

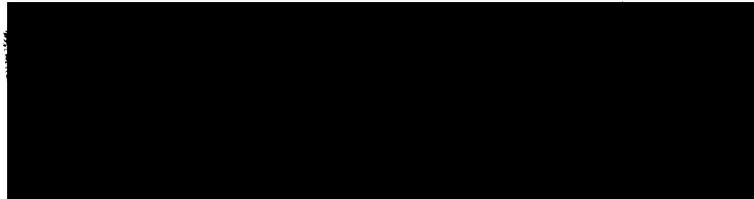
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U.S. Citizenship
and Immigration
Services

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FILE: LIN 04 069 52075 Office: NEBRASKA SERVICE CENTER Date: NOV 02 2005

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 Nebraska 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 an organization providing cultural and educational services to Japanese children, as well as supplemental education in English, mathematics and reading based on the curriculum of the Japanese Education Ministry. It seeks to employ the beneficiary as a teacher of Japanese culture and language 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 he determined that the record did not establish the proffered position as 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; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

In filing the petitioner's appeal on March 26, 2004, counsel indicated that he would submit a separate brief and/or evidence within 30 days. As the evidence of record contains no additional materials, the AAO contacted counsel on September 12, 2005 to determine whether he had submitted the documentation indicated. Counsel has not responded. Accordingly, the record is complete.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (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 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS must examine the ultimate employment of the alien. 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 duties of the position actually require 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.

The petitioner states that it is seeking the beneficiary’s services as a teacher of Japanese culture and language. Evidence of the beneficiary’s duties includes: the Form I-129, with a January 2, 2004 letter of support from the petitioner; and the petitioner’s February 24, 2004 letter responding to the director’s request for evidence.

As the time of filing, the petitioner indicated that the beneficiary would be responsible for the following duties:

- Developing curriculum and course objectives for Japanese culture and language courses;
- Providing instruction to students of various ages in Japanese culture and language through lectures, discussions, demonstrations and use of visual aids;
- Assigning lessons and reviewing and grading students’ work;
- Preparing, administering and correcting tests to determine each student’s knowledge of presented material; and
- Evaluating progress of individual students and preparing and maintaining reports; discussing progress with parents.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 his denial, the director, relying on the 2002-2003 edition of the *Handbook*, found the proffered position to be principally that of a self-enrichment education teacher, employment that did not impose a degree requirement on the beneficiary. While he also acknowledged that the beneficiary would be required to undertake some of the duties of a kindergarten, elementary and middle school teacher, he determined that, as such employment would occur at a private educational facility, these duties also did not require the beneficiary to hold the minimum of a baccalaureate degree or its equivalent. The AAO concurs with the director's findings.

The beneficiary's duties, as described, would require her to perform as a teacher of Japanese culture and language. As indicated by the petitioner in response to the director's request for evidence, the cultural courses to be taught by beneficiary would include: the tea ceremony, origami, flower arrangement, calligraphy, and kimono instruction. As stated by the director, such responsibilities appear closely aligned to the employment of self-enrichment teachers who, as described by the *Handbook* at pages 225-226, teach courses that students take for pleasure or personal enrichment, courses that usually do not lead to a particular degree or vocation. As already noted by the director, those who provide self-enrichment instruction need not hold a degree at the baccalaureate level to seek employment. As discussed by the *Handbook* at page 227:

The main qualification for self-enrichment teachers is expertise in their subject area; however, requirements may vary greatly with both the type of class taught and the place of employment Some self-enrichment teachers are trained educators or other professionals who teach enrichment classes in their spare time. In some disciplines, such as art or music, specific teacher training programs are available

The academic courses for which the petitioner has indicated the beneficiary would be responsible include Japanese, reading, mathematics, science, social studies, history, art and English. While such courses, if taught at a public school, would require the beneficiary to be licensed as a teacher and, therefore, to have completed both a bachelor's degree and an approved teacher-training program, no such requirements are imposed on those who teach in private institutions (*Handbook* at pages 234-235). Accordingly, the AAO, like the director, finds none of the proffered position's duties to impose a degree requirement on the beneficiary. Therefore, it cannot be established as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the proffered position may be established as a specialty

occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a specific degree requirement is common to the industry in parallel positions among similar organizations or the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. To establish the petitioner's degree requirement as the norm within its industry, the petitioner has submitted materials from nine organizations providing instruction in the Japanese language and culture. However, the submitted documentation does not establish the proffered position as a specialty occupation.

The evidence provided by the petitioner does not prove that its degree requirement exists in parallel positions, as required by the second criterion. Although the nine institutions represented in the record appear similar in operation to the petitioner, only five specifically indicate they impose a degree requirement on their teaching staffs. Of the five institutions that impose a degree requirement, none describes the duties of their instructors. Without a description of the duties for which these organizations require degrees, the record does not establish that their teaching positions are parallel to the proffered position described by the petitioner. Further, none provides any independent evidence, i.e., employment records and related academic credentials, to document the degrees held by their teaching staffs. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)).

These five organizations indicate that their baccalaureate degree requirement is based on teaching standards set by the Japanese Ministry of Education. However, the AAO notes that the record contains the petitioner's translation of what is described as an excerpt from the Education Ministry's website that indicates that Japanese teaching certificates are also awarded to individuals with associate degrees. While counsel asserts that these second-class certificates allow individuals to teach only at the kindergarten level, there is no evidence in the record that supports counsel's statements. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the record does not establish that a baccalaureate degree is a standard requirement for teachers employed by organizations teaching Japanese language and culture.

The AAO also concludes that the record before it does not establish that petitioner's position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. It finds no evidence that would support a finding that the proffered position, based on its complexity or unique nature, can be distinguished from other similar but non-degreed employment. Accordingly, the petitioner cannot establish its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this case, the

petitioner has submitted no evidence to establish that it has a history of requiring a degree or its equivalent for its teaching positions, nor for the proffered position. Although the petitioner has submitted an Internet notice regarding the start-up of its language and cultural instruction program in which it asks for the submission of teaching applications, that notice does not stipulate that applicants must have the minimum of a baccalaureate degree or its equivalent in a directly related field. Instead, it indicates only that the petitioner is seeking energetic and dedicated persons to fill its teaching positions. Therefore, the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to prove that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. However, a review of the record does not establish that the beneficiary's duties are more specialized or complex than those normally performed by teachers in private educational institutions. Nor does the AAO find the proffered position to be an amalgam of jobs that would require the beneficiary to possess knowledge and skills beyond those required for private cultural and language instruction. As a result, the proffered position cannot be established as a specialty occupation on the basis of the exceptional specialization and complexity of its duties.

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as a specialty occupation under any of the four alternate criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to the director's finding that the petitioner has also failed to establish that, at the time of filing, it had an existing position for which it required the beneficiary's services.

An H-1B alien must be coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B). Therefore, to establish its proffered position as a specialty occupation, a petitioner must not only describe employment that requires the attainment of the minimum of a baccalaureate degree or its equivalent, but must establish that this employment is consistent with its operations, i.e., that it will employ the beneficiary in the position that has been described. Accordingly, the petitioner in the instant case, as it seeks the beneficiary's services as a teacher of Japanese language and culture, must establish that it is an organization providing this type of instruction.

To establish itself as an institution providing instruction in Japanese language and culture, the petitioner has submitted copies of what counsel has identified as descriptions of its operations. This material does not, however, describe the petitioner's operations. Instead, it consists of two proposals – one for the creation of a Japanese Saturday school and the other for a Japanese summer school – which offer a general description of the curriculum to be taught and indicate that the petitioner's language and calligraphy classes will begin in February 2004 and that all other classes will begin in April 2004. The proposals are supplemented by a copy of a bank statement documenting that a checking account has been established in the petitioner's name, the petitioner's Internet advertisement regarding its teaching positions, and a copy of a registration form for Japanese language classes beginning on February 21, 2004, which was submitted by the petitioner to establish

its ability to immediately employ the beneficiary. These materials do not, however, establish either that the petitioner currently operates as a school teaching Japanese language and culture or that it was in the process of starting one at the time of filing.

The AAO finds the record to contain none of the detail that could be expected to document the start-up of a school. Although the petitioner's Japanese Saturday school proposal indicates that it intended to begin providing Japanese language instruction within a month of the date of filing and its other courses two months later, the record contains no listing of the courses to be taught or how the curriculum will be organized, including the levels at which the petitioner was to provide instruction. There is also no evidence that the petitioner had identified or acquired space in which to provide instruction or was in the process of doing so. Although the record indicates that initial language classes would take place at a public library in Monona, Wisconsin, the petitioner's proposal for its Japanese Saturday school indicates only that it hopes to obtain rental space from the Four Lakes Distance Education Network (FLDEN). Further, there are no invoices/receipts that would indicate that the petitioner had begun to acquire instructional materials for its language or cultural courses. Although the banking statement provided by the petitioner indicates withdrawals, there is no explanation of these expenditures and their relation to the start-up of the petitioner's school. Moreover, with the exception of the Internet advertisement seeking teaching staff, the record offers no advertisements or announcements, no introductory letters or fact sheets that would establish that the petitioner was, at the time of filing, in the process of seeking students for its language and cultural programs.

The registration form submitted by the petitioner to prove that it would employ the beneficiary as of February 2004 also fails to establish the petitioner's operations. Although the form indicates that Japanese language courses are to be taught at the Monona Public Library in Monona, Wisconsin beginning February 21, 2004, it does not establish that such courses would be provided by the petitioner, as indicated in the petitioner's response to the director's request for evidence and its proposal for a Japanese Saturday school. Instead, the registration form for the courses that the petitioner stated the beneficiary would teach indicates that Japanese language classes at the Monona Public Library would be provided through the auspices of the FLDEN noted above. Although the record indicates that the petitioner's director is an FLDEN instructor and that FLDEN would potentially provide the petitioner with rental space for its school, it offers no other information regarding the relationship between the two entities, including whether the FLDEN Japanese language classes would be provided by the petitioner. Accordingly, the AAO finds the registration form to raise questions as to whether the petitioner would independently operate its own language programs or serve as an adjunct of FLDEN programs. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based on the record before it, the AAO concludes that the petitioner has failed to provide sufficient evidence to establish either that it has an existing business teaching Japanese language and culture or that it was in the process of establishing one at the time of filing. Evidence of the petitioner's operations as an organization providing instruction in the Japanese language and culture is limited to the copy of its bank statement and its Internet announcement seeking teaching staff. This documentation is, however, insufficient to establish the petitioner as a private educational institution, particularly in light of the unresolved nature of the petitioner's

affiliation with the FLDEN. Therefore, the record fails to establish that the petitioner would employ the beneficiary in the proffered employment. An H-1B alien must be coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B).

For the reasons related in the preceding discussion the petitioner has failed to qualify the proffered position as a specialty occupation. The record does not establish either that the proffered position meets the requirements set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming to the United States to perform services in a specialty occupation, as required by section 101(a)(15)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B). 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 met that burden.

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