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U.S. Citizenship
and Immigration
Services

PA

2005

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

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:

[Redacted]

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 director of the 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.

The petitioner is a pre-school and kindergarten that seeks to employ the beneficiary as a teacher. The petitioner, therefore, 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 is not a specialty occupation. Counsel submits a brief and additional evidence.

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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a kindergarten teacher. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail being responsible for introducing to pupils numbers, language arts, social studies and group interaction through the use of games, music, films, visual aids of various colors, designs and quantities; teaching the fundamentals of reading, writing, good manners and right conduct, personal hygiene, and literature, preparatory to their elementary education; observing children's behavior and social development, detecting and monitoring ill health or emotional disturbance and discussing observations with parents. The petitioner indicated that it requires its teachers to have a bachelor's degree in elementary education, education or business administration.

The director issued a request for evidence and requested the petitioner to provide the regulatory requirement from the State of California licensing board on teacher and student ratio. The director requested the current number of enrollees in both nursery and kindergarten as approved by the school board for the current school year and the required curriculum. The director asked for an explanation of why the school is not operating according to state regulations as described and how the licenses were approved on the number of students as claimed without the proper teacher-student ratio. The director requested the necessary documents to show that all current teachers are baccalaureate degree holders. Additionally, the director requested copies of the last three-quarters of the Form DE-6 quarterly wages report.

In response, the petitioner stated that its day care facilities are duly licensed to operate by the California Department of Social Services (CDSS) Community Care Licensing Division. Its first branch is authorized to maintain thirty-seven enrollees while its second facility is licensed for forty-two students. The petitioner stated that its schools have a total of seventy-five students, fifty of whom are in kindergarten while twenty-three are in nursery school. The petitioner stated that the CDSS requires a 1:12 adult to child ratio for kindergarten and 1:4 ratio for nursery school. The petitioner explains that it obtains teachers from independent contractors pending the employment of permanent ones. Additionally, the petitioner submitted a list of three teachers and the director and stated that they all had either a bachelor's degree in education or elementary education. The petitioner submitted a copy of its curriculum and sample lesson plans, and copies of licenses for its two branches. The petitioner submitted a copy of its Form 941 employer's quarterly tax return dated July 18, 2003 which indicated zero employees and zero wages for that period. The petitioner submitted a Form DE-6 for the quarter ending December 31, 2002 which indicated no payroll. The petitioner submitted a Form DE-6 for the quarter ending June 30, 2003 which indicated no payroll. The petitioner submitted one W-2 for one employee for tax year 2002. Additionally, the petitioner submitted Forms DE-6 for the quarters ending June 30, 2002 and September 30, 2002 indicating one employee.

The director denied the petition. The director noted that the petitioner did not provide the current number of enrollees as requested for the current school year. The director noted that although the petitioner provided a separate list of current teachers in their employ with their educational attainments, the petitioner did not provide verifiable credentials. The director found that the petitioner has not demonstrated that its business operation has a valid need for the proffered position and requires an individual to perform the duties of the proffered position. The director did not agree that the proffered position of teacher requires the beneficiary to have a baccalaureate degree and found that the evidence does not establish that there is a bone fide position. The director stated that there must be a reasonable and credible offer of employment that is consistent with the needs of the organization. The director found that there is no consistent information to indicate that the position exists as described in the petitioner's business. The director indicated that the

petitioner has not substantiated its claim of the number of enrollees for the beneficiary to teach, and that the current numbers of teachers as presented are actually in its employ. The director determined that the proffered position was not a specialty occupation.

On appeal, counsel contends that the petitioner has clearly demonstrated the existence of a bona fide need for the position of kindergarten teacher and that the bachelor's degree requirement for the teaching staff of the petitioner is a practice within the industry and that the position involves a specialty occupation.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply 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.

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. CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

The petitioner claims that it operates as a nursery school and kindergarten in two facilities, with seventy-five students and three teachers plus a director. The record does not contain any evidence of enrollment. Simply going on 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 Dec. 190 (Reg. Comm. 1972)). There is no evidence in the record that establishes that the school is open and functioning. The record does not contain any tax returns that demonstrate an ongoing concern. The record does not contain evidence of the stated number of employees on the Form I-129 as demonstrated by the submitted DE-6 Forms and the Form 941. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Without such evidence the petitioner has not established that the beneficiary is coming to the United States to perform services temporarily in a specialty occupation as required by Section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

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.

Factors often considered by CIS when determining these criteria include: 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With reference to kindergarten and nursery school teachers in private schools, the *Handbook* does not indicate that such teachers are required to have a baccalaureate degree in a specific specialty. Thus, the *Handbook* does not establish that the proffered position requires a baccalaureate degree in a specific specialty for entry into the position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on submitted internet job postings from various schools and day care centers. However, the petitioner has not provided sufficient information to establish that the schools are similar organizations. The information provided does not include information about the size of the advertising schools and their number of students. Additionally, because the petitioner has not provided sufficient evidence to support its claims about its size, the AAO is unable to compare the petitioner to those schools advertising for kindergarten teachers. This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* reveals that the proffered position is performed by kindergarten and nursery school teachers in private schools, positions that do not require a bachelor's degree in a specific specialty

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner indicated that candidates for its teaching positions had to have a baccalaureate degree from an accredited college and teaching experience. However, as previously stated, 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 petitioner indicated that it would accept candidates with a bachelor's degree in business administration, which negates its contention that it requires a specific degree related to the specialty occupation as required by the regulations. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or liberal arts, without further specification, does not establish the position as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

In addition, the petitioner did not submit any documentation to establish the academic credentials of other teachers in its employ. Going on 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 Dec. 190 (Reg. Comm. 1972)). Therefore the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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. The petitioner provided no further detail as to any specialized or complex duties that the beneficiary would perform as a kindergarten teacher. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. 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.

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