

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the petition remanded to the director for entry of a new decision.

The petitioner is an educational facility that seeks to employ the beneficiary as a toddler curriculum instructional coordinator. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant classification as a 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 on the basis of her determination that the petitioner had failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

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 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The term "employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

In reaching her determination that the petitioner would not act as the beneficiary's employer, the director looked to the petitioner's 2004 income tax return, which stated that the petitioner had not paid any salaries or wages in 2003. Accordingly, the director entered the following finding:

From this evidence, it would appear that the beneficiary would be providing her services to the petitioner as an independent contractor. By definition, independent contractors are not employees of the organizations for which they provide their services. Since the petitioner has provided no independent objective evidence to the contrary, they have not demonstrated that they will be employing the beneficiary in a specialty occupation.

In its September 22, 2005 letter in support of its appeal, the petitioner addresses the director's finding:

For the last several years we have outsourced our human resource and payroll functions to a company called Paychex. This arrangement is typical in the industry and helps us to manage our business affairs more efficiently and effectively. This also allows our employees to receive group rate premiums for insurance benefits. Paychex handles all taxes and administrative matters for our employees. Paychex pays all federal and state taxes for the

employees and we reimburse Paychex for the payment of these taxes. Paychex charges us a fee for performing these services.

Paychex files all employment tax forms for us including the 940 and 941 federal tax forms. Every pay period, we reimburse Paychex for all wages and taxes paid on our behalf. Our profit and loss statement shows the wages and taxes paid to Paychex in the expense line item named Payroll Expenses. A copy of a recent profit and loss statement is attached as "Exhibit 4." Any amounts paid to independent contractors are included in the expense line item named Independent Contractors. Therefore, we distinguish between our employees and independent contractors.

According to the petitioner's profit and loss statement for the period January 1, 2005 through September 21, 2005, the petitioner had paid \$534,076.19 in payroll expenses.

The AAO finds that the petitioner has overcome the director's concerns regarding the existence of an employer-employee relationship, and finds that the petitioner has established itself as an "employer" under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(ii).

The next issue to be discussed is whether the petitioner has established its proposed position as a specialty occupation. The director did not make a determination on this issue. 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:

[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 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.

According to the petitioner’s July 26, 2005 letter of support, the duties of the proposed position would include planning, directing, implementing, and controlling a toddler curriculum as part of the petitioner’s “Skills and Abilities Project” to address toddlers’ developmental skills in Spanish, art, independence, music, science, and motor skills, in accordance with Montessori principles; coordinating, mentoring, and supervising the implementation of this curriculum with specialty teachers in all areas; supervising the teachers and assistants; instructing the teachers and assistants, in accordance with internal regulations and the beneficiary’s own analytical and decision-making authority, so that they reach their development and evaluation goals; supervising the curriculum as it is implemented in the classroom to ensure that the children for whom the program is being implemented meet or exceed Montessori educational expectations; managing and directing the curriculum development project, using the beneficiary’s specialized knowledge, skills, and language proficiency, so as to provide the petitioner with long-term goals; and performing other duties according to the petitioner’s needs.

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.

The 2006-2007 edition of the *Handbook* offers the following information regarding the duties and responsibilities of instructional coordinators:

Instructional coordinators, also known as curriculum specialists, staff development specialists, or directors of instructional material, play a large role in improving the quality of education in the classroom. They develop curricula, select textbooks and other materials, train teachers, and assess educational programs in terms of quality and adherence to regulations and standards. They also assist in implementing new technology in the classroom. Instructional coordinators often specialize in specific subjects, such as reading, language arts, mathematics, or social studies.

Instructional coordinators evaluate how well a school or training program’s curriculum, or plan of study, meets students’ needs. They research teaching methods and techniques and develop procedures to determine whether program goals are being met. . . .

Many instructional coordinators plan and provide onsite education for teachers and administrators. They may train teachers about the use of materials and equipment or help them to improve their skills.

The totality of the evidence in this proceeding, including detailed information and documentation regarding the proposed duties, the petitioner's business operations, tax information, and the petitioner's organizational structure, establishes that the duties of the proposed position are substantially similar to those of an instructional coordinator as described in the *Handbook*. According to the *Handbook*, such a position requires at minimum bachelor's degree, though most employers prefer a master's degree. Therefore, the proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The record of proceeding as currently constituted, however, does not permit the AAO to approve the petition at this time. Although the director stated that she was "satisfied that the beneficiary attained the equivalent of a formal baccalaureate degree in her field of study," the AAO disagrees with this assessment.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C), as described above. The beneficiary did not earn a degree from a United States institution of higher education, so she does not qualify under the first criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. According to an evaluation performed by the Global Education Group, dated July 11, 2002, the beneficiary's foreign education is not equivalent to a degree. Rather, it is equivalent to "1.5 years of undergraduate study in Early Childhood Education and related subjects at a regionally accredited university in the United States."

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so he does not qualify under the third criterion.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

It is this fourth criterion under which the petitioner must classify the beneficiary's work experience.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under this criterion is determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(D). The record contains four evaluations of the beneficiary's work experience: (1) the first, dated July 11, 2002 is from the Global Education Group; (2) the second, dated August 9, 2005, is from [REDACTED] Director of E.L.I.T.A., Inc.; (3) the third, dated August 4, 2005, is from [REDACTED] a research assistant at Purdue University; and (4) the fourth, dated August 11, 2005, is from [REDACTED], Professor and Chair of Psychology at Rollins College, located in Winter Park, Florida.

The first evaluation is deficient for two reasons. First, the evaluation is defective because a credentials evaluation service may evaluate educational credentials only. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Further, there has been no showing that the evaluator [REDACTED], has the authority to grant college-level

credit for training and/or experience at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Nor has there been a demonstration that [REDACTED], or [REDACTED] possess the authority to grant college-level credit for training and/or experience at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. The AAO notes that [REDACTED] is a professor and department chair at Rollins College, but no evidence has been submitted to demonstrate that she possesses such authority or that Rollins College has such a program. The AAO reviewed Rollins College's website¹ for this information, but was unable to confirm from the website whether such a program exists at that institution and whether [REDACTED] has the authority to grant college-level credit.

Accordingly, the beneficiary does not qualify under the first criterion.

No evidence has been submitted to establish, nor has the petitioner contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that the beneficiary submit the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under the third criterion. As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary is unqualified under this criterion because the Global Education Group's evaluation did not find the beneficiary's foreign education equivalent to a degree. Rather, it found her education equivalent to "1.5 years of undergraduate study in Early Childhood Education and related subjects at a regionally accredited university in the United States." In a similar vein, the evaluations from [REDACTED], and [REDACTED] pertained to the beneficiary's work experience, not her degree.

No evidence has been submitted to establish, nor has the petitioner contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation²;

¹ See <http://www.rollins.edu> (accessed December 6, 2006).

² *Recognized authority* means a person or organization with expertise in a particular field, special skills

- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The petitioner's submission traces the beneficiary's work experience from April 1970 onward. According to the Global Education Group evaluation, the beneficiary's degree is equivalent to 1.5 years of college study. Thus, the beneficiary lacks 2.5 years of college study. As such, the AAO's next line of inquiry is therefore to determine whether at least seven and a half years of this work experience included the theoretical and practical application of specialized knowledge required by the specialty, whether it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the specialty, and whether the beneficiary achieved recognition of expertise in the specialty occupation as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The AAO finds that the record does demonstrate that at least seven and a half of the beneficiary's previous work experience included the theoretical and practical application of specialty knowledge required by the specialty occupation and that it was gained while working with peers, supervisors, or subordinates who held degrees. However, the record does not demonstrate that the beneficiary achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), as discussed *infra*.

First, the petitioner has not established that [REDACTED] or [REDACTED] are "recognized authorities," as defined by the regulation, so their assessments do not qualify the beneficiary. Thus, the beneficiary is not qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i).

Although the petitioner has submitted evidence that the beneficiary is a member of the National Association for the Education of Young Children, no information has been submitted regarding this organization, how one becomes a member, or whether this organization is directly related to the proposed position. Moreover, from the information submitted it appears that membership is obtained through the simple payment of a \$75 membership fee. The petitioner has not established that the beneficiary is qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(ii).

or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

No information has been submitted to establish that published material by or about the alien has appeared in professional publications, trade journals, books, or major newspapers, so the beneficiary is not qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(iii).

Nor has the petitioner established that the beneficiary is licensed or registered as a toddler curriculum instructional coordinator in a foreign country, so the beneficiary is not qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(iv).

Finally, the petitioner has not submitted evidence of achievements by the beneficiary which a recognized authority has determined to be significant contributions to the field of the specialty occupation. Again, the petitioner has not established that [REDACTED], or [REDACTED] are "recognized authorities," as defined by the regulation, so their assessments do not qualify the beneficiary under this criterion. Thus, the beneficiary is not qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(v).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Accordingly, the record of proceeding, as presently constituted, does not establish that the beneficiary qualifies to perform the duties of this specialty occupation. Therefore, the director's decision will be withdrawn and the matter remanded for the entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of this specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 9, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.