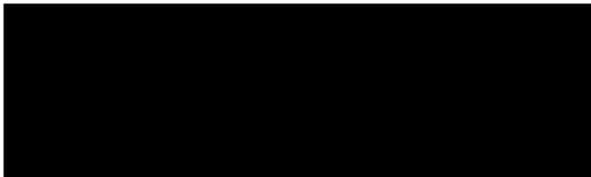


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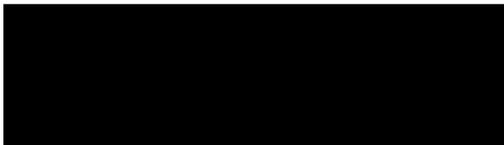
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FILE: EAC 06 142 50721 Office: VERMONT SERVICE CENTER Date: **NOV 06 2007**

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, Chief
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 preschool learning and childcare center. It seeks to employ the beneficiary as a preschool 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, counsel submits a brief and additional information 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 requests for additional evidence; (3) the petitioner's response to the director's requests; (4) the director's denial letter; and (5) the Form I-290B with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a preschool teacher. Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's responses to the director's requests for evidence. According to this evidence the beneficiary would:

- Instruct students individually and in groups, adapting teaching methods to meet students' varying needs and interests;
- Observe and evaluate children's performance, behavior, social development, and physical health;
- Teach basic skills such as color, shape, number and letter recognition, personal hygiene, and social skills;
- Demonstrate activities to children;
- Confer with other staff members to plan and schedule lessons promoting learning and following approved curricula;
- Confer with parents or guardians, other teachers, counselors, and administrators to resolve student's behavioral and academic problems;
- Establish and enforce rules of behavior, and policies and procedures to maintain order among students;

- Establish clear objectives for all lessons, units, and projects, and communicate those objectives to children;
- Guide and counsel students with adjustment and/or academic problems, or special academic interests;
- Identify children showing signs of emotional, developmental, or health-related problems, and discuss them with supervisors, parents or guardians, and child development specialists;
- Instruct and monitor students in the use and care of equipment and materials, in order to prevent injuries and damage;
- Maintain accurate and complete student records, and prepare reports on children and activities, as required by laws, district policies and administrative regulations;
- Meet with other professionals to discuss individual students' needs and progress;
- Meet with parents and guardians to discuss their children's progress, and to determine their priorities for their children and their resource needs;
- Organize and label materials and display children's work in a manner appropriate for their sizes and perceptual skills;
- Organize and lead activities designed to promote physical, mental, and social development such as games, arts and crafts, music and storytelling;
- Plan and conduct activities for a balanced program of instruction, demonstration, and work time that provides students with opportunities to observe, question, and investigate;
- Plan and supervise class projects, field trips, visits by guests, or other experiential activities, and guide students in learning from those activities;
- Prepare and implement remedial programs for students requiring extra help;
- Prepare children for later grades by encouraging them to explore learning opportunities and to persevere with challenging tasks;
- Prepare for assigned classes and show written evidence of preparation upon request of immediate supervisors;
- Prepare materials, classrooms, and other indoor and outdoor spaces to facilitate creative play, learning and motor-skill activities, and safety;

- Prepare objectives and outlines for courses of study, following curriculum guidelines or requirements of states and schools;
- Prepare, administer and grade tests and assignments to evaluate children's progress;
- Provide a variety of materials and resources for children to explore, manipulate, and use, both in learning activities and in imaginative play;
- Read books to entire classes or to small groups;
- Supervise, evaluate, and plan assignments for teacher assistants and volunteers;
- Administer standardized ability and achievement tests, and interpret results to determine children's developmental levels and needs;
- Attend professional meetings, educational conferences, and teacher training workshops in order to maintain and improve professional competence;
- Attend staff meetings, and serve on committees as required;
- Collaborate with other teachers and administrators in the development, evaluation, and revision of kindergarten programs;
- Involve parent volunteers and older students in children's activities, in order to facilitate involvement in focused, complex play;
- Provide disabled students with assistive devices, supportive technology, and assistance accessing facilities such as restrooms;
- Select, store, order, issue and inventory classroom equipment, materials and supplies; and
- Use computers, audiovisual aids, and other equipment and materials to supplement presentations.

The petitioner requires a minimum of a bachelor's degree in early childhood education or a related field for entry into the proffered position.

Upon review of the record, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for preschool teachers in a private school setting. The *Handbook* notes that all 50 States and the District of Columbia require public school teachers to be licensed. Licensure, however, is not required for teachers in private schools. All States require public school general education teachers to have a bachelor's degree and to have completed an

approved teacher training program with a prescribed number of subject and education credits, as well as supervised practice teaching. The education and teacher training requirements, however, do not apply to teachers in private school settings. Thus, there is no requirement that the beneficiary have a license, teacher training, or a degree in any specific specialty to enter into the proffered position. The petitioner has failed to establish the criterion listed at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner asserts that a degree requirement is common to the industry in parallel positions among similar organizations, and in support of that assertion submits the following:

- Copies of several job advertisements for preschool teachers;

The job advertisements submitted do not establish the petitioner's assertion. Two of the advertisements require a bachelor's degree in a specified field of study; four state that a degree is preferred, but not required; one prefers a bachelor's or associate's degree; four state that a degree is required but do not indicate that the degree need be in any particular educational discipline; two state that a degree is required, or, the applicant must be pursuing a degree; and one requires a degree because of applicable state law. The advertisements clearly indicate that a degree in a specific educational discipline is not a standard industry requirement for preschool teachers in a private setting.

- A study by the National Institute For Early Education Research (NIEER);

The NIEER is a study of high-quality pre-kindergarten programs in five states, and reports that children attending state-funded pre-kindergarten programs in those states gained significantly in educational development. The study noted that a common element across those programs was that all, or nearly all teachers in those states teaching in the state funded pre-kindergarten programs, have a four-year college degree with an early childhood specialization. The study does not, however, state that a baccalaureate level education, in a specific educational discipline, is common in the pre-school teacher industry (private sector). The study does not establish the petitioner's assertion.

- Government Education and Human Services Cluster;

This document indicates that kindergarten teachers in public schools initially need a bachelor's degree, followed by a master's degree within ten years. The document does not state that a degree is required for pre-school teachers in a private setting. The document does not establish the petitioner's assertion.

- "Critical Facts About Young Children and Early Childhood Programs in the United States" - National Association for the Education of Young Children (NAEYC);

The NAEYC indicates that 30 states do not require early childhood teachers to have any specialized training prior to working with young children in child care centers. Further, NAEYC reports that: 33% of child-care center teachers have a bachelor's degree or more; 47% have some college

(including an associate's degree); and 20% have a high school education or less. The information provided by NAEYC indicates that a baccalaureate level education is not required nationally for pre-school teachers in a private setting.

The petitioner has failed to establish that a degree requirement is common to the industry in parallel positions among similar organizations as set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner asserts that it normally requires a degree in a specific specialty for entry into the proffered position. In support of that assertion, the petitioner provided the names of present and former employees who perform, or have performed, the duties of the proffered position, along with copies of their educational credentials. The petitioner lists [REDACTED] as presently working as a "lead teacher" and submitted an untranslated copy of her foreign diploma. The petitioner did not submit an evaluation of [REDACTED] foreign degree from a reliable credentials evaluation service to establish that it is equivalent to a United States bachelor's degree earned at an accredited college or university. The petitioner also listed two former lead teachers stating that they both held bachelor's degrees. Likewise, both diplomas submitted for these individuals were untranslated foreign documents that were unsupported by a credentials evaluation from a reliable credentials evaluation service to establish that the degrees are equivalent to a United States degree from an accredited college or university. Moreover, for the three lead teachers presently holding the position, it does not appear that the petitioner required a degree in a specific field, as one is listed as a Bachelor of Business Administration, the second as Bachelor of Education, and the third as Bachelor of Arts. The current teacher holds an associate degree; the previous teacher also held an associate degree.¹ 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. 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 menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the duties of the proffered position, as described by the petitioner, do not appear to be so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor do the duties appear to be so complex or unique that they can only be performed by individuals with a degree in a specific specialty. The evidence presented by the petitioner does not establish that the duties of the proffered position are any more specialized, complex or unique than those normally performed by preschool teachers in the industry who are not required to possess a baccalaureate level education. The duties to be performed by the beneficiary are routinely performed in the industry by individuals who do not have a baccalaureate level education.

¹ Both the petition and the LCA indicate that the position is a preschool teacher. Only in response to the requests for evidence did the petitioner state that the position is for a lead teacher.

The petitioner references the *Dictionary of Occupational Titles (DOT)* position description for kindergarten teachers with its associated SVP rating to establish the position as a specialty occupation. Neither the *DOT's* SVP rating nor a Job Zone category indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

Finally, the petitioner provides documentation to establish that similar petitions have been approved for H-1B status. This reference will not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the entire record of proceedings in the petitions referred to by counsel. Accordingly, no comparison of the positions can be made. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. In the present matter, the petitioner has offered the beneficiary a position as a preschool teacher. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error and a violation of 8 C.F.R. § 214.2 paragraph (h).

The petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), or under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that the offered position meets any of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 not sustained that burden and the appeal shall accordingly be dismissed.

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