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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date:
OCT 05 2010

IN RE: Petitioner:
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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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.

The petitioner is a private Montessori school with nine employees. It seeks to employ the beneficiary as a kindergarten teacher 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 concluding that: 1) the petitioner failed to demonstrate that it offered a bona fide position; and 2) the petitioner failed to demonstrate that the proffered position is a specialty occupation.

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

First, the AAO will examine whether the petitioner offered a bona fide position to the beneficiary.

The petitioner is a Montessori school, licensed in the State of Illinois and a member of the American Montessori Society. In its support letter, the petitioner states that the beneficiary has been offered full-time employment as a kindergarten teacher:

Specifically, she will teach basic skills such as color, shape, number and letter recognition, personal hygiene, and social skills; establish and enforce rules for behavior, and policies and procedures to maintain order among students; observe and evaluate children's performance, behavior, social development, and physical health; instruct students, adapting methods to meet students' varying needs and interests; read books to entire classes or to small groups; demonstrate activities to children; provide a variety of materials and resources for children to explore, manipulate, and use, both in learning activities and in imaginative play; plan and conduct activities for a balanced program of instruction, demonstration, and work time that provides students with opportunities to observe, question, and investigate; confer with parents or guardians, other teachers, counselors, and administrators to resolve students' behavioral and academic problems; prepare children for later grades by encouraging them to explore learning opportunities and persevere with challenging tasks.

The petitioner also states that it requires a bachelor's degree in child education or related studies with at least two years of work experience and that it provides education that "emphasizes the potential of the young children (under age 5)"

The petitioner also submitted an education evaluation along with copies of the beneficiary's education documents indicating that she has the equivalent of a bachelor of science degree in psychology from an accredited college or university in the United States.

With the petition, the petitioner submitted a unilateral employment agreement that it has with the beneficiary to work as a kindergarten teacher.

On April 15, 2009, the director issued an RFE requesting additional evidence that the job offered is a specialty occupation, including a more detailed job description, with percentages of time to be spent in each duty, and that the beneficiary is qualified to perform in the claimed specialty occupation as well as evidence pertaining to the petitioner.

In response to the RFE, counsel submitted the petitioner's federal income tax return, which stated that the petitioner is a pre-school. Counsel also submitted additional documentation of the beneficiary's credentials, including evidence that she passed the PRAXIS Series test for teaching core curriculum for the education of exceptional students and special education preschool/early childhood development. Additionally, counsel submitted transcripts of graduate coursework taken by the beneficiary at a foreign university in special education; however, this coursework was not incorporated into the credential evaluation that was submitted. Counsel also submitted other schools' advertisements for teachers, mainly preschool, none of which are from Montessori schools. Moreover, many of these advertisements indicate that either a bachelor's degree is not required or, if it is required, that a bachelor's degree is required, but not in a specific specialty. The only advertisement that does require at least a bachelor's degree in education is for a pre-school teacher position at a daycare facility that requires fluency in Mandarin as well as English.

The petitioner did not submit a more detailed position description, as was requested in the RFE.

The director denied the petition on June 1, 2009.

On appeal, counsel argues that the proffered position is that of a kindergarten teacher and that the petitioning school teaches students from pre-school through first grade. Counsel submits a letter from the President/Head of School, which states that kindergarten is offered at the school and that the school accepts children with special needs. The President/Head of School also states that she wants the beneficiary to replace her in the classroom. The petitioner submits a certificate from the American Montessori Society, which states that the petitioner serves students from the ages of six weeks to seven years "in two classrooms." Student health data submitted by the petitioner indicates that there are 26 students enrolled in the petitioner's school.

From this evidence, especially the document evidencing that the petitioning school has two classrooms, the AAO finds that while it is likely that the beneficiary would teach kindergarten students as the petitioner claims, it is also likely that the beneficiary would teach preschool students as well, most likely in a combined classroom. Therefore, while it is not a misrepresentation for the petitioner to title the proffered position as a "kindergarten teacher," this job title is also not an accurate representation of the grade level for all of the students the beneficiary would teach. However, as the petitioner has demonstrated that it is a legitimate employer that has made a genuine offer of employment to the beneficiary, even though the beneficiary is likely to teach preschool students in addition to kindergarten students, the AAO finds that the petitioner's job offer to the beneficiary is bona fide, and the director's decision with regard to this issue will be withdrawn.

Next, the AAO will examine whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one 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:

An 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

To make its determination whether the employment as described by the petitioner qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty 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)).

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. 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.

As discussed previously, the petitioner states that it is seeking the beneficiary’s services as a kindergarten teacher. Also mentioned previously, the petitioner did not provide a detailed position description, including a breakdown of the percentage of time to be spent in each duty. Consequently, it is not clear how much of the time the beneficiary will teach kindergarten students and how much she will teach preschool students (or in the case of a combined classroom, what percentage of the students are in kindergarten and what percentage are in preschool). According to the *Handbook* section on Teachers – Preschool, except Special Education, “[s]ome employers may prefer workers who have taken secondary or postsecondary courses in child development and early childhood education or who have work experience in a child care setting. Other employers require their own specialized training. An increasing number of employers require at least an associate degree in early childhood education.” Therefore, the *Handbook* indicates that working as a preschool teacher does not normally require a bachelor’s degree *in a specific specialty* and therefore is not a specialty occupation.

Even if the petitioner could demonstrate, which it did not do, that the beneficiary would only work as a

kindergarten teacher and not as a preschool teacher, or that any preschool related duties would only be incidental to her kindergarten teaching duties, the *Handbook* states: “[p]rivate school teachers do not have to be licensed but *may* still need a bachelor’s degree.” [Emphasis added.] Because the *Handbook* does not indicate that a bachelor’s degree *in a specific specialty* is normally required for kindergarten teachers in a private school setting, the *Handbook* does not establish that a private school kindergarten teacher is a specialty occupation.

Of course, the fact that private pre-school and/or kindergarten teachers do not constitute an occupational group that categorically requires at least a bachelor’s degree, or its equivalent, in a specific specialty does not preclude the possibility that the duties and associated performance requirements of a particular position in a particular educational entity would require such a degree or degree equivalency. However, the AAO finds that neither the duties described by the petitioner or any documentary evidence in this record of proceeding establishes that requirement.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position’s duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor’s degree, in a specific specialty, that is common to the petitioner’s industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS 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)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor’s degree in a specific specialty. The petitioner did not submit any expert opinions or other documentation evidencing that Montessori schools similar to the petitioner require a bachelor’s degree in a specific specialty for their preschool/kindergarten teachers.

Also discussed previously, none of the advertisements submitted appear to be from Montessori schools. Moreover, many of these advertisements indicate that either a bachelor’s degree is not required or, if it is required, that a bachelor’s degree is required, but not in a specific specialty. Therefore, the petitioner does not provide any job-vacancy advertisements evidencing a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner. Additionally, there is no independent documentary evidence establishing that the advertisements

are representative of an industry-wide recruiting and hiring standard for the type of position proffered in this petition.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “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.” The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for private school teacher positions. Moreover, as mentioned previously, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than teaching positions that can be performed by persons without a specialty degree or its equivalent, particularly in parallel positions in organizations similar to the petitioner.

Next, as the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The person whom the beneficiary would replace at the school is also its President/Head of School and therefore holds additional responsibilities beyond teaching. Moreover, although this person states that she is a “[g]raduate of Northern Illinois University and [has] taken additional classes for the special child at College of DuPage,” no supporting evidence was provided that this person holds at least a bachelor's degree or the equivalent in a specific specialty closely related to teaching. Even though the President states that she has enclosed copies of her certifications and certificates, these documents were not attached. 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)).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As mentioned earlier, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than preschool/kindergarten teaching positions that are not usually associated with a bachelor's degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason, the petition will be denied.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, even though the beneficiary appears to have taken graduate coursework in special education from a foreign university, the petitioner did not submit an education evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services

requiring at least a bachelor's degree or the equivalent in child education or a related field, as was stated as a *minimum requirement* by the petitioner. Instead, the credential evaluator found that the beneficiary's education is equivalent to a U.S. bachelor's degree in psychology. As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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