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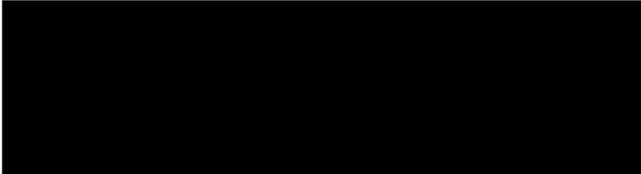
FILE: SRC 04 800 35196 Office: TEXAS SERVICE CENTER Date: **JUL 05 2006**

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. Weimann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. 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 non-profit religious organization that operates an early childhood development center that educates children in basic skills necessary to promote language, social, and motor skills. The petitioner seeks to employ the beneficiary as a preschool teacher. Accordingly, 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 determining that the proffered position is not a specialty occupation. On appeal, counsel asserts that the position is a specialty occupation and submits a brief.

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.

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 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.

When determining whether a particular job qualifies as a specialty occupation, CIS does not only 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 record of proceeding before the AAO contains: (1) the Form I-129, including the petitioner's September 14, 2004 letter of support; (2) the director's October 7, 2004 request for additional evidence; (3) the petitioner's November 23, 2004 letter in response to the director's request for further evidence; (4) the director's December 27, 2004 denial letter; and (5) the Form I-290B and 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 Form I-129 petition; the petitioner's letter of support; and counsel's letter in response to the director's request for further evidence. According to the Form I-129 petition, the beneficiary would be instructing children in activities designed to promote social, physical, and intellectual growth needed for primary school. The petitioner's September 14, 2004 letter of support stated that the duties of a preschool teacher are:

1. Instructs children normally up to 5 years of age in activities designed to promote social, physical, and intellectual growth needed for primary school in [a] church operated preschool program.
2. Plans individual and group activities to stimulate growth in language, social and motor skills, such as learning to listen to instructions, playing with others, and using play equipment.
3. Develop[s] and submit[s] lesson plans establishing the activities of the children and the concepts that will be taught from day-to-day.
4. Coordinate[s] and plans activities of children in special school-sponsored programs.

The petitioner stated that the minimum educational requirement for the proffered position is a bachelor's degree or its equivalent in early childhood education or a related field of study. In addition, the petitioner indicated that the beneficiary qualified for the position based on her education and work experience equivalent to a Bachelor's Degree in Early Childhood Education and work as a resident kindergarten teacher for a kindergarten school in Korea from January 1997 through June 2004.

Counsel for the petitioner, in his response to the director's request for further evidence, provided further explanation of the beneficiary's duties as a preschool teacher, indicating she would be responsible for:

- a) Supervising, training, directing, and evaluating staff members assigned to the program by ensuring constant and consistent fulfillment of all daily tasks.
- b) Recruiting students and explaining the program to visitors, by holding informational parent meetings, open houses and registration meetings.

- c) Attending continuous training and education and maintaining appropriate records as required by law.
- d) Instructing children normally up to 5 years of age in activities designed to promote social, physical, and intellectual growth needed for primary school in the private church operated preschool program.
- e) Teaching children in the program the fundamentals of reading, math, art, etc.
- f) Planning individual and group activities to stimulate growth in language, social and motor skills, such as learning to listen to instructions, playing with others, and using play equipment.
- g) Evaluating children in the ongoing process of assessment of developmental skills and conducting parental conferences when necessary.
- h) Developing and submitting lesson plans establishing the activities of the children and the concepts that will be taught from day-to-day.
- i) Coordinating, budgeting, and planning activities of children in special school-sponsored programs through researching and developing new craft activities consistent with group and individual needs.

Counsel for the petitioner asserted that only a person possessing a baccalaureate degree or its equivalent in early childhood education could perform these duties and provided six job advertisements for preschool teachers in support of his assertion. Counsel also submitted: an excerpt from the 2004-2005 edition of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on the nature, working conditions, and training associated with teaching positions; an excerpt from the *Dictionary of Occupational Titles (DOT)* indicating that the Specific Vocational Preparation (SVP) rating of 7 is given to the occupation of preschool teacher; an excerpt of an article apparently published by Rutgers, The State University of New Jersey, suggesting that the most effective preschool teachers have at least a four-year college degree and specialized training in early childhood; a statement from the North Carolina Department of the Secretary of State attesting to the petitioner's non-profit status; photographs of the petitioner's place of business; and a statement that the petitioner employed a pastor, two assistant pastors, and a music minister.

On December 27, 2004, the director denied the petition, determining that the petitioner had not established that a bachelor's degree is common to the industry in parallel positions among similar organizations or, in the alternative, that the employer showed that its particular position is so complex or unique that only an individual with a degree could perform it. The director referenced an excerpt of the 2004-2005 edition of the *Handbook* and concluded that the petitioner had failed to establish that the position meets the requirements of a "specialty occupation."

On appeal, counsel for the petitioner contends: that the advertisements for preschool teacher submitted in response to the director's request for evidence is concrete proof that a bachelor's degree is common to the industry in parallel positions in similar organizations; that the 2004-2005 *Handbook* noted that some states require a bachelor's degree for a preschool teacher and that the petitioner is located in one such state; that the *Dictionary of Occupational Titles (DOT)* states that the Specific Vocational Preparation (SVP) rating for a preschool teacher is a level 7; and that the information submitted by the petitioner is sufficient to prove that private religious schools commonly require a baccalaureate degree when hiring preschool teachers.

Counsel's assertions are not persuasive. When evaluating whether the proffered position is a specialty occupation, the AAO will consider each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With reference to preschool teachers, the *Handbook* 2006-2007 edition indicates 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* 2006-2007 edition does not report that private school 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; and indicates that generally private schools associated with religious institutions desire candidates who share the values that are important to the institution. Thus, the *Handbook* does not establish that a private preschool teacher must have a baccalaureate degree in a specific specialty for entry into the occupation.

Counsel on appeal quotes the *Handbook's* reference to degree requirements imposed on preschool teachers in certain states and asserts that North Carolina is such a state. However, the language of the *Handbook* on which counsel relies refers to state requirements for preschool teachers in public schools, not those in private institutions. Accordingly, the *Handbook* does not support counsel's assertions regarding the position's degree requirement.

To determine whether the petitioner's degree requirement is shared within its industry, CIS often considers 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)). As observed above, the *Handbook* does not state that a private preschool teacher requires a baccalaureate degree. With regard to parallel positions in similar private schools, counsel submitted six job advertisements for the position of preschool teacher. Four of the six advertisements indicated that a bachelor's degree was preferred but did not indicate that such a degree was required, nor did the advertisements indicate that the degree should be in a specific specialty. One of the advertisements suggested that a successful candidate would have a "B.A./B.S. degree" but did not indicate that the degree should be in a specific specialty. Only one "job advertisement" suggested that a bachelor's degree in early childhood education would meet the advertiser's minimum requirements but this particular "job advertisement" did not identify the prospective employer or indicate where the potential employee should apply, casting doubt on the legitimacy of the job announcement. Further, the petitioner submitted no documentation that any professional educational association has determined that a bachelor's degree is required for entry into the field nor did the petitioner submit letters or affidavits from other private religious preschools that attest that such preschools

"routinely employ and recruit only degreed individuals." Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The AAO notes counsel's reference to the Specific Vocational Preparation (SVP) rating of 7 given to the occupation of preschool teacher by the *DOT*. However, the AAO does not consider the *DOT* to be 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. Further, the SVP rating of 7 assigned by the *DOT* to the occupation of preschool teacher does not indicate that a bachelor's degree in a specific specialty is required. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. The record does not demonstrate that the industry standards require an individual in the position of preschool teacher to have attained a bachelor's degree or its equivalent in a specific specialty.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted no documentation that the proffered position involves duties seen as either unique or complex so that only an individual with a degree in a specific specialty could perform them. Therefore, the record does not demonstrate that the proffered position's complexity or unique nature distinguishes it from similar but non-degreed employment under the second prong of the criterion. In this matter, a baccalaureate or higher degree or its equivalent is not the normal minimum requirement for entry into the position of a preschool teacher. The petitioner has failed to establish the first and second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) which provides that an employer establish that it normally requires a degree or its equivalent for the position. In this matter, the petitioner does not attempt to establish the proffered position as a specialty occupation on the basis of its normal hiring practices. Accordingly, the record offers no evidence, such as the academic credentials of other preschool teachers in its employ, that would establish the proffered position as a specialty occupation under the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) which requires that the petitioner establish that 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 for the petitioner asserted in response to the director's request for further evidence that only an individual possessing a baccalaureate degree or its equivalent in early childhood education could perform the duties of the proffered position. However as observed above, the duties of the proffered position are routine for any preschool teaching position. The petitioner has provided no description of any specialized or complex responsibilities that would distinguish the proffered position from that of a private preschool teacher; employment the *Handbook* indicates does not impose a degree requirement. Without such evidence, the petitioner has not established the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). 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).

Beyond the decision of the director, the record does not demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. To establish the beneficiary's qualifications to perform the duties of the proffered position, the petitioner submitted an evaluation of the beneficiary's education and employment experience prepared by Silvergate Evaluations, Inc. in Baltimore, Maryland. The evaluation finds the beneficiary's certificate in early childhood education from the Soon Eui Women's College in Korea and her seven years of experience and training to be the equivalent of a baccalaureate degree in early childhood education. This evaluation does not, however, establish that the beneficiary holds the equivalent of a U.S. degree in a field directly related to the proffered position.

When attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The Silvergate evaluation establishes only that the beneficiary's two years of education in Korea is the equivalent of a U.S. associate's degree. Thus, the record fails to demonstrate that the beneficiary holds the equivalent of a baccalaureate degree in a field directly related to the proffered position. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Upon review of the totality of the record, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations or that the beneficiary is qualified to perform the duties of a specialty occupation. Therefore, the AAO will 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.

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