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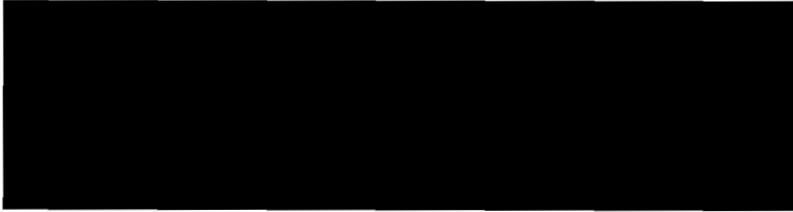
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FILE: LIN 04 157 52061 Office: NEBRASKA SERVICE CENTER Date: **MAY 29 2008**

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 nonimmigrant visa petition was denied by the director, who certified his decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The petitioner operates early childhood learning centers in the States of Kansas and Missouri and claims to have 44 employees. The petitioner seeks to employ the beneficiary as a preschool teacher. The petitioner, therefore, 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 is not a specialty occupation.

The record of proceeding before the AAO contains: (1) the May 7, 2004 Form I-129 and supporting documents; (2) the director's May 18, 2004 request for evidence (RFE); (3) counsel's July 13, 2004 response to the director's RFE and supporting documents; (4) the director's July 27, 2004 approval; (5) the director's December 21, 2004 notice of intent to revoke approval (NOIR); (6) counsel's January 14, 2005 rebuttal to the NOIR; (7) the director's August 3, 2005 decision revoking approval of the petition; (8) counsel's September 16, 2005 untimely appeal; (9) the director's October 16, 2005 notice that the untimely appeal would be treated as a motion; (10) the director's February 14, 2006 motion decision; (11) counsel's March 16, 2006 Form I-290B and brief in support of the appeal; (12) the AAO's June 4, 2007 decision withdrawing the director's August 3, 2005 decision and remanding the petition to the director for entry of a new decision; (13) the director's June 20, 2007 NOIR; (14) counsel's July 18, 2007 rebuttal to the NOIR; (15) the director's August 2, 2007 decision denying the petition, and certification to the AAO; and (16) counsel's September 3, 2007 brief for consideration by the AAO. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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:

An 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) consistently interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner seeks the beneficiary’s services as a preschool teacher. In a letter dated April 16, 2004, the petitioner’s operations manager described the proposed duties as follows:

Instruct preschoolers in activities designed to promote social, physical, and intellectual growth; plan individual and group activities to stimulate growth in language and social and motor skills; assess the special needs of individual students and groups; provide educational guidance and mentoring to teacher assistants and aides; perform the daily maintenance of a fully equipped classroom; maintain discipline; and keep attendance records.

The director found that the proposed preschool teacher duties do not require a bachelor’s degree. Citing the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific

specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In his September 3, 2007 brief, counsel asserts, in part, that the nature of the proffered position is essentially the same as that of teachers in general, an occupation that requires a bachelor's degree as a minimum qualification and thus qualifies as a specialty occupation. Counsel also asserts that "preschool teacher" is a general title for the proffered position, but a more specific and accurate title is "Prekindergarten Lead Teacher," as the students to be taught by the beneficiary are primarily four-years-olds, not lower-aged children as in a usual preschool setting. Counsel cites to the *Matter of Strippa*, 11 I&N Dec. 674 (Reg. Comm. 1966), to state that a teacher position qualifies as a member of the professions, and asserts that the director's denial of the instant petition is inconsistent with precedent decisions, as CIS has previously approved many H-1B petitions for preschool teachers. Counsel states that the evidence of record contains an expert opinion evaluation as supporting documentation. Counsel submits the following new job description, duties and responsibilities for the proffered "Prekindergarten Lead Teacher" position:

Job Description:

Teacher organizes, leads, and instructs prekindergarten students in learning activities designed to promote intellectual, social, and academic development needed for primary school education.

Duties and Responsibilities:

- Teach students basic skills such as color, shape, number and letter recognition, personal hygiene, and social skills;
- Provide a variety of materials and resources for students to explore, manipulate and use, both in learning activities and in imaginative play;
- Establish and enforce rules for behavior, and procedures for maintaining order;
- Observe and evaluate students' performance, behavior, social development, and physical health;
- Assess students' individual needs; identify children showing signs of emotional, developmental, or health-related problems; and discuss them with supervisors, parents or guardians, and child development specialists;
- Meet with parents and guardians to discuss their children's progress and needs, determine their priorities for their children, and suggest ways that they can promote learning and development; and
- Enforce all administration policies and rules governing students.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, 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; a degree requirement is common to the industry in parallel positions among similar organizations; or 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*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO does not concur with counsel that the proffered position is a specialty occupation. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the "Teachers – Preschool, Kindergarten, Elementary, Middle, and Secondary" occupation category in the *Handbook*, 2006-07 edition, finds that requirements for public preschool teachers are generally more stringent than those for private preschool teachers and that private schools are generally exempt from meeting State licensing standards. The *Handbook* does not report that private preschool teachers must have a baccalaureate degree in a specific specialty; it notes only that private institutions prefer candidates who have a bachelor's degree in childhood education for elementary school teachers; thus, the *Handbook* does not contain information establishing that a private school teacher must have a baccalaureate degree in a specific specialty for entry into the occupation.

The AAO acknowledges counsel's assertion that the proffered position is actually a "Prekindergarten Lead Teacher," as the students to be taught by the beneficiary are primarily four-years-olds, not lower-aged children as in a usual preschool setting. The petitioner, however, has not demonstrated that the duties of a "Prekindergarten Lead Teacher" elevate the complexity of the proffered position to require a bachelor's degree in a specific specialty. Going on 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 Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Counsel's citation to the *Matter of Strippa* is also noted. This decision, however, dealt with membership in the professions,¹ not membership in a specialty occupation. While these terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act, 8 U.S.C. § 1184(i). That statutory language effectively supersedes *Matter of Strippa*. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

Regarding parallel positions in the petitioner's industry, counsel states that the evidence of record contains an expert opinion evaluation from I ██████████, who concludes that the proffered position requires an individual who is capable of providing high quality early childhood education to prekindergarten students. As already discussed extensively in the evidence of record, namely, in the AAO's June 4, 2007 decision, there is an inadequate factual foundation established to support Professor Borland's opinion that the proffered position requires a bachelor's degree in education or a related field. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As the opinion of Professor Borland is not based on a factual foundation, the AAO does not find it probative in this matter.

Counsel also states that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding, however, does not contain all of the supporting evidence submitted to CIS in the prior cases. In the absence of all of the corroborating evidence contained in other records of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

Moreover, 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, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service

¹ The AAO observes that counsel's quote regarding the definition of a profession includes teachers in elementary or secondary schools, colleges, academies, or seminaries and does not include preschool teachers.

center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The record does not include sufficient evidence from firms, individuals, or professional associations regarding an industry standard. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment as a preschool teacher. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Although counsel suggests that the petitioner has satisfied this criterion, counsel does not provide evidence documenting the petitioner’s past hiring practices. As discussed in the AAO’s June 4, 2007 decision, the petitioner claims to employ 44 personnel but indicates that only four employees hold bachelor’s or higher degrees. The AAO declines to speculate on the education level of the majority of the petitioner’s employees or the duties of those individuals who may have bachelor’s degrees.² The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel states that the proposed “Prekindergarten Lead Teacher” duties are more complex than the duties of a preschool teacher of lower-aged children as in a usual preschool setting. Counsel, however, has not established that they exceed in scope, specialization, or complexity those usually performed by preschool teachers as discussed in the *Handbook*, an occupational category that does not require a baccalaureate or higher degree in a specific specialty. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As discussed extensively in the AAO’s June 4, 2007 decision, there is an inadequate factual foundation established to support Professor Borland’s opinion that the proposed duties are so complex as to require a bachelor’s degree in education or a related field. The description of duties as depicted in the record, including the description offered on appeal, do not include specific specialized and complex elements that elevate the proffered position to a specialty

² The record does not contain documentary evidence including diplomas and transcripts substantiating that any of the petitioner’s employees have bachelor’s degrees in a specific related discipline. Going on 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. at 165.

occupation. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. For this reason, the petition may not be approved.

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.

ORDER: The director's August 2, 2007 decision is affirmed.