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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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SEP 28 2007

FILE: EAC 05 108 53777 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 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 private preschool. 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 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 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 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 response to the director's request for evidence. According to this evidence the beneficiary would:

- Attend staff meetings and mandatory training classes;
- Attend professional workshops to accumulate a minimum of three hours credit;
- Attend parent conferences;
- Support and encourage the philosophy of the Center daily when representing the Center in the community;
- Conduct daily teacher directed activities and discussions in accordance with the curriculum and Center policies;
- Execute activities as planned;
- Submit lesson plans to the director for approval (if requested) at least two working days prior to when the plan will take effect, revise lesson plan if necessary, and post current lesson plans;
- Justify the use of a particular material or activity in relation to the growth of a child;
- Plan for individual differences between children and treat all children equally with respect and compassion;
- Create and maintain an accepting environment that fosters self-confidence, imagination, exploration and creativity;

- Plan age appropriate activities for children in the areas of art, science, language, literature, games and movement, and music and finger plays in accordance with established curriculum;
- Be flexible in working with individuals and groups;
- Implement techniques of possible discipline and self-directed learning;
- Encourage and guide the expression of feelings and independence;
- Provide opportunities, materials and directions for sensorial education;
- Record observations of each child if requested, assess their growth, development, and behavior in relation to national norms; and
- Plan activities that provide opportunities for manipulation of various kinds of materials and be sensitive to cultural differences.

The petitioner states that it 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, the record does not reflect that there is an industry requirement that the beneficiary have a license, teacher training, or a degree in any specific specialty to enter into the proffered position. The *Handbook* notes that licensing requirements for preschool teachers in public schools varies by state. Requirements for public preschool teachers are generally more stringent 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.¹ As previously noted, private schools are generally exempt from meeting State

¹ According to the Council for Professional Recognition website (http://www.cdacouncil.org/CDA_OBT.htm), a CDA credential requires applicants to meet the following: be 18 years of age or older; have a high school diploma or GED; have 480 hours of experience working with children within the last five years; and have 120 hours of formal child care education (education may be for credit or non-credit) in the past five years. A baccalaureate level education is not required.

licensing standards. For secondary school teacher jobs, they prefer candidates who have a bachelor's degree in the subject they intend to teach, or in childhood education for elementary school teachers. There is no degree requirement, however, for preschool teachers in a private school setting. The petitioner has failed to establish the criterion listed at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner does not state that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, and offers no evidence in this regard. The petitioner has failed to establish the first prong of the criterion at 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. The record does not, however, establish this assertion. To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner did not provide this documentation. Simply going on the 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 190 (Reg. Comm. 1972)). Further, the petitioner submitted documentation detailing the qualifications for "senior staff" noting the following qualifications: must be at least 21 years old; have a high school diploma or certificate of high school equivalency; must have completed at least 90 hours in early childhood education or child development; and have at least one full year experience in a licensed child care program and in the primary age group served, or hold a CDA or an AA in early childhood education, or, a B.S. or B.A., or a master's degree from a reputable college or university. The petitioner also presented a position announcement for "senior teachers" that had been previously placed with the Maryland Department of Labor. That announcement indicates that the petitioner requires a bachelor's degree or a CDA and experience. The evidence of record does not establish that a degree in a specific specialty is normally required for the position. 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. *See id* at 388. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)

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. The petitioner has not established the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), or the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the petitioner asserts that previous agency decisions have classified the offered position as a specialty occupation. 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. 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 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.