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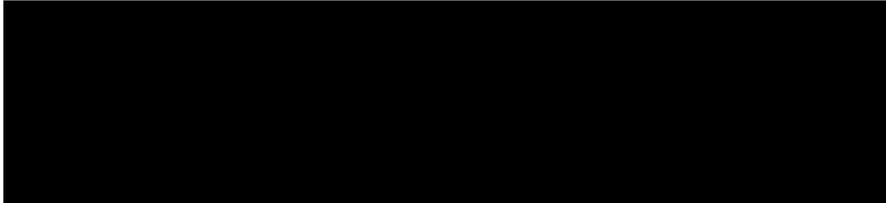
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U.S. Citizenship
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FILE: WAC 06 100 50593 Office: CALIFORNIA SERVICE CENTER Date: **AUG 21 2007**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 Director, 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.

Established in 1894, the petitioner is a public elementary school district in Phoenix, Arizona. The petitioner has 1,050 employees and a gross annual income of \$39,580,209. Pursuant to a previously approved H-1B petition filed on behalf of the beneficiary, the petitioner has been employing the beneficiary as a bilingual substitute teacher 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's request for further evidence (RFE); (3) counsel's response to the director's RFE and supporting documents; (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.

On April 29, 2006, the director sent the petitioner a notice of request for evidence asking that the petitioner submit a copy of the contract between the petitioner and the beneficiary showing the expiration date of the contract. The petitioner responded to the RFE in a letter dated May 17, 2006 explaining that it does not provide contracts for substitute teachers, but that it intends to continue employing the beneficiary. In a letter dated May 22, 2006, counsel states that "the signed I-129 and the letter from the petitioner" are proof of the job offer. On July 6, 2006, the director denied the petition on the basis that (1) the position offered is not a specialty occupation, (2) the petitioner failed to establish that an actual employer/employee relationship will exist, and (3) that the petitioner failed to establish that the beneficiary will actually perform services in a specialty occupation.

On appeal, counsel submits a brief indicating that the offered position is a specialty occupation, that the petitioner intends to employ the beneficiary in the offered position, and that the petitioner will employ the beneficiary continuously in the offered position.

The first issue in this matter is whether the petitioner has established the position 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.

On appeal, the AAO notes that counsel references the Specific Vocational Preparation (SVP) rating of 7.0 to <8.0 given to the occupation of elementary school teacher by the *Occupational Information Network O*Net OnLine (O*Net)*. However, the AAO does not consider *O*Net* 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. *O*Net* 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. Furthermore, the SVP rating of 7.0 to <8.0 assigned by *O*Net* to the occupation of elementary school 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. The SVP rating 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.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The *Handbook's* discussion of the duties of preschool, kindergarten, elementary, middle and secondary teachers states the following:

Most *elementary school teachers* instruct one class of children in several subjects. In some schools, two or more teachers work as a team and are jointly responsible for a group of students in at least one subject. In other schools, a teacher may teach one special subject – usually music, art, reading, science, arithmetic, or physical education – to a number of classes. A small but growing number of teachers instruct multilevel classrooms, with students at several different learning levels.

* * *

Teachers often work with students from varied ethnic, racial, and religious backgrounds. With growing minority populations in most parts of the country, it is important for teachers to work effectively with a diverse student population. Accordingly, some schools offer training to help teachers enhance their awareness and understanding of different cultures. Teachers may also include multicultural programming in their lesson plans, to address the needs of all students, regardless of their cultural background.

Teachers design classroom presentations to meet students' needs and abilities. They also work with students individually. Teachers plan, evaluate, and assign lessons; prepare, administer, and grade tests; listen to oral presentations; and maintain classroom discipline. They observe and evaluate a student's performance and potential and increasingly are asked to use new assessment methods. For example, teachers may examine a portfolio of a student's artwork or writing in order to judge the student's overall progress. They then can provide additional assistance in areas in which a student needs help. Teachers also grade papers, prepare report cards, and meet with parents and school staff to discuss a student's academic progress or personal problems.

Evidence of the beneficiary's duties includes the Form I-129 petition with supplement H, the petitioner's August 3, 2006 letter of support, and counsel's brief on appeal. According to this evidence the beneficiary will assume the duties normally performed by an elementary school teacher, including:

- Teach elementary school subjects as a bilingual teacher (see Form I-129, page 3);
- Work on a daily basis for nine schools in the Creighton School District, substituting for teachers and participating in staff development program (see Form I-129 Supplement H, page 7); and
- Lecture, demonstration, use of audiovisual teaching aids to present subject matter to class; and maintain order in the classroom (see petitioner's August 3, 2006 letter of support, page 1).

The duties, as described, are similar to those of an elementary school teacher as outlined by the *Handbook*.

According to its August 3, 2006 letter of support, the petitioner requires a minimum of a bachelor's degree and a substitute teaching license in Arizona for entry into the proffered position. The AAO now turns to the *Handbook's* discussion of the qualifications necessary for entry into the field. The *Handbook* states the following with regard to the qualifications required for public school teachers:

All 50 States and the District of Columbia require public school teachers to be licensed.

* * *

Requirements for regular licenses to teach kindergarten through grade 12 vary by State. However, all States require 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. Some States also require technology training and the attainment of a minimum grade point average. A number of States require that teachers obtain a master's degree in education within a specified period after they begin teaching.

In Arizona, substitute teachers have both educational and licensing requirements. The State requires that substitute teachers complete a bachelor's degree and apply for certification as a "substitute." Although substitute teachers in Arizona are required to have at least a bachelor's degree the State does not require a specific degree or course of study for the position. Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires a showing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the type of position being proffered. Although Arizona requires that substitute teachers have a bachelor's degree, a wide range of educational backgrounds is suitable for entry into the position. When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, 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.

Thus, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not submitted any evidence that it is the industry standard among similar organizations to require a baccalaureate degree for parallel positions. To meet the burden of proof imposed by the regulatory language, the petitioner must establish that its degree requirement exists in parallel positions among organizations similar to the petitioner. The petitioner has not submitted documentation to support such an industry standard. Nor does the Arizona Department of Education require a degree in a specialty for its substitute teachers.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to establish that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position, as set forth in the petition, does not support such a finding as the record contains no documentation to support a finding that the proposed position is more complex or unique than substitute positions at other schools within the public school district.

Therefore, the petitioner has not established that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has also not established that the petitioner normally requires a degree or its equivalent in a specialty for the proposed position. To determine a petitioner's ability to meet this 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. The petitioner is bound by the education requirements dictated by the Arizona Department of Education requiring that all substitute teachers obtain a bachelor's degree as a prerequisite to State licensure as a substitute teacher. However, the degree does not have to be in a specific field, and no specific course of study is required for certification. The petitioner has, therefore, failed to satisfy the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's 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 in the specialty. As previously discussed, the Arizona Department of Education does not require a baccalaureate degree in a specific specialty for the position of substitute teacher, and the petitioner has submitted no evidence to demonstrate that the duties of its proposed position in the school district are more specialized and complex than those of any substitute teacher in Arizona. Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial.

As noted *supra*, the director also denied the petition on the basis that the petitioner failed to establish that an actual employer/employee relationship will exist and that the petitioner failed to establish that the beneficiary will actually perform any services in a specialty occupation.

Although the term "employee" is not defined by the regulation for purposes of the H-1B classification, the term "employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

In his July 6, 2006 decision, the director questioned whether the instant petition constitutes a clear offer of employment and whether the beneficiary will, in fact, perform actual services for the petitioner. The regulation at 8 C.F.R. § 214.2(h)(4)(iv)(B) provides that an employment contract between the petitioner and the beneficiary shall be provided, or a summary of the terms of the oral agreement under which the beneficiary will be employed if there is no written contract. In its August 3, 2006 letter in support of the appeal, the petitioner summarizes the duties for the position, the beneficiary's compensation, and the maximum number of hours that he may work per week. In a separate letter dated May 17, 2006, the petitioner states its intention to employ the beneficiary through October 29, 2007. Thus, the petitioner has established a proposed employment agreement with the beneficiary.

In her appeal brief, counsel argues that in 2005, the beneficiary worked 213 days and that his services were needed practically every day. As evidence of the beneficiary's past employment, the petitioner has submitted copies of the beneficiary's 2004 and 2005 Internal Revenue Service Form W-2 Wage and Tax Statement as well as the petitioner's payroll records from March 11, 2005 to February 24, 2006. Furthermore, according to its letter of August 3, 2006, the petitioner states that "on a daily basis we have teachers absent due to a variety of reasons and not enough substitutes to cover these vacancies." In view of this evidence, the AAO finds that the beneficiary will work for the petitioner as a substitute teacher. The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary. *See* 8 C.F.R. § 214.2(h)(4)(ii). The director's findings that a position does not exist and that the petitioner will not be the beneficiary's employer are withdrawn.

The petition may not be approved, however, as the record does not establish the substitute teacher position as a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

As always, 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 petition shall accordingly be denied.

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