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U.S. Citizenship and Immigration Services

[redacted]

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FILE: SRC 04 145 51227 Office: TEXAS SERVICE CENTER Date: JAN 29 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

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 service center director 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 preschool, and a before and after school child care facility that seeks to employ the beneficiary as a Lead Teacher. The petitioner seeks 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 determined that the proffered position is not a specialty occupation. The petition was denied accordingly. On appeal counsel submits further documentation and asserts that the proffered position qualifies as a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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, a 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.

U.S. 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 petitioner's letter of support; (3) the director's request for additional evidence (RFE); (4) the petitioner's response to the director's RFE request; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner seeks the beneficiary's services as a lead teacher. Evidence of the beneficiary's duties include: the Form I-129 petition; the petitioner's letter of support; the petitioner's response to the director's RFE; and counsel's brief on appeal and supporting documentation. According to this evidence, the proffered position consists of the following duties:

> Greeting parents and children daily;
> Completing 3-month lesson plans for submission to curriculum coordinator;
> Working with the Letter People curriculum to get all teaching tool supplies ready on a daily basis;
> Following the letter people curriculum in math, science, language and arts to make sure children are working to be ready for the school age programs;
> Distributing job duties to assistants to make sure the classroom runs smoothly at all times;
> Setting up parent-teacher conferences twice a year to discuss progress of their child;
> Making sure homework goes home at least twice a week, and encouraging children to bring it back to keep up with child's progress.

The petitioner asserts that the proffered position requires teaching experience, and a baccalaureate degree in education from an accredited college. The petitioner asserts that the beneficiary's bachelor's degree in Home Economics qualifies the beneficiary for the proffered position.

The director found that a baccalaureate degree in a specific specialty was not required for entry into the described position. The director found that the described position was most closely related to that of a preschool teacher, as described in the U.S. Department of Labor's (DOL), Occupational Outlook Handbook *(Handbook.)*. The director referenced position requirement information contained in the *Handbook,* which indicates that a baccalaureate or higher degree, or its equivalent is not normally the minimum requirement for entry into a preschool teacher position. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner asserts through counsel, that the proffered position is not a preschool teacher position, and that the position qualifies as a specialty occupation. Counsel points out that the petitioner's facility (Kids R Kids) accepts preschool, and school-aged children up to twelve years old. Counsel further asserts that the proffered position, "requires the dissemination of knowledge to children in parcels which the children can easily comprehend," and that, "proper teaching requires the teacher to understand the materials and to have the organizational skills to prepare and follow lesson plans." Counsel indicates that "a bachelor's degree is standard in the field of early childhood education" and that the petitioner, "hires Lead Teachers with bachelor's degrees so that they have a proper understanding of early childhood development and learning processes." In addition, counsel asserts that:

> The Dictionary of Occupational Titles assigns an SVP of 7 to both kindergarten and preschool teachers. The U.S. Department of Labor Employment and Training Administration assigns Kindergarten Teachers to Job Zone 4 . . . . Job Zone 4 has a Specific Vocational Preparation level range of 7 to 8. . . . An SVP of 7-8 means that over two (2) years up to and including ten (10) years of training and/or education is required. An SVP of 7-8 is prima facie evidence that a position qualifies as a specialty occupation.

Upon review of the record, the AAO finds that the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A), and that the proffered position is not a specialty occupation.

The AAO turns first to 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; and a degree requirement is common to the industry in parallel positions among similar organizations, or in the alternative, 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*, 764 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

On appeal, counsel states that the duties of the proffered position parallel those of a kindergarten or preschool teacher, as discussed in the Department of Labor's *Dictionary of Occupational Titles (DOT),* and counsel provides a copy of the pertinent section of this document, which indicates that the *DOT* assigns a Specific Vocational Preparation (SVP) rating of 7-8 to the occupation of kindergarten teacher. He also offers a comparison of the proffered position's duties with those identified by the *DOT.*

The AAO notes first that the *DOT* information provided relates to a kindergarten teacher position. The position described by the petitioner resembles a preschool, or before-and-after school teacher assistant position. Moreover, the DOT information provided by counsel reflects that an individual may, in some cases, qualify for a kindergarten teaching position without a four-year bachelor's degree. Furthermore, the AAO finds that the *DOT* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The SVP rating assigned by the *DOT* is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. Accordingly, the *DOT* information contained in the record does not establish the proffered position as a specialty occupation under the first criterion.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* does not indicate that preschool teachers and day care center teacher's assistants positions, the positions most closely related to the position described in the present matter, require a baccalaureate degree in a specific specialty. A review of the 2006-2007 edition of the *Handbook* reflects on page 229, that the position of preschool teacher does not require a bachelor's or higher degree, and the *Handbook* indicates on page 220, that the educational requirements for teacher's assistants range from a high school diploma to some college training. Thus, the *Handbook* does not establish that the proffered position requires a bachelor's degree in a specific specialty.

The record also contains no evidence to establish the second criterion contained in 8 C.F.R. § 214.2(h)(4)(iii)(A) - that a degree requirement is common to the industry in parallel positions among similar organizations. The AAO notes further that the record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position.

In addition, the record fails to demonstrate that the proffered position duties are so complex or unique that they can only be performed by an individual with a bachelor's degree. Although counsel claims that the duties and level of responsibility of the proffered position's duties exceed those of a preschool teacher, the submitted evidence fails to support counsel's claim. The evidence provided by the petitioner clearly reflects that the petitioner provides preschool and before-and-after school care to elementary school aged children; that the petitioner is a not a standard public school or licensed private educational school; and that the petitioner does not provide a state-mandated curriculum. The AAO finds that none of the submitted evidence establishes that the proffered position is a teaching position either at the kindergarten level or above. The evidence reflects that the petitioner provides all-day preschool services to preschool-aged children, and before-and-after school care and educational tutoring, or teacher's assistant aid, to elementary school-aged children. Based on the foregoing, the petitioner has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) or (*2*).

The petitioner has also failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which states that the employer normally requires a degree or its equivalent for the position. The petitioner submits a list of 12 lead teachers and the type of educational degree each holds. The AAO notes that 5 of the 12 have degrees in education or related fields; the remaining 7 have degrees in a variety of fields such as economics, English sociology and home economics. As noted above, in order to qualify as a specialty occupation, a position must require a baccalaureate degree in a specific field. Moreover, the AAO notes that the petitioner has 41 employees, and lists the degrees for just these 12 lead teachers. No other documentation of record indicates the positions of the remaining 29 employees, or if any of them are lead teachers. The petitioner has not established that it requires a degree in a specialty for all its lead teacher positions. Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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. As previously discussed, the duties of the proffered position resemble those of a preschool teacher and/or a teacher's assistant, as described in the *Handbook*. The *Handbook* clearly reflects that a bachelor's degree in a specific specialty is not required for these positions. The petitioner has thus failed to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As previously discussed, the petitioner failed to establish that the proffered position requires the performance of specialized or complex duties. The petitioner has thus also failed to establish the fourth criterion under 8 C.F.R. § 214.2(h)(4)(iii)(A) whereby it is required to show that the nature of the specific duties is so specialized

and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner in the present matter has not sustained that burden. The appeal will therefore be dismissed.

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