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U.S. Citizenship and Immigration Services

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FILE: WAC 03 066 50015 Office: CALIFORNIA SERVICE CENTER Date: JUN 09 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is [redacted] In order to employ the beneficiary as a preschool teacher of children between three and six years of age, 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the petitioner had failed to establish that the proffered position was a specialty occupation within the meaning of any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel asserts that the evidence of record establishes the position's specialty occupation status under all of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

In reaching its decision, the AAO considered the entire record of proceeding, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B as annotated by counsel, counsel's brief, and the documentary evidence submitted with the brief.

Upon consideration of the entire record, including all of the material submitted on appeal and at the earlier stages of the proceeding, the AAO has concluded that the director's decision to deny the petition was correct, and that, accordingly, the appeal should be dismissed and the petition denied.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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.

In light of the petitioner's emphasis, in parts of the record, that it requires at least a baccalaureate degree for the position at issue, it is worth special note that 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 with highly specialized knowledge that would be directly applied in the proffered position.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) is satisfied where the evidence establishes that a baccalaureate or higher degree, or the equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position. The evidence of record here does not reach this threshold.

While counsel and the petitioner assert that the proffered position requires at least a bachelor's degree or its equivalent, they do not assert that the degree or equivalent is required to be in any particular major. See, for instance: section 1 of counsel's brief on appeal; the [redacted] letter from the petitioner's administrator submitted on appeal, which states, in part, that a "baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position that we are filling with [the beneficiary]"; and section 1 of counsel's letter in reply to the RFE.

The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. However, as discussed below, the *Handbook* does not indicate that the proffered position is in an occupational category that requires at least a baccalaureate or the equivalent in a specific specialty. [1]

On appeal, counsel, in part, refers to this quote in the [redacted] and Secondary" section of the *Handbook's* 2002-2003 edition: "all States require 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." However, later in the same section, that edition of the *Handbook* indicates that that a bachelor's degree is not a universal requirement for licensing at the preschool level:

> Licensing requirements for preschool teachers vary by State. Requirements for public school teachers are generally higher than those for private preschool teachers. Some States require a bachelor's degree in early childhood education and others require an associate degree, while others may require certification by a nationally recognized authority. The Child Development Associate (CDA) credential is the most common type of certification. It

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[1] The director mistakingly referenced the *Handbook's* 2002-2003 edition, when actually he quoted and relied on an earlier version of the *Handbook* that substantially treated [redacted] the same occupational group, and accordingly dedicated a separate section to them ("Preschool Teachers and Child-Care Workers"). Beginning with its 2002-2003 edition, the *Handbook* has treated these two occupations as distinctly different. School childcare workers are now treated separately, in a [redacted] section, while the *Handbook* now addresses preschool teachers in a section entitled [redacted] However, neither the edition which the director quoted nor later editions of the *Handbook* report that preschool teachers are normally required to possess a baccalaureate or higher degree, or the equivalent, in a specific specialty.

> requires a mix of classroom training and experience working with children, along with an independent assessment of an individual's competence.

The *Handbook's* 2004-2005 edition contains nearly identical language:

> 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. [redacted] 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 copies of previous decisions by the Administrative Appeals Unit (AAU), as the AAO was previously known, are not persuasive. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, the two previous decisions provided by counselor are distinguishable from the facts in the instant proceeding, for at least the following reasons.

The favorable [redacted] preschool teacher position specifically noted a condition that is not in the instant record, namely, that the applicable [redacted] "Montessori preschool teachers must complete an additional year of training after receiving their bachelor's degree in early childhood education or a related field." In contrast, the evidence in the present proceeding indicates that the proffered position does not require a bachelor's degree "in early childhood education or a related field," or in any specific specialty. For example, the "Montessori Training Options" document (tabbed "Exhibit B" on appeal) states, in part, "A bachelor's degree [no major specified] is required for admission to U.S. courses, but some exceptions are made based upon the applicant's background and goals."

The other decision [redacted] predated the Immigration [redacted] the subsequently promulgated H-1B regulations that apply to the instant proceeding [redacted] was decided under different standards than apply to the proffered position. Furthermore, the preschool teacher duties in the 1989 decision were substantially different from those proposed by the petitioner here.

Because it is at a Montessori school, the particular position at issue has an added educational requirement not common to preschool teaching positions, namely, completion of the coursework required for Montessori certification. However, neither the [redacted] document nor any other evidence in the record establishes that the requisite Montessori coursework elevates the overall hiring requirement (a bachelor's degree in no specific area) to the equivalent of a baccalaureate or higher in early childhood development or any other specific specialty.

Next, the petitioner has not presented evidence that would qualify the proffered position under either of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The record contains no evidence to satisfy the first prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*2*) by establishing that a specific-specialty degree requirement is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by CIS 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 [redacted]

As just discussed, the *Handbook* does not report that the proffered position is one that requires a degree in a specific specialty. Also, there are no submissions from individuals or other firms involved in the hiring of Montessori preschool teachers. Furthermore, as mentioned earlier, th[redacted] document indicates that a bachelor's degree in any academic area is sufficient for entry to Montessori training in the United States.

The AAO does not agree with counsel's assertion that the record's three Internet job vacancy announcements from other Montessori schools satisfy this prong's requirement. Two of these advertisements are from the same general employer [redacted] evelopment centers at different locations. These two advertisements state only that a "BA/BS in Early Education or related field strongly desired." The third specifies only "a bachelor's degree and [redacted] These documents are too few to establish an industry-wide hiring requirement. Furthermore, none of them specify that the bachelor degrees that they require must be in a specific specialty.

The AAO also found that the evidence of record does not qualify the proffered position under the second 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 indicate that the beneficiary's work as a Montessori preschool teacher would be either so unique or so technically demanding as to require a bachelor's or higher degree in a specific specialty.

Next, 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 – is not met. It is noted that the petitioner's letter on appeal asserts, without corroborating documentation, that "a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position that we are filling with the beneficiary" and that of the petitioner's four current employees, two hold master's degrees and two bachelor's degrees. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings [redacted] Furthermore, the letter does not describe the majors in which the degrees are held, nor does it relate the history of the petitioner's hiring requirements or what the petitioner may have accepted as the "equivalent" of a bachelor's degree.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) – the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In particular, the AAO is not persuaded that the record's list of differences between Montessori and traditional classroom teaching establishes that the proposed duties are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

AAO notes another basis upon which the petition must be denied. According to the petitioner and counsel, Montessori teaching positions are distinguished by and require Montessori certification. (See, for example, paragraph 4 of counsel's brief, and the letter submitted on appeal by the petitioner's administrator.) Thus, Montessori certification is a material requirement for performing the duties of the proffered position. Yet, the administrator's letter on appeal indicates that the beneficiary had not achieved her Montessori certification when the petition was filed on her behalf. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). 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. 1978). For this additional reason also, CIS may not approve the petition.

Therefore, the AAO shall not disturb the director's denial of the petition: the petitioner has failed to establish that the proffered position is a specialty occupation within the meaning of any criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A).

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.