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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



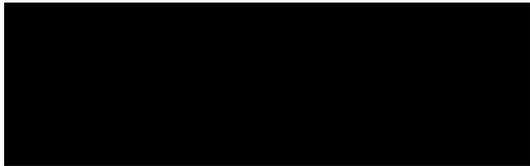
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Date: **FEB 28 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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:

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 \$630. 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
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 remain denied.

The petitioner is a public school district in the State of Arizona which employs 71 personnel and seeks to employ the beneficiary as a special education 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 the petitioner failed to establish that the beneficiary possessed the appropriate licensure required for the proffered position.

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

The director in this matter determined that the beneficiary did not possess the appropriate licensure to perform the duties of the proffered position in the State of Arizona. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner is seeking the beneficiary's services as a special education teacher. Counsel for the petitioner notes that to qualify for this position the beneficiary must meet state teaching certification requirements and possess a bachelor's degree with a major, minor, or equivalent in the candidate's teaching field. The record shows that the beneficiary possesses a substitute teaching certificate issued by the [REDACTED] valid from August 17, 2007 until November 21, 2013. The record also includes the beneficiary's educational credentials

showing she received a Bachelor's degree in Secondary Education from the [REDACTED], a Master's degree in Education, from the University of [REDACTED], and a Master of Arts in Education, with a major in Special Education from [REDACTED], Philippines. The beneficiary's degrees were evaluated as the U.S. equivalent of a Bachelor of Science in Secondary Education with a concentration in Computer Technology and a Master of Arts in Education and a Master of Arts in Education with a concentration in Special Education.

The issue in this matter is whether the beneficiary's substitute certification is sufficient under the statutes and regulations of Arizona to perform the duties of the proffered position. The Form I-129 and the Labor Condition Application (LCA) indicate that the petitioner is requesting the beneficiary's services beginning on October 1, 2009 and ending September 30, 2012.

Counsel cites Arizona Revised Statutes (ARS) § 15-782(C) as the statute granting authority to the State Board of Education to set forth the qualifications of teachers; however, ARS § 15-782(C) is applicable to career and technical education and vocational education, not special education in a K through 12 public school. The AAO finds ARS section 15-203 which sets out the powers and duties of the State Board of Education more applicable to this matter. ARS § 15-203 states in pertinent part:

A. The state board of education shall:

14. Supervise and control the certification of persons engaged in instructional work directly as any classroom, laboratory or other teacher or indirectly as a supervisory teacher, speech therapist, principal or superintendent in a school district, including school district preschool programs, or any other educational institution below the community college, college or university level, and prescribe rules for certification, including rules for certification of teachers who have teaching experience and who are trained in other states, which are not unnecessarily restrictive and are substantially similar to the rules prescribed for the certification of teachers trained in this state.

Title 7 of the [REDACTED] sets out the rules promulgated by the [REDACTED]. Article 6 consisting of Sections [REDACTED] through [REDACTED], were adopted effective December 4, 1998. The section pertinent to this matter states (emphasis added):

R7-2-614. Other Teaching Certificates

- A. Except as noted, all certificates are subject to the general certification provisions in [REDACTED]
- B. Substitute Certificate - grades K through 12
 1. The certificate is valid for six years and renewable by reapplication.
 2. The certificate entitles the holder to substitute in the temporary absence of a regular contract teacher. *A person holding only a substitute certificate shall not be assigned a contract teaching position.*

3. An individual who holds a valid teaching or administrator certificate shall not be required to hold a substitute certificate to be employed as a substitute teacher.
4. *A person holding only a substitute certificate shall be limited to teaching 120 days in the same school each school year.*
5. The requirement for issuance is a bachelor's degree and a valid fingerprint clearance card issued by the Arizona Department of Public Safety.
6. Substitute certificates previously issued as valid for life under this rule shall remain valid for life.

The petitioner, in the October 20, 2009 letter signed by Superintendent [REDACTED] asserts that the beneficiary is authorized to teach special education with the substitute certification she possesses. [REDACTED] notes that the [REDACTED] of Education no longer issues Emergency Teaching Certificates; so, school districts have turned to the use of Substitute Teaching Certificates in order to obtain teaching licenses for teachers in cases such as this. [REDACTED] assures that the petitioner will assist the beneficiary in obtaining an [REDACTED] Special Education Teaching Certificate once she arrives in [REDACTED]. [REDACTED] indicates that to obtain an [REDACTED] Special Education Teaching Certificate, the candidate must achieve a passing score on the professional knowledge portion of the [REDACTED] Teacher Proficiency Assessment, an assessment administered only in person in the State of Arizona.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license "prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation." In this matter, the beneficiary does not possess the necessary state license.

Although [REDACTED] indicates that the beneficiary may teach special education with a substitute certification, the [REDACTED] precludes an individual holding a substitute teaching certification from assignment to a contract teaching position. Moreover, an individual holding a substitute teaching certificate is limited to teaching 120 days in the same school each school year. See [REDACTED] Administrative Code Title 7 Article 6 – R7-2-614(B)(4). Thus the regulation at 8 C.F.R. § 214.2(h)(4)(v)(B), which governs temporary licensing is not applicable¹ as an individual with a substitute teaching certification is not authorized to fully perform the duties of the proffered position. Even if the AAO accepted that the substitute teaching certification as used in [REDACTED] is analogous to a temporary license, which it is not, the petitioner has not provided the degree of supervision the beneficiary would

¹ The regulation at 8 C.F.R. § 214.2(h)(4)(v)(B), provides that, if a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien and, upon review of these factors, H classification may be granted. [REDACTED] methodology of using a substitute teaching certificate in place of a temporary license has not been established as being authorized by the [REDACTED]

receive while working as a substitute and has not identified the limitations placed upon the beneficiary while working under the substitute certification.

Beyond the decision of the director, the petitioner has not provided evidence of its ability to employ the beneficiary in a specialty occupation for the three years requested on the Form I-129 and the LCA. As observed above, a substitute teacher may only be employed 120 days in the same school each school year. The record does not provide an avenue of specialty occupation employment for the beneficiary for the entire requested duration of the petition. [REDACTED] notes that an individual must achieve a passing score on the professional knowledge portion of the [REDACTED] prior to obtaining a full license and although the petitioner may assist the beneficiary in passing the test, the beneficiary when the petition was filed was not qualified to actually teach for the requested duration of the petition and there is no guarantee that she will qualify. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a special education teacher in the State of Arizona, or that the position of substitute teacher, the actual position the beneficiary would likely perform until obtaining a license, qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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