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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 253 54607 Office: CALIFORNIA SERVICE CENTER Date: **APR 06 2010**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


Perry Rhew
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 summarily dismissed.

The petitioner is a private, church owned and operated childcare/preschool facility in Colorado. To employ the beneficiary in what the Form I-129 designates as a Spanish Language Teacher Assistant, the petitioner 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 director denied the petition, because she determined that the evidence of record failed to establish the proffered position as a specialty occupation as that term is defined at section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and its implementing regulations at 8 C.F.R. § 214.2(h)(4).

The Form I-129, which was filed on August 20, 2007, identifies the proffered position as Spanish Language Teacher Assistant, and the related Labor Condition Application (LCA) identifies the position as "Teacher Assistant." The petitioner's letter of support dated May 4, 2007, states:

[The beneficiary's] position title would be "Teacher Assistant." One of her roles is of [sic] helping and assisting our teachers implement their daily lesson plans, assisting in the daily routine of our preschool children, and helping to implement [the petitioner's] Spanish Emersion.

The record's Employment Agreement between the petitioner and the beneficiary states that the beneficiary's position "will be that of Teacher's Assistant for the Shark class" and that her classroom responsibilities "will be according to the Job Description, personnel policies[,] and any other agreement which has been made between her and the Lead Teacher or Director."

The documents filed with the Form I-129 include the following "Job Description for Assistant Teacher/Teacher Aide":

The person selected for this position will be responsible for assisting a classroom teacher in general supervision of a class of twelve to fifteen children between the ages of two and six.

Qualifications

The person selected for this position must be at least eighteen years of age, in the process of becoming professionally prepared to be a teacher of young children, and must meet the requirements of Colorado State Licensing. This person **MUST** have a warm and friendly personality, be sensitive to the feelings and needs of others, be able to relate well to children, and be willing to fulfill responsibilities in accordance with the school's educational philosophy.

Responsibilities

Responsibilities will include, but will not be limited to, the following:

- * Assisting and implementing the daily program under the direction of the teacher.
- * Assisting and preparing the learning environment, setting up interest centers, and preparing needed materials and supplies.
- * Supervising the classroom when the teacher is out of the room. Helping in general household tasks.
- * Assisting the teacher in other appropriate ways.
- * Maintaining professional attitudes and loyalty to the school at all times.
- * Treating all children with dignity and respect.
- * Attending all staff meetings and recommended training programs and conferences.
- * Participating in professional organizations that work for the improvement of early childhood education.

In response to a Request for Additional Evidence (RFE), and again on appeal, the petitioner attempts to change the position from Assistant Teacher to Lead Teacher. As the Lead Teacher position and its attendant duties materially expand and elevate the duties which the beneficiary would perform, they will not be considered by the AAO. The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits the classification for which the petition was filed. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The appeal argues for specialty occupation recognition of the Lead Teacher position, not the Teacher Assistant position for which the petition was filed. Consequently, the appeal identifies no legal or factual error by the director in denying the petition for its failure to establish as a specialty occupation the position for which the petition was filed. As the petitioner fails to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition on the basis of the position for which it was filed, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v), which directs that an officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.