

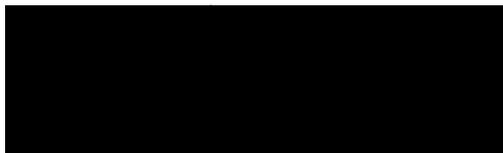
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
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FILE: EAC 04 017 53592 Office: VERMONT SERVICE CENTER

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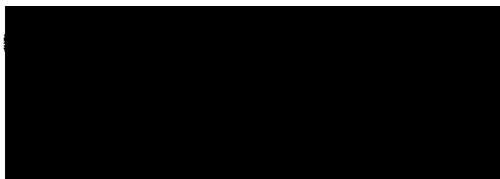
SEP 21 2005

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, Director
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 childcare center and 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 director denied the petition because the proffered position does not qualify as a specialty occupation. On appeal, counsel submits a brief indicating that the offered position qualifies as a specialty occupation.

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 I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would:

- Create lesson plans, implementing them within the classroom;
- Follow activity schedules;
- Develop parent/teacher interactions;
- Change and create bulletin boards;
- Decorate classrooms;
- Maintain children’s developmental progress records and assessments while complying with all governmental regulations as a classroom teacher; and
- Provide care and instruction for pre-school children as well as children from kindergarten through the fifth grade.

In response to the director’s request for evidence, the petitioner indicated that the beneficiary would also serve as a back-up program director as needed on a weekly basis, and that Virginia law required back-up directors to have a minimum of an endorsement or bachelor’s degree in a child related field from an accredited college or university plus one year of programmatic experience in the group care of children. The petitioner indicates in its letter dated February 26, 2004, that this particular job duty was not listed with the filing of the initial petition because the beneficiary’s skills had not, at that time, been matched with this particular duty. Thus, this duty was not required of the petitioner when the Form I-129 petition was filed. The purpose of the request for evidence 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 a request for evidence, a

petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the Form I-129 petition was filed is a specialty occupation. See *Matter of Michelin Tire*, 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 duty of back-up program director will not, therefore, be considered.

The petitioner states that a bachelor's degree is the minimum requirement for entry into the proffered position, but does not state that the degree need be in any particular discipline. The petitioner finds the beneficiary qualified for the proffered position, however, by virtue of her foreign education which has been determined by a credentials evaluation service to be equivalent to a bachelor's degree in elementary education, a master's degree in special education and a doctor of philosophy degree in educational psychology and guidance from an accredited college or university in the United States.

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/kindergarten 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, there is no requirement that the beneficiary have a license, teacher training, or a degree in any specific specialty to enter into the proffered position. 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 assert that a degree requirement 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 referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner does assert that it normally requires a degree for the offered position, and in support of this assertion submits copies of diplomas for present and past employees. Those diplomas indicate that some employees held baccalaureate level or higher degrees in severe disabilities, early childhood education, hospitality management, psychology, elementary education, and fine arts in theatre. Other employees held associate degrees in applied science, education, early childhood education, and early childhood development. While the petitioner asserts that only teachers with a baccalaureate level education teach children from kindergarten age through the fifth grade, no evidence was submitted to support this assertion. The AAO notes that the petitioner has not asserted or proved that its preschool teachers, such as the proffered position, possess a degree in a specific specialty. 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 record does not establish that the diplomas supplied represent the educational qualifications of all teachers in the petitioner's employ. Citizenship and Immigration Services 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.¹ 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 documentation submitted does not establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the nature of the specific duties is not so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, nor are the duties so complex or unique that they can be performed only by individuals with a degree in a specific specialty. The duties to be performed are routine in the industry for preschool/kindergarten teachers. The petitioner does state that its teachers are required to follow the same standards of learning that local public schools follow and in support of that assertion submitted a year 2000 draft copy of the preschool standards of learning for the Commonwealth of Virginia. The petitioner also submitted blank copies of lesson plans that the petitioner would be required to complete which are the same or similar forms that public schools use. The preschool standards of learning prepared by the Commonwealth do not indicate that a bachelor's degree is required by preschool teachers in order to successfully meet those standards, and the blank lesson plans submitted do not establish that the duties to be performed by the beneficiary in the petitioner's work setting are of such complexity that a bachelor's degree would be required to perform them. The petitioner has failed to establish either of the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

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.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.