

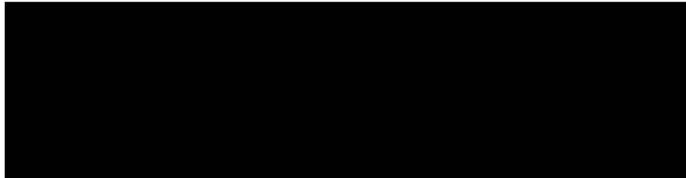
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FILE: LIN 03 264 52178 Office: NEBRASKA SERVICE CENTER Date: MAR 20 2008

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director revoked a prior approval of the Form I-129 petition on August 3, 2005, on the ground that the proffered position is not a specialty occupation. The petitioner then filed an untimely appeal to that revocation. The director treated the untimely appeal as a motion to reopen, and dismissed the motion on February 14, 2006, stating that the petitioner had not overcome the grounds of the original denial. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be revoked.

The petitioner is a daycare and preschool. It 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 issue to be discussed in this proceeding is whether the director properly revoked approval of the petition.

Pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error. In this instance, approval of the petition was in violation of paragraph (h) of the cited regulation in that the proffered position does not qualify as a specialty occupation. 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner was given due and proper notice of the director's intent to revoke the petition. The petitioner responded to the notice. The director then appropriately revoked the Form I-129 petition on the above stated grounds.

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 notice of intent to revoke (NOIR); (3) the petitioner’s response to the NOIR; (4) the director’s decision to revoke approval of the petition dated August 3, 2005; (5) the director’s decision on motion to reopen dated February 14, 2006, affirming the prior decision; (6) 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 Form I-129 petition and supporting documentation. According to this evidence the beneficiary would:

- Instruct preschool children in activities designed to promote social, physical, and intellectual growth;
- Plan 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;
- Provide educational guidance and mentoring to teacher assistants and teacher aides; and
- Deal with children’s issues as well as parents’ concerns and questions, and communicate those to the director.

The petitioner requires a minimum of a bachelor’s degree in early childhood or elementary education for entry into the proffered position.

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 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, the record does not reflect that there is an industry requirement that the beneficiary have a license, teacher training, or a degree in any specific specialty to enter into the proffered position. The *Handbook* notes that licensing requirements for preschool teachers in public schools vary by state. Requirements for public preschool teachers are generally more stringent than those for private preschool teachers. Some states require a bachelor's degree in early childhood education, while others require an associate's degree, and still others require certification by a nationally recognized authority. The Child Development Associate (CDA) credential, the most common type of certification, requires a mix of classroom training and experience working with children, along with an independent assessment of an individual's competence.¹ As previously noted, private schools are generally exempt from meeting state licensing standards. For secondary school teacher jobs, they prefer candidates who have a bachelor's degree in the subject they intend to teach, or in childhood education for elementary school teachers. There is no degree requirement, however, for preschool teachers in a private school setting. The petitioner has failed to establish the criterion listed at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner asserts that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, but offers no evidence in support of this assertion. 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)). The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner asserts that it normally requires a degree in a specific specialty for entry into the proffered position, but offers no evidence in support of that assertion. Again, 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)). To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually 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 the instant case, the petitioner has submitted no evidence regarding its hiring practices as the position is new in the petitioner's organization. Accordingly, the record does not establish the proffered position as a specialty requirement under the third criterion. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)

¹ According to the Council for Professional Recognition website (http://www.cdacouncil.org/CDA_OBT.htm), a CDA credential requires applicants to meet the following: be 18 years of age or older; have a high school diploma or GED; have 480 hours of experience working with children within the last five years; and have 120 hours of formal child care education (education may be for credit or non-credit) in the past five years. A baccalaureate level education is not required

Finally, the duties of the proffered position, as described by the petitioner, do not appear to be so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor do the duties appear to be so complex or unique that they can only be performed by individuals with a degree in a specific specialty. The evidence presented by the petitioner does not establish that the duties of the proffered position are any more specialized, complex or unique than those normally performed by preschool teachers in the industry who are not required to possess a baccalaureate level education. The duties to be performed by the beneficiary are routinely performed in the industry by individuals who do not have a baccalaureate level education. The petitioner has failed to establish 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 director's decision to revoke approval of the petition was correct, and the AAO shall not disturb the director's revocation 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 revoked.