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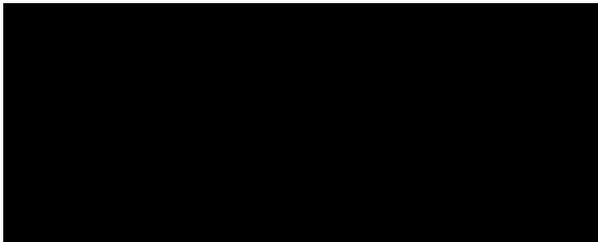
FILE: WAC 03 093 50153 Office: CALIFORNIA SERVICE CENTER Date:

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 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 school that seeks to employ the beneficiary as a kindergarten 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: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief and additional evidence.

The AAO will first address the issue of whether the proffered position is 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.

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) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. 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 teaching elementary science, personal hygiene, and humanities to promote physical, mental, and social development; supervising student activities such as field trips; organizing and conducting games and group projects to develop cooperative behavior and assist children in forming satisfying relationships; encouraging students in activities such as singing, dancing, and rhythmic activities; instructing students about personal hygiene; observing students to detect signs of ill health or emotional disturbance and to evaluate progress; discussing student problems and progress with parents; and alternating periods of strenuous activity with periods of rest or light activity to avoid over stimulation and fatigue. The petitioner seeks to employ the beneficiary because she possesses the equivalent to a U.S. bachelor's degree in childhood education, and has over 12 years of experience as a teacher.

The director determined that the proffered position was not a specialty occupation. According to the director, the record shows that the petitioner operates a preschool facility and day care, not an academic school. The director stated that the petitioner asserted that it normally requires a degree and/or Montessori training for teachers, thus confirming that it does not require a specific baccalaureate degree. Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director states that it reveals that the duties of the proffered position are performed by a preschool teacher, an occupation that does not require a specific baccalaureate degree. The director found that the beneficiary was not qualified for a specialty occupation.

On appeal, counsel states that the proffered position is a specialty occupation and that the beneficiary is qualified for the position. Counsel asserts that the director misclassified the duties of the proffered position; they are not analogous to a preschool teacher, and counsel refers to the *Handbook* and *Dictionary of Occupational Titles (DOT)* to support his assertion. Counsel states that the position announcements reveal that a degree is required for the proffered position. Counsel states that the petitioner gave information about a former employee who was a kindergarten teacher, and counsel further states that the petitioner attested that it normally requires a degree for the proffered position. Counsel stresses that the beneficiary is qualified for the proffered position.

Upon review of the record, the petitioner has not established that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO first considers 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)).

In determining whether a 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.

Counsel's reference to the *DOT* to support his assertion that the proffered position is analogous to a kindergarten teacher is not convincing. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The DOL has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and the *O*Net* provide 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. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information in the *DOT*.

A review of the *Handbook* discloses that the duties of the proffered position do not rise to the level of those performed by kindergarten teacher. The *Handbook* conveys:

Preschool children learn mainly through play and interactive activities. *Preschool teachers* capitalize on children's play to further language and vocabulary development (using storytelling, rhyming games, and acting games), improve social skills (having the children work together to build a neighborhood in a sandbox), and introduce scientific and mathematical concepts (showing the children how to balance and count blocks when building a bridge or how to mix colors when painting). Thus, a less structured approach, including small-group lessons, one-on-one instruction, and learning through creative activities such as art, dance, and music, is adopted to teach preschool children. Play and hands-on teaching also are used in kindergarten classrooms, but there academics begin to take priority. Letter recognition, phonics, numbers, and awareness of nature and science, introduced at the preschool level, are taught primarily by *kindergarten teachers*.

The petitioner does not describe the beneficiary as primarily teaching letter recognition, phonics, and numbers. The petitioner stated that the beneficiary will teach "elementary science" and "humanities," though the petitioner gives no indication as to the percentage of time devoted to these activities. Consequently, the director correctly concluded that the proffered position is similar to a preschool teacher.

With regard to educational requirement of a preschool teacher, the *Handbook* reports:

Licensing requirements for preschool teachers also vary by State. Requirements for public preschool teachers are generally higher than those for private preschool teachers. Some States require a bachelor's degree in early childhood education, 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.

The petitioner fails to establish the first criterion because the *Handbook* states that educational requirements for public preschool teachers is higher than for private school teachers, and that some states require a specific baccalaureate degree and others accept candidates with an associate's degree. Thus, employers seeking private preschool teachers accept candidates with an associate's degree. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, preschool teacher.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the petitioner submits a posting from Catholic Charities. The job description of the Catholic Charities and the Kids Alot positions are brief; thus, the AAO cannot determine whether they are parallel to the proffered position. Mooseheart Child City and & School, Inc. prefers, but does not require, a degree in social service, human service, education, psychology, or a related field; thus, its educational requirements differ from the proffered position. Further, three job postings are not sufficient to establish that a specific baccalaureate degree is an industry requirement.

No evidence shows that 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 analogous to a preschool teacher, an occupation that does not require a specific baccalaureate degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The petitioner avers that a prior kindergarten teacher possessed a baccalaureate degree. Yet, no evidence in the record supports this statement. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 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 requirements, then any alien with a bachelor's degree could be brought into the United States to perform a 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. Again, the *Handbook* discloses that the proffered position is analogous to a preschool teacher, an occupation that does not require a specific baccalaureate degree.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As discussed, the *Handbook* reveals that the proffered position is analogous to a preschool teacher, an occupation that does not require a specific baccalaureate degree.

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 on this ground.

The AAO has concluded that the proffered position is not a specialty occupation requiring a specific baccalaureate degree. As such, the beneficiary is qualified to perform the duties of the proffered position.

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.

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.