growth in language, social, and motor skills;
- Monitor development patterns in pupils;
- Confer with parents concerning behavior and development of their children; and
- Confer with other teachers and school administrators concerning instructional methodologies and trends in early childhood development.

On appeal, the petitioner contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

In determining whether a proposed 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 Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

A review of the “Teachers—Preschool, Kindergarten, Elementary, Middle, and Secondary” job description in the *Handbook* confirms that a baccalaureate degree is not required for preschool teachers:

Requirements for public school teachers are generally higher than those for private preschool teachers. Some States require a bachelor’s degree in early childhood education, while 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.

As the *Handbook* indicates, even for public schools where the requirements are typically more stringent than in private schools, an associate degree or certification may be adequate preparation for a preschool teacher. Accordingly, the proposed position does not meet the first criterion required for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

In its response to the director's request for additional evidence, the petitioner did not submit any evidence that it is the industry standard among similar organizations to require a baccalaureate degree for parallel positions. To meet the burden of proof imposed by the regulatory language, the petitioner must establish that its degree requirement exists in parallel positions among organizations similar to the petitioner. The petitioner has not submitted documentation to support such an industry standard.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. Again, the *Handbook* reveals that the duties of the proposed position are analogous to those of preschool teachers, which do not require a degree in a specific specialty. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner. On appeal, the petitioner included a "Pre-K Teacher Job Description." However, this job description does not expand upon the duties previously submitted, or support a different finding.

After filing the appeal, the petitioner also submitted a letter dated June 18, 2007 which highlights the additional reasons as to why the beneficiary was offered the position.

The request for this particular person is being so rigorously pursued because of the unique set of qualifications she would bring to our school. The first being, that she is specifically educated and qualified in special needs. This specialty is highly sought after by the public school system, and is nearly impossible to attract into the preschool setting, even though early identification and intervention have the highest success rates. Secondly, she is bilingual and fluent in both Spanish and English. In recent years, we have had several children and parents whose only language was Spanish. This has caused many difficulties for students, parents and teachers. It negatively impacts the education available for these Hispanic students...

While these qualifications make the beneficiary a highly qualified candidate for the position, as described in the initial filing, the response to the director's request for evidence, and in the job description filed on appeal, the proffered position is that of a preschool teacher and not of a bilingual special education teacher. The additional duties that the beneficiary can perform as a bilingual special education teacher were never mentioned by the petitioner in any of the prior submissions as required duties for the position of preschool teacher. Although the duties of bilingual special education teacher might be considered so complex or unique that only an individual with a degree could perform them, the addition of such duties would constitute a material change to the petition. On appeal, 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 petitioner has not established that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

In his June 2, 2006 request for evidence, the director specifically requested documentation of degrees and evidence of employment such as pay stubs or Internal Revenue Service Forms W-2 or W-3 for other individuals currently or previously employed in this position, or in similar positions, by the petitioner. In its response to the request for evidence, the petitioner did not include the requested documentation. On appeal, the petitioner submitted copies of its employees diplomas, transcripts, and pay stubs.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated without regard to this evidence. Further, the AAO notes that these employees' degrees are not in a specific or closely related field, and do not establish this criterion.

The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Moreover, 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. To interpret the regulations any other way would lead to absurd results. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's 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 in the specialty. As previously discussed, the *Handbook* indicates that private employers do not normally require a baccalaureate degree in a specific specialty for preschool teachers, and no evidence has been submitted to demonstrate that the duties of the proposed position are more specialized and complex than those of other preschool teachers without a baccalaureate degree in a specific field. Thus, the proposed position does not qualify for classification specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a

specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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.