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Services

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FILE: SRC 05 185 50930 Office: TEXAS SERVICE CENTER Date: FEB 28 2007

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. 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 for profit organization that provides computer software services and supplemental educational services. The Form I-129 indicates it employs five personnel. The petitioner seeks to employ the beneficiary to teach elementary and preschool subjects. Accordingly, 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 record includes: (1) the June 16, 2005 Form I-129 and supporting documents; (2) the director's July 14, 2005 request for further evidence (RFE); (3) the petitioner's undated letter and supporting documentation in response to the director's RFE; (4) the director's October 25, 2005 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On October 25, 2005, the director denied the petition determining that the petitioner had failed to establish that the proffered position is a specialty occupation. On appeal, the petitioner submits a statement and attachments.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 proffered position.

On the Form I-129 and the letter in support of the petition, the petitioner indicated that the proffered position is that of a teacher and that the duties comprise the following:

Teach one or more subjects to students in supplemental education facilities operated by [the petitioner]. Teachers primarily teach Math & Science subjects for K-12 children. Instructs students, using various teaching methods, such as lecture and demonstration, and uses audiovisual aids and other material to supplement presentations. Prepare course objectives and outline for course of study following curriculum guidelines or requirements of state and school. Assign lessons and corrects homework. Administer tests to evaluate pupil progress, record results, and issues reports to inform parents of progress. Keep attendance records. Maintains discipline in classroom. Meet with parents to discuss student progress and problems. Participate in faculty and professional meetings, educational conferences, and teacher training workshops. Perform related duties, such as sponsoring one or more activities or student organizations, assisting pupils in selecting course of study, and counseling student in adjustment and academic problems. May be identified according to subject matter taught. May be required to hold certification from state.

In an undated response to the director's October 25, 2005 RFE, the petitioner indicated:

- The job requirement does not require authorization from state or federal agencies.
- K-12 children will attend the center for enhancing or mastering Math.
- There will not be any classes per say [sic]. The child comes at his own free time and completes the class work (In Work sheet method). The child comes for an hour at the time specified by the teacher for one-on-one tutoring.
- Currently we are teaching Math. Science will be taught in the near future.
- Please refer to the different aspects of [the petitioner] above which explains in detail the mode of teaching.
- The teacher will work at [REDACTED] and also at [REDACTED]

- There are no certification requirements for either location.

The petitioner noted that it is "in the business of providing Supplement Education. We are not a School." The petitioner also stated that it needed trained teachers who have a bachelor's degree in math or science and a bachelor's degree in education. The petitioner further provided job advertisements for teachers from: (1) the Sylvan Learning Centers indicating that it required teachers to have a teaching certificate and a bachelor's degree in an unspecified discipline; (2) the Huntington Learning Center indicating it required its teachers to have a bachelor's degree in an unspecified discipline and sometimes required a teaching certificate; and, (3) Kaplan Test Prep and Admissions indicating the education level of its teachers should be a bachelor's degree.

The petitioner also submitted a list of teachers that it currently employed indicating that each teacher had a bachelor's degree in education, among other degrees. The petitioner provided an evaluation for each of the seven teachers summarizing and evaluating their education to be the equivalent of a bachelor's degree in education among other degrees. The record does not include these individuals' diplomas or original transcripts.

On October 25, 2005, the director denied the petition determining that the offered position resembled the position of a "tutor" and that the Department of Labor's *Occupational Outlook Handbook (Handbook)* did not identify educational requirements for the occupation of a tutor. The director determined that a tutoring position is akin to the position of a vocational teacher, and that many states license vocational teachers without a bachelor's degree. The director further determined that the petitioner had not established that industry standards for the proffered position required a bachelor's degree or that the petitioner's self-imposed standard made the occupation a specialty occupation. The director concluded that the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner asserts that the same qualifications that are required for public school teachers are also required for teachers who work in private schools but that licensure is not necessary for private school teachers. The petitioner attaches the same job advertisements as submitted in response to the director's RFE, as well as, additional advertisements from: (1) Aspira Inc. of Illinois indicating it requires a bachelor's degree in education or related field as a minimum for a math and science teacher; (2) Davidson Tutoring indicating it requires a valid California teaching credential and proficiency in all levels of the incumbent's subject; and (3) Fusion Learning Center that indicates the ideal candidate would have a bachelor's degree or higher in education, math, science, or related field. The petitioner asserts that these advertisements show that it is a common industry practice to hire teachers with a bachelor's degree in supplemental education programs. The petitioner contends that if the proffered position had been classified as a teacher as it had requested, the position would qualify as a specialty occupation.

The petitioner's assertions are not persuasive. The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. As the director observed the 2006-2007 *Handbook* does not discuss the occupation of a private school teacher providing a supplementary education; however, the *Handbook* discusses teachers who teach self-enrichment subjects.

The *Handbook* states: "Self-enrichment teachers provide instruction in a wide variety of subjects that students take for self-enrichment or self-improvement." The AAO finds that supplemental courses in math or science provided by private schools and taken voluntarily by the student are courses that fall within the domain of self-improvement subjects. The *Handbook* reports: "[t]he 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." Thus, the *Handbook* does not establish that a baccalaureate degree in a specific specialty is necessary for entry into the described occupation. The record does not provide other evidence that demonstrates the proffered position requires the attainment of a bachelor's degree or its equivalent in a specific specialty. The petitioner has not established that the duties of the proffered position satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether 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. To determine whether the petitioner's degree requirement is shared within its industry, CIS often considers 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 this matter as observed above, the *Handbook* does not report that a baccalaureate degree or higher is required for the proffered position. With regard to parallel positions in similar private schools, the petitioner has submitted several job advertisements for teachers at other supplemental learning centers. The majority of the advertisements indicate that a bachelor's degree is required but do not specify that the degree must be in a specific discipline; only two advertisements out of ten indicate that a degree in education or math or science is required. When only a degree of generalized title or a range of degrees is required to perform a job, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). Accordingly, the record does not demonstrate that the proffered position is a specialty occupation pursuant to the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted no documentation that the proffered position involves duties seen as either unique or complex so that only an individual with a degree in a specific specialty could perform them. Therefore, the record does not demonstrate that the proffered position's complexity or unique nature distinguishes it from similar but non-degreed employment under the second prong of the criterion. In this matter, a baccalaureate or higher degree or its equivalent in a specific discipline is not the normal minimum requirement for entry into the position of a teacher at a private learning center. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning now to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the AAO finds that the petitioner has not submitted sufficient evidence to establish that it normally requires a bachelor's degree or its equivalent for the proffered position. The AAO acknowledges the petitioner's claim that seven of its teachers have attained

foreign degrees that have been evaluated as equivalent to a bachelor's degree in education among other disciplines. However, the petitioner has not provided independent evidence that it employs the seven teachers it references. The AAO observes that the Form I-129 indicates that the petitioner had only five employees when the petition was filed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the record does not include: evidence that clarifies when the petitioner employed the teachers referenced, if at all; original copies of the employees' foreign transcripts; the teachers' foreign diplomas; or payroll stubs, tax records, or other evidence substantiating that the petitioner actually employs or employed these individuals. 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)).

Further, the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. 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. If CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. In this matter, the petitioner has not submitted evidence demonstrating that the job duties associated with the proffered position require the theoretical and practical application of a body of highly specialized knowledge, and the 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 petitioner has not established the proffered position as a specialty occupation under the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) which requires that the petitioner establish that 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. The petitioner does not submit a description of any specialized or complex responsibilities that would distinguish the proffered position from that of a self-improvement/enrichment teacher; employment the *Handbook* indicates does not impose a degree requirement. Without such evidence, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the record does not demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. The record contains the beneficiary's diploma from Bangalore University certifying the beneficiary's degree in education and a copy of a degree in science issued by the University of Calicut, as well as partially legible transcripts from both universities. However, the record does not contain an evaluation of the beneficiary's foreign degrees. The record does not contain sufficient evidence

demonstrating that the beneficiary is eligible to perform the duties of a specialty occupation. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Upon review of the totality of the record, the record fails to reveal any evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. The record also fails to establish that the beneficiary is qualified to perform the duties of a specialty occupation. Therefore, the AAO will not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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