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U.S. Citizenship  
and Immigration  
Services

*DD*

FILE: WAC 04 028 50163 Office: CALIFORNIA SERVICE CENTER Date: **DEC 23 2005**

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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the California Service Center 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 charter school, with 35 employees. It seeks to employ the beneficiary as a teacher of its students between four and six years of age 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 he determined that the record did not establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and previously submitted evidence. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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) 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 must examine the ultimate employment of the alien. 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 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the duties of the position actually require 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 states that it is seeking the beneficiary’s services as a teacher. Evidence of the beneficiary’s duties includes: the Form I-129, with an August 29, 2003 letter of support from the petitioner; and counsel’s April 27, 2004 letter responding to the director’s request for evidence.

The petitioner has indicated that the beneficiary would be responsible for the following duties:

- Teaching elemental, natural and social science; personal hygiene; and music, arts and literature;
- Supervising activities, including field visits, group discussions and dramatic and play acting;
- Fostering cooperative and satisfying relationships with other children and adults;
- Encouraging students in singing, dancing, rhythmic activities and in the use of art materials;
- Coordinating with parents regarding student progress and development;
- Preparing lesson materials, plans and examination materials; and
- Grading and monitoring student progress.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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 a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

In his denial, the director, relying on the 2000-2001 edition of the *Handbook*, found the proffered position to be that of a preschool teacher and childcare worker, employment that would not impose a degree requirement on the beneficiary. The AAO does not agree and withdraws the director’s finding in this regard.

The AAO’s review of the record finds the petitioner to have established itself as a charter school operating in California. Under section 47605(l) of the California Education Code, a California charter school is required to employ teachers who hold a California Commission on Teacher Credentialing (CCTC) certificate, permit, or other document equivalent to that required of individuals teaching at the same level in “other public schools” in California. Therefore, as the proffered position requires the beneficiary to teach a range of subjects for the petitioner, she must, under California law, hold the same type of teaching credentials as an individual seeking to teach multiple subjects at a public elementary school. The CCTC website ([www.ctc.ca.gov/credentials/leaflets/cl561c.html](http://www.ctc.ca.gov/credentials/leaflets/cl561c.html)) indicates that an individual wishing to teach multiple subjects at the preschool and kindergarten through grade 12 levels in California must possess its multiple subject teaching credential, of which one requirement is the completion of a baccalaureate or higher degree from a regionally-accredited college or university. Therefore, the AAO concludes that employment as a teacher at a charter school in California would impose a degree requirement on the beneficiary. It does not, however, find this degree requirement to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The degree requirement just noted establishes only that individuals seeking employment as teachers in charter schools must have college degrees, not that such degrees must be in a field directly related to their work, as required to establish the proffered position as a specialty occupation. When a job can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study.

On appeal, counsel submits material from the Department of Labor’s *Online Wage Library*, which assigns a JobZone rating of 4 to kindergarten teachers, i.e., requires them to hold the minimum of a baccalaureate degree. However, the *Online Wage Library* 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 JobZone rating of 4 given to the position of kindergarten teacher does not indicate that a bachelor’s degree in a specific specialty is required.

To establish a proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. To prove that the petitioner’s degree requirement is the norm within its industry, counsel, on appeal, submits five Internet advertisements

for kindergarten teachers. This documentation does not, however, establish the proffered position as a specialty occupation. None of the five announcements included in the record are published by educational institutions that can be identified as charter schools in the State of California. Nor do they offer descriptions of the actual duties to be performed by the incumbents. As a result, they do not respond to the first prong's requirements that the petitioner establish a degree requirement in parallel positions among similar organizations.

The record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. The AAO finds no evidence in the record that would distinguish the proffered position from similar non-degreed employment. Therefore, the petitioner cannot establish the proffered position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally 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 this case, the petitioner has submitted no evidence – nothing to document its teaching roster or the degrees held by those on that roster – to establish that it has a history of requiring a degree or its equivalent for its teaching positions. The petitioner cannot, therefore, establish the proffered position as a specialty occupation on the basis of its usual hiring practices.

On appeal, counsel asserts that the petitioner's August 29, 2003 letter of support, in which it states its degree requirement, satisfies the requirements of the third criterion. He further contends that CIS should not deny the instant petition based "simply on the ground that the Service was not satisfied that the petitioner-appellant normally requires the applicants for the specified position to hold a bachelor's degree," that factors such as an employer's size and past hiring practices are not material when it can be established that a professional position is being offered and the beneficiary is qualified for that position.

While the AAO finds the petitioner's letter of support to state its desires regarding the hiring of a degreed individual for the proffered position, that letter does not satisfy the requirements of the third criterion. It is not a petitioner's desires regarding a proffered position that dictate whether a position qualifies as a specialty occupation under Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. Therefore, the petitioner's statement that its proffered position requires the minimum of a baccalaureate degree cannot substitute for the actual documentation of its normal hiring practices.

With regard to counsel's contention that the petitioner's hiring practices are not material to the adjudication of

the instant petition, the AAO notes that the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A) offer petitioners four alternate avenues to establish a proffered position as a specialty occupation, one of which is based on petitioners' normal hiring practices. Although a petitioner need satisfy only one of the criteria to qualify a proffered position, CIS is obligated to explore all four before concluding that a petitioner has failed to meet its burden of proof. In cases where a petitioner has offered no evidence responding to the requirements of a particular criterion, the absence of such evidence is appropriately noted by the director in his denial. In the instant case, the director's denial appropriately indicated that he had considered all four criteria, including that regarding the petitioner's normal hiring practices, prior to reaching his decision.

The fourth criterion requires a petitioner to prove that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. On appeal, counsel contends that the duties of the proffered position, as listed by the petitioner in its August 29, 2003 letter of support, establish it as a specialty occupation under the fourth criterion. The AAO does not agree.

As described by the petitioner, the proffered position would require the beneficiary to teach elemental, natural and social sciences, personal hygiene, and music, arts and literature to kindergarten children. Accordingly, the AAO has reviewed the record to determine whether the petitioner has established that these duties would require the beneficiary to possess the type of knowledge normally associated with a degree in early childhood education or another field directly related to the teaching of young children. It has not.

The petitioner, in its August 29, 2003 letter of support, indicated that it found the beneficiary's baccalaureate degree in home economics education and her one and one-half years of graduate work in the same field to qualify her to perform the duties of the proffered position. However, a degree in home economics education, although it is a degree in education, is not a degree directly related to the teaching of young children and, therefore, the duties of the proffered position of kindergarten teacher. As the petitioner's letter of support indicates that the proffered position may be filled by an individual whose academic degree is not directly related to the teaching duties it has described, it has not established the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO also notes that the record fails to provide sufficient evidence to establish that the beneficiary is coming to the United States to perform services in a specialty occupation, as required by section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). To qualify a proffered position as a specialty occupation, a petitioner must establish not only that the duties of the proffered position are those of a specialty occupation, but also that it will employ the beneficiary in these duties upon his or her arrival in the United States. The petitioner, however, has submitted no evidence to prove that it would require the beneficiary to hold the necessary credentials to teach at a charter school in California. Accordingly, it has not established that it would employ the beneficiary as a kindergarten teacher. For this reason, as well, the petitioner is unable to establish the proffered position as a specialty occupation.

Beyond the decision of the director, the AAO notes that the record fails to establish the beneficiary's qualifications to perform the duties of a specialty occupation.

To prove that a beneficiary is qualified to perform the duties of a specialty occupation, a petitioner must establish that the individual it seeks to employ holds full state licensure to practice in the occupation, if such

licensure is required; a degree in the specific specialty or has experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2). In the instant case, the proffered position requires the beneficiary to hold California teaching credentials to perform the duties of the proffered position. However, as already noted, the petitioner has provided no evidence that establishes that the beneficiary holds such credentials. Accordingly, the petitioner has failed to meet the requirements of section 214(i)(2) of the Act.

For the reasons related in the preceding discussion, the petitioner has not established its proffered position as a specialty occupation.

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 met that burden.

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