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U.S. Citizenship  
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Services

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JUL 31 2007

FILE: LIN 06 066 51767 Office: NEBRASKA 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.

*for Michael T. Kelly*  
Robert P. Wieman, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the nonimmigrant visa petition. 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 Presbyterian church that also maintains a Korean language and culture school. The petitioner seeks to employ the beneficiary as a Korean language and culture instructor. Accordingly, 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record includes: (1) the Form I-129 and supporting documents filed December 29, 2005; (2) the director's January 5, 2006 request for further evidence (RFE); (3) counsel's March 28, 2006 response to the director's RFE and supporting documents; (4) the director's April 4, 2006 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On April 4, 2006, the director denied the petition, determining that the petitioner had failed to establish that the proffered position is a specialty occupation. In a separate decision, also dated April 4, 2006, the director determined that the beneficiary did not have a valid passport on the date the instant petition was filed and thus the request for an extension of stay could not be approved. On appeal, counsel for the petitioner submits a brief and attachments.

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 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)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 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.

On the Form I-129, the petitioner indicated that the proffered position is that of a "Korean Language Program Administrator/Instructor." In an undated letter appended to the petition, the petitioner indicated that the position included oversight of the petitioner's Korean language program and after-school education program for children ages 6 through 17. The petitioner indicated the purpose of its language program is to teach students how to read, write, and speak Korean, as well as to teach Korean history, music, dance, cultural traditions, values, and ethics. The petitioner noted that the program also offers academic tutoring for students on regular school coursework on an individual and as-needed basis. The petitioner stated:

As Korean Language Program Administrator/Instructor, [the beneficiary] will develop and implement [a] curriculum that is appropriate to the ages and skill levels of the program's many students. She will develop lesson plans and choose appropriate textbooks for each class. She will establish clear objectives for each lesson plan/unit and project and communicate those objectives to students. [The beneficiary] will conduct classes and instruct students through lectures, discussions, and demonstrations. She will also organize field trips and extracurricular activities to motivate and broaden the educational experience of her students. She will prepare, administer, and grade tests and assignments to evaluate students' progress. She will also assign and grade class work and homework. [The beneficiary] will also provide individualized tutoring to students with special needs. Finally, [the beneficiary] will direct and supervise the program's two volunteer assistant teachers.

The petitioner indicated the position required a bachelor's degree in education or its equivalent in experience as a minimum entry requirement, as well as fluency in written and spoken English and Korean and formal knowledge of Korean culture.

The petitioner also provided letters from the pastors of two other Korean Presbyterian Churches who both indicated that they required their Korean language teachers to have a baccalaureate degree or its equivalent. The petitioner also submitted an excerpt from the Department of Labor's *Online O\*NET (O\*NET)* discussing self-enrichment education teachers and noting its report that self-enrichment teachers would have a JobZone rating of 4.

In response to the director's RFE, counsel for the petitioner noted that the proffered position "is an unlicensed position" as Oregon state law did not require private education institutions such as the petitioner's language program to require licensure for their teachers. Counsel also indicated that the beneficiary in the proffered position would spend 95 percent of her time as a classroom teacher and 5 percent of her time on ancillary administrative duties necessary to maintain the program including supervision of two volunteer assistant teachers. Counsel referenced the beneficiary's prior approvals in H-1B status and asserted that the proffered position is the same as the positions for which the prior approvals were granted.

Counsel also submitted five job announcements for positions including: (1) a part-time teacher/instructor at the Sylvan Learning Center listing a bachelor's degree in the educational field of the advertisement and requiring a certified teaching license; (2) a part-time teacher/tutor for Huntington Learning Center requiring a bachelor's degree and state teaching credentials; (3) a director/teacher for a nonprofit school for children with autism that indicated the ideal candidate would have an ABA and/or BCABA/BCBA certification; (4) a part-time tutor/teacher for an unidentified entity that listed a bachelor's degree in the educational field of the advertisement; and (5) a director of learning for KnowledgePoints that listed a bachelor's degree in the educational field of the advertisement.

Counsel also noted that the petitioner's pastor had previously performed the duties of the position and that the pastor held a bachelor's degree in Korean history, a Master's degree in Education, a Master of Divinity degree, and a Doctorate in Theology. The petitioner provided copies of the pastor's master's degrees. Counsel also asserted that the description of the duties of the proffered position demonstrated that the duties were specialized and complex.

On April 4, 2006, the director denied the petition agreeing that the proffered position is similar to a self-enrichment education teacher; but noting that the Department of Labor's *Occupational Outlook Handbook (Handbook)* reported the main qualification for a self-enrichment teacher is expertise in a subject matter. The director found that the proffered position did not require the successful candidate to have a bachelor's degree in a specific specialty. The director acknowledged counsel's reference to the *O\*NET*; the submitted advertisements for teachers/tutors; the petitioner's pastor's educational background; and counsel's assertion that the duties of the proffered position were specialized and complex. The director determined, however, that the petitioner had not demonstrated that the proffered position met any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel for the petitioner submits an April 25, 2006 opinion authored by [REDACTED] and Professor of Education and Chair of the Department of Curriculum and Teaching at Teachers College at Columbia University. [REDACTED] opines: "[c]ompanies seeking to employ a Korean Presbyterian Program Administrator/Instructor in the field of Education require prospective candidates to possess at least a Bachelor's degree in the area of Education or a related field from an accredited institution of higher learning." [REDACTED] repeats the description of the proffered position and concludes that the position requires the theoretical and practical application of an advanced highly specialized body of knowledge in the field of education, as the minimum requirement for entry into the occupation. [REDACTED] again repeats elements of the description and concludes, without analysis, that the skills needed to perform these duties are often taught in junior and senior courses in a bachelor's program in education. [REDACTED] indicates in summary that the

proffered position requires the diversity of expertise and range of abilities that is optimally obtained through bachelor's-level study in the field of education.

Counsel also submits several additional letters from Korean churches with Korean language programs that indicate a preference for teachers with bachelor's degrees. None of the churches indicate the bachelor's degree must be in a specific discipline. Counsel again references the beneficiary's prior approvals in H-1B classification and asserts that the approvals were for essentially identical Korean language teaching positions.

Counsel asserts that [REDACTED]'s opinion, the *O\*NET*, the Department of Labor's *Dictionary of Occupational Titles*, (*DOT*), the *Handbook*, unpublished decisions, the letters from other Korean churches with Korean language programs, and the petitioner's hiring practice for this position, all support the conclusion that the proffered position is a specialty occupation. Counsel contends that the director's disregard for the prior approvals of the beneficiary's classification as an H-1B nonimmigrant is arbitrary, capricious, and an abuse of discretion. Counsel also opines that the Service should not deny amendments and extensions of stay to the beneficiary and her husband because their passports had expired and the Korean Consulate had not yet approved the extension requests for their passports when the petition was filed.

Preliminarily, the AAO observes the director's denial of the beneficiary's extension of stay because the beneficiary did not have a valid passport when the petition was filed is not an issue that is subject to appeal. The AAO will not address counsel's opinion on that issue.

Turning to the criteria to establish the proffered position as a specialty occupation, the AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With reference to self-enrichment teachers, the *Handbook* 2006-2007 edition reports: "[t]eachers who conduct courses on academic subjects in a non-academic setting, such as literature, foreign language, and history courses, are also included in this occupation." As the director observed, the *Handbook* indicates: "[t]he main qualification for self-enrichment teachers is expertise in their subject area." Thus, the *Handbook* does not specify that a bachelor's degree in a specific discipline is a requirement for a self-enrichment teacher for entry into the occupation.

The AAO acknowledges counsel's reference to the *DOT* and the *O\*NET* and its description of the responsibilities for self-enrichment teachers. However, the AAO does not consider either the *DOT* or the *O\*NET* to be persuasive sources of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. Both the *DOT* and the *O\*NET* provide only general information about the tasks and work activities associated with a particular occupation, and about the education, training, and experience required to perform the duties of that occupation. An SVP or JobZone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. The *DOT* and its successor the *O\*NET* do not establish that the position of an after-school self-enrichment teacher requires the attainment of a bachelor's degree or its equivalent in a specific specialty.

The AAO also acknowledges [REDACTED]'s opinion regarding the position of a Korean Presbyterian Program Administrator/Instructor. [REDACTED] indicates that he is qualified to comment on the educational requirements of the proffered position because of the positions that he has held at Teachers College Columbia University. However, [REDACTED] does not support his conclusion that the duties of the proffered position, duties both the AAO and the petitioner agree are the duties of a self-enrichment teacher, require a bachelor's degree in a specific field for entry into the position. Rather, [REDACTED] restates the duties of the proffered position and concludes that the skills needed to perform these duties are often taught in junior and senior courses in a bachelor's program in education. [REDACTED] does not provide an analysis of the skills necessary to perform the duties or substantiate that the skills are gained through courses that are part of a four-year course of university-level study.

Moreover, [REDACTED] does not explain or otherwise support why his opinion of this occupation is contrary to the *Handbook's* report. The AAO observes that the *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. The record does not contain evidence that [REDACTED] interviewed the beneficiary, researched the petitioner's after-school language program, or otherwise investigated the actual duties required of the proffered position. The record does not contain evidence that [REDACTED] interviewed or visited the other Korean language programs or analyzed the duties of those individuals employed in other Korean language programs. [REDACTED] does not base his opinion on objective surveys and independent detailed evidence of an industry standard. There is thus an inadequate factual foundation established to support the opinion. [REDACTED] opinion is insufficient to overcome the *Handbook's* finding that the occupation of a self-enrichment teacher is an occupation that does not require a bachelor's degree in a specific discipline. Where an opinion is in any way questionable, the AAO may discount it or give it less weight. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The petitioner has not established that the duties of the proffered position satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether 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. To determine whether the petitioner's degree requirement is shared within its industry, CIS often considers 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 this matter as observed above, the *Handbook* does not report that a self-enrichment teacher requires a baccalaureate degree. With regard to parallel positions in similar after-school language programs, the petitioner has submitted five job announcements and several letters from other church Korean language programs.

The job announcements submitted do not provide sufficient information regarding the duties of the proffered positions to demonstrate the positions are parallel to the petitioner's position. The AAO observes that three of the advertisements require state teaching certification, a requirement significantly dissimilar to the proffered

position. The AAO observes further that none of the advertisers required a bachelor's degree in a specific discipline. To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. When a job can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). The advertisements submitted do not establish that a degree requirement in a specific discipline is common to the industry in parallel positions among similar organizations.

Likewise the several letters submitted by other church Korean language programs failed to detail the actual duties of their Korean language instructors, failed to specify that the organizations required a bachelor's degree in a specific discipline, and failed to provide supporting documentation that their Korean language teachers held bachelor's degrees in specialties directly related to their positions. 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)).

The record does not contain sufficient evidence to establish that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the record does not demonstrate that the proffered position's complexity or unique nature distinguishes it from similar but non-degreed employment under the second prong of the criterion. The described duties are those of a self-enrichment teacher, duties that are not associated with a bachelor's degree in a specific discipline. The petitioner has not identified any specific duties that elevate the position to one that would require the education obtained through a four-year university program. The AAO again acknowledges the opinion of Dr. Borland on this issue, but again finds the opinion lacks the factual foundation and analysis necessary to be probative in this matter. The petitioner has not established that a baccalaureate or higher degree or its equivalent is common to the industry in parallel positions among similar organizations or, in the alternative, is so complex or unique that it can be performed only by an individual with a degree in a specific discipline. The petitioner has failed to establish the alternative prongs of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Upon review of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) the AAO finds that the petitioner has also failed to establish this criterion. The petitioner emphasizes that the individual that previously performed the duties of the proffered position was the pastor of the church, an individual with a master's degree in education and in divinity. However, it is not the education of an individual that makes a position a specialty occupation, but rather the duties of the particular position. In this matter, the petitioner has not provided evidence that the proffered position requires the education and skills of an individual who has obtained a bachelor's degree in a specific discipline. Again, 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. To interpret the regulations any other

way would lead to absurd results. If CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. The petitioner has not established that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) which requires that the petitioner establish that 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. The petitioner does not submit a description of any specialized or complex responsibilities that would distinguish the proffered position from that of a self-enrichment teacher; employment the *Handbook* indicates does not impose a degree requirement. The record does not contain evidence of any specific duties that elevate the proffered position to one that requires a bachelor's degree in a specific discipline. The AAO recognizes the beneficiary's expertise in the Korean language. However, the petitioner has not substantiated that the beneficiary's expertise could only have been obtained through the attainment of a baccalaureate degree in a specific discipline. To the contrary, the evidence of record demonstrates that an individual with knowledge of the Korean language and culture could perform the duties of the position. Without evidence demonstrating that the duties of the position contain elements that are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the record contains evidence that the beneficiary was previously approved for H-1B status on the basis of petitions filed by a different petitioner. However, prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding does not indicate whether the director reviewed the prior records and the rationale for the prior decisions. However, if those records contained the same evidence as submitted with this petition, CIS would have materially erred in approving the previously filed petitions. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The AAO also points out that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Upon review of the totality of the record, the record fails to reveal any evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. Therefore, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the evidence of record does not establish that the beneficiary is qualified to perform the duties of a specialty occupation. The AAO finds that the Foundation for International Services, Inc. evaluation is based on the beneficiary's foreign education and her work experience. When attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The Foundation for International Services, Inc. evaluation does not establish that the beneficiary's foreign education and work experience is the equivalent of a U.S. degree. The second evaluation submitted by [REDACTED] indicates the beneficiary completed a three-year program in Korea in 1962. [REDACTED] opines that the Korean program is the equivalent of a four-year course of study at a college in the United States. However, [REDACTED] does not substantiate his opinion with documentary evidence. The evaluation is insufficient to establish that the beneficiary is qualified to perform the duties of a specialty occupation. The record is insufficient to establish that the beneficiary holds a baccalaureate degree in a field directly related to the proffered position. For this additional reason, the petition will be denied.

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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.