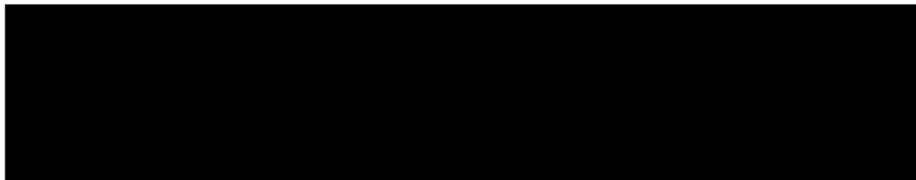




U.S. Citizenship
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Services

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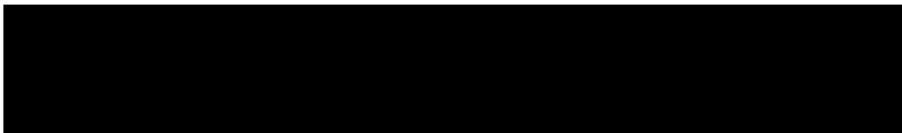
FILE: EAC 06 148 53405 Office: VERMONT SERVICE CENTER Date: FEB 08 2008

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 daycare and preschool. It seeks to employ the beneficiary as a kindergarten Montessori teacher and endeavors to classify her 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 kindergarten Montessori teacher. Evidence of the beneficiary’s duties was set forth in the Form I-129 petition and attachment. According to this evidence the beneficiary would:

- Teach children individually and in small groups;
- Guide children’s research and exploration, capitalizing on interests and excitement about subjects;
- Apply practical application of the Montessori method of education which is based on human tendencies and will help children to explore, move, share with a group, be independent and make decisions, create order, develop self-control, abstract ideas from experience, use creative imagination, work hard, repeat, concentrate and perfect one’s efforts;
- Introduce children to concepts by means of lecture, lesson, something read in a book, etc., and to process information developing understanding of concepts through work, experimentation and creation;
- Guide children to understanding, demonstrated by the ability to pass a test with confidence, to teach others, and to express with ease; and
- Teach basic skills such as color, shape, numbers and letter recognition, personal hygiene and social skills, social interaction, emotional development, sensitive periods, intelligence development, personal development, freedom-individual liberty, independence, behavioral tendencies, fantasy, reality, order, respect, point of contact, concentration, joy of learning, normalization, etc.;

The petitioner states that it requires a minimum of a bachelor’s degree in education with primary concentration or equivalent work experience as a Montessori teacher 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 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 states that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations. In support of this assertion, counsel submitted copies of several job advertisements for preschool/Montessori teachers. The advertisements required applicants to possess a bachelor's degree, but did not require the degree to be in any specific educational discipline. The petitioner also makes reference to the *Handbook's* discussion of the educational requirements for kindergarten teachers. The discussion to which the petitioner refers, however, references public school kindergarten teachers who must be licensed to work as teachers in a public school setting. The educational and licensing requirements for those teachers do not apply to private school teachers. 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. 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. In support of that assertion, the petitioner submitted documentation to establish the educational credentials of some of its past teachers. The documentation submitted, however, does not

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.

establish that any of those teachers possessed a baccalaureate level education, or experience equivalent to a bachelor's degree. The teachers had worked as preschool teachers and/or received training at various institutions. The documentation submitted does not establish, however, that their education, training, and/or experience was equivalent to a bachelor's degree earned from an accredited institution of higher learning in the United States. 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. *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 offered position are any more specialized, complex or unique than those normally performed by Montessori preschool teachers in a private daycare/preschool setting 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).

The petitioner also asserts that a previous AAO decision had 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 proceeding in the petition 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 Montessori kindergarten 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).

Finally, the petitioner asserts that the offered position's SVP rating establishes the position as a specialty occupation. Counsel's assertions are unpersuasive. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP classification does not describe how those years are to be divided among training, formal education, and experience, nor does it specify the particular type of degree, if any, that a position would require.

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.