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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

D1

[redacted]

FILE: EAC 06 216 52028 Office: VERMONT SERVICE CENTER Date: SEP 08 2006

IN RE: Petitioner: [redacted]
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:

[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.

Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION:** The service center director recommended denial of the nonimmigrant visa petition and certified the matter for review to the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The petition will be approved.

The petitioner is a nonprofit public school district that seeks to employ the beneficiary as a bilingual education teacher. The petitioner seeks 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 petitioner seeks to hire the beneficiary through an alternative teacher certification program called *TeacherTrak*. This program allows Texas public schools to hire foreign nationals under a "probationary" teaching certificate, and involves a collaborative effort between public universities and colleges and public primary and secondary schools. Upon successfully completing a two-semester teaching "internship" in a public school, an internship that includes additional training and evaluation coordinated with a college or university, participants in the program take the appropriate state teacher certification exam.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) the director's notice of certification; (6) the petitioner's brief; (7) an amicus curiae brief from the American Immigration Lawyers Association (AILA); and (8) an amicus curiae brief from [redacted] (T&F), a Houston, Texas law firm that represents numerous school districts in the State of Texas. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on three grounds: 1) USCIS received sufficient numbers of H-1B petitions to reach the statutory numerical limitation (the H-1B cap) for fiscal year 2006 (FY06) and the petitioner did not qualify for an exemption from the H-1B cap; 2) the proffered position is not a specialty occupation; and 3) the beneficiary is not qualified to perform services in a specialty occupation. The AAO will address each ground for denial in turn.

## THE PETITIONER QUALIFIES FOR EXEMPTION FROM THE FY06 H-1B CAP

The AAO will first address the director's decision that the petitioner does not qualify for exemption from the FY06 H-1B cap. The AAO agrees with the director that the petitioner is not an institution of higher education or a nonprofit entity related to or affiliated with an institution of higher education.

As stated in the director's decision, as of August 10, 2005, USCIS had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY06, which covers employment dates starting on October 1, 2005 through September 30, 2006. On the Form I-129, the petitioner requested a starting employment date of August 1, 2006. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)[1], the director determined that the petition could be rejected. However,

[1] 8 C.F.R. § 214.2(h)(8)(ii)(E) provides, in pertinent part:

because the petitioner indicated on the Form I-129 that it is a nonprofit organization or entity related to or affiliated with an institution of higher education as such institutions of higher education are defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. § 1001(a), and thus exempt from the FY06 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was accepted but denied on the ground that the petitioner failed to demonstrate that it in fact qualifies for this exemption.

Section 214(g)(5)(A) of the Act, as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who "is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity . . . ."

For purposes of H-1B cap exemption for an institution of higher education, or a related or affiliated nonprofit entity, the H-1B regulations adopt the definition of institution of higher education set forth in section 101(a) of the Higher Education Act of 1965. Section 101(a) of the Higher Education Act of 1965, (Pub. Law 89-329), 20 U.S.C. § 1001(a), defines an institution of higher education as an educational institution in any state that:

> (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
>
> (2) is legally authorized within such State to provide a program of education beyond secondary education;
>
> (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
>
> (4) is a public or other nonprofit institution; and
>
> (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

In response to the director's request for additional evidence, the petitioner asserted that the legislative history of AC21 provides a rationale for exempting persons who are employed or have received an offer of employment at an institution of higher education from the H-1B cap that applies equally to individuals who are employed or have

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> If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year.

received an offer of employment at a primary or secondary school. In particular, the petitioner cited the Senate Report accompanying AC21, which states in relevant part:

> This section exempts from the numerical limitation (1) individuals who are employed or receive offers of employment from an institution of higher education, affiliated entity, nonprofit research organization or governmental research organization and (2) individuals who have a petition filed between 90 and 180 days after receiving a master's degree or higher from a U.S. institution of higher education. The principal reason for the first exemption is that by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans. The more highly qualified educators in specialty occupations we have in this country, the more Americans we will have ready to take positions in these fields upon completion of their education. Additionally, U.S. universities are on a different hiring cycle from other employers. The H-1B cap has hit them hard because they often do not hire until numbers have been used up; and because of the academic calendar, they cannot wait until October 1, the new fiscal year, to start a class.[2]

While the rationale for granting an exemption to the H-1B cap for institutions of higher education might also support granting a similar exemption to primary and secondary schools, nothing in the statutory language or legislative history of AC21 indicates that it was the intent of Congress to do so through this legislation. The H-1B cap exemption provisions of AC21 make no reference to primary or secondary schools, and the legislative history of AC21 does not indicate any congressional intent that such schools be included within the definition of institutions of higher education.[3] The AAO observes that Congress, in exempting certain entities from the H-1B fee it imposed in the American Competitiveness and Workforce Improvement Act (ACWIA),[4] specifically listed institutions of "primary or secondary education" as exempt from the fee in addition to institutions of higher education.

The AAO finds that neither the statutory language nor the legislative history demonstrate that Congress intended to exempt all nonprofit organizations that provide educational benefits to the United States. Rather, the "[c]ongressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related

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[2] Sen. Rep. No. 106-260 at 21-22 (April 11, 2000).

[3] *See generally* 146 Cong. Rec. S9643-05 (October 3, 2000) (Statements of Senators [redacted]; 146 Cong. Rec. S9449-01 (September 28, 2000) (Statements of Senator [redacted]); 146 Cong. Rec. S7822-01 (July 27, 2000) (Statement of Senator [redacted] 146 Cong. Rec. S538-05 (February 9, 2000) (Statements of [redacted]

[4] Enacted as title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-641.

nonprofit entities . . . ."[5] The director correctly found that the evidence does not establish that the petitioner should be included in the statutory definition of an institution of higher education. Therefore, the petitioner does not qualify for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act.

The petitioner has asserted, however, that it is H-1B cap exempt under section 214(g)(5)(A) of the Act as a nonprofit entity that is related to or affiliated with an institution of higher education. The director did not dispute that the petitioner is a nonprofit entity, but found that the evidence on record does not establish that the petitioner is a related or affiliated entity of an institution of higher education within the meaning of section 214(g)(5)(A).

Following USCIS policy, the director applied the definition of related or affiliated nonprofit entity found in 8 C.F.R. § 214.2(h)(19)(iii)(B).[6] 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the enactment of ACWIA, defines what is a related or affiliated nonprofit entity specifically for purposes of the H-1B fee exemption provisions of that act:

> *An affiliated or related nonprofit entity.* A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

Counsel for the petitioner, AILA and T&F contend that the director erred in applying the "narrow" definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B) for several reasons:

- The regulation at 8 C.F.R. § 214.2(h)(19)(iii)(B) addresses the H-1B fee exemption provisions of ACWIA and USCIS cannot consider it legally binding on the H-1B cap exemption provisions of AC21 without first going through the rulemaking process required by the Administrative Procedure Act (APA).[7]

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[5] Memo. from Michael Aytes, Assoc. Dir. for Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Dept. Homeland Sec., to Reg. Dirs. & Serv. Ctr. Dirs., *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3 (June 6, 2006) (hereinafter referred to as "Aytes Memo").

[6] *See* Aytes Memo at 4 ("[T]he H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B fee exemption. Adjudicators should apply the same definitions [as outlined in 8 C.F.R. § 214.2(h)(19)(iii)(B)] to determine whether an entity qualifies as an affiliated nonprofit entities [sic] for purposes of exemption from the H-1B cap").

[7] In particular, AILA points to the "notice-and-comment" requirements found at 5 U.S.C. § 552(a), which provide in pertinent part that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

- Unlike the "restrictive" ACWIA, AC21 was intended as a "remedial statute" which must be "liberally construed to give effect to the remedial purposes for which [it] was enacted."[8]

- The former Immigration & Naturalization Service (INS), when drafting the regulation at 8 C.F.R. § 214.2(h)(19)(iii)(B), claimed it was drawing on generally accepted definitions of the terms "related" and "affiliated", but the actual language used in the regulation is far more restrictive than any generally accepted definitions.

- USCIS must apply the broad definition of "affiliation" found in section 101(e)(2) the Act[9] or a similarly broad definition suggested by other uses of the terms, or forms of the terms, "affiliated" and "related" in the Act.

The AAO, as a component of USCIS, generally defers to official statements of policy issued by the agency, whether or not these statements constitute legislative rules binding on the courts pursuant to the Supreme Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Nevertheless, the AAO finds that USCIS reasonably interpreted AC21, which is silent as to the meaning of the phrase "related or affiliated nonprofit entity", to apply the definition of the phrase found at 8 C.F.R. § 214.2(h)(19)(iii)(B).[10]

Although AILA characterizes ACWIA as "restrictive" and AC21 as "remedial", the AAO observes that these laws contain both remedial and restrictive provisions. Both laws, for instance, contain provisions increasing the annual allotment of H-1B visas, though ACWIA did this only temporarily. At issue here are two similar provisions in these laws, both of which are arguably ameliorative in nature: the exemption to the H-1B fee in ACWIA and the exemption to the H-1B cap in AC21. Indeed, the fee exemption provision in ACWIA exempts by its explicit terms more organizations from the H-1B fee—including primary and secondary schools—than AC21 does from the H-1B cap.

The terms "affiliated" and "related", or some form thereof, appear in various sections of the Act. Counsel for petitioner, AILA and T&F assert that the controlling definition of the term affiliation is found in 101(e), which provides, in pertinent part, that "[f]or purposes of this Act":

> (2) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

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[8] AILA Brief at 8.

[9] This section provides that "the giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation."

[10] *See Chevron*, 467 U.S. at 844, (". . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.")

This definition of affiliation was included when the Act was first enacted in 1952. At that time, the use of the term "affiliation" in the Act was limited to provisions making aliens associated with communist, anarchist or totalitarian parties or organizations inadmissible or ineligible for other benefits under the Act.[11] As discussed above, ACWIA introduced the phrase "related or affiliated nonprofit entity" in the context of the H-1B fee exemption for institutions of higher education, and the INS promulgated a regulation in accordance with the requirements of the APA defining the phrase. Congress then included essentially the same phrase in enacting the H-1B cap exemption for institutions of higher education.

AILA argues that, as observed by the Supreme Court in *Atlantic Cleaners & Dyers*, 286 U.S. 427 (1932), identical words in different parts of the same act can have different meanings to meet the purposes of the law. But this rule of construction can be applied equally to the definition of affiliation found in section 101(e)(2)—which, by its own terms, does not contain the exclusive definition of affiliation—or to other definitions of the terms "related" or "affiliated" found in or derived from other sections of the Act.

It should be noted that many non-profit organizations enjoy association of some form with institutions of higher education in the United States. If USCIS applied the definition in section 101(e)(2) of the Act as counsel urges, *any* nonprofit entity could claim exemption from the H-1B cap for *all* of its employees simply by giving or promising a negligible monetary sum to any institution of higher education. There is no indication in the language or the legislative history of AC21 that Congress intended or foresaw such a result.

The AAO finds that it is more likely that Congress intended, by including the phrase "related or affiliated nonprofit entity" in the language of AC21 without providing further definition or explanation, that this phrase be interpreted consistently with the only definition of the phrase that existed in the law at the time of the enactment of AC21: the definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B). Such an interpretation by USCIS is reasonable, and the AAO will defer to USCIS policy in making its determination on this issue.

The petitioner must thus satisfy the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) in order to be exempt from the H-FY06 H-1B cap as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act. The AAO finds that the best reading of 8 C.F.R. § 214(h)(19)(iii)(B) allows the petitioner to demonstrate that it is an affiliated or related nonprofit entity by showing one or more of the following:

(1) The petitioner is associated with an institution of higher education through shared ownership or control by the same board or federation;

(2) The petitioner is operated by an institution of higher education; or

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[11] *See*, e.g., INA § 212(a)(3)(D), 8 U.S.C. 1182(a)(3)(D)(aliens affiliated with communist or totalitarian party inadmissible); *see also* INA § 313(a), 8 U.S.C. 1424(a)(naturalization forbidden for persons affiliated with anarchist, communist or totalitarian parties or organizations advocating the overthrow of the government of the United States by violence or other unconstitutional means); INA § 313(d), 8 U.S.C. § 313(d)(exception to previous rule for persons whose past affiliation was involuntary); and INA § 340(c), 8 U.S.C. § 340(c)(revocation of naturalization for later affiliation with organizations listed in section 313(a)).

(3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.[12]

Counsel contends that the petitioner is affiliated with institutions of higher education in several ways:

- Public institutions of higher education and public primary and secondary school districts, such as the petitioner, are all ultimately owned by the State of Texas and subject to the control of the State of Texas and the U.S. government.

- In accordance with the Texas Education Code, the Texas State Board of Education and the Texas Higher Education Coordinating Board must "ensure that long-range plans and educational programs established by each board provide a comprehensive education" through the "P-16 Council", a council on which the commissioner of education and commissioner of higher education serve as co-chairs.

- The petitioner, as well as other public school districts in Texas, has developed cooperative, and often contractual, relationships with institutions of higher education to conduct student teacher programs, which allow "candidates studying to become teachers to have access to a school with a probationary certificate where they can put into practice the theoretical knowledge acquired in the institution of higher learning" by teaching, earning academic credits and/or fulfilling state certification requirements in the process.

- The petitioner operates concurrent enrollment and advanced placement programs that allow students to attend classes at a community college and earn college credits while still attending high school.

The petitioner submitted evidence of contractual relationships it has with several universities related to student teaching by students at these universities in the petitioner's schools. In particular, counsel asserts that the alternative certification program in which the beneficiary will participate as a "teacher intern" involves a close partnership between the petitioner and Richland College. Counsel contends that Richland College "controls" the arrangement in that it provides technical assistance, training, and/or professional support for each of the program's mentor teachers and interns; prepares the teachers for the classroom experience and certification exams; and provides each intern with eligibility and obligation requirements for the alternative certification program and conducts yearly audits to determine eligibility for the program.

The AAO first considers whether the petitioner has established that it is a related or affiliated nonprofit entity pursuant to the first prong of 8 C.F.R. 214.2(h)(19)(iii)(B): shared ownership by the same board or federation. The

[12] This reading is consistent with the Department of Labor's regulation at 20 C.F.R. § 656.40(e)(ii), which is identical to 8 C.F.R. § 214.2(h)(19)(iii)(B) except for an additional comma between the words "federation" and "operated". As noted by AILA, the Department of Labor explains in the supplementary information to its ACWIA regulations that it consulted with the former INS on this definitional issue, which supports the conclusion that both regulations were intended to be identical.

AAO concurs with the director that the petitioner does not meet the definition of related or affiliated nonprofit entity simply because public universities and public primary and secondary schools are all nonprofit entities ultimately owned by the State of Texas. The AAO interprets the terms "board" and "federation" as referring specifically to educational bodies such as a board of education, board of regents, etc. Accepting the petitioner's argument concerning "shared ownership" would allow virtually any state government agency in Texas, or other state, to claim exemption from the H-1B cap regardless of whether the agency had any connection whatsoever to higher education, a result that would be inconsistent with the intent of AC21.

The record does not establish that public institutions of higher education and public primary and secondary schools are owned or controlled by the same boards or federations in the State of Texas. The evidence in the record shows that the Texas Education Agency and the State Board of Education control public primary and secondary schools, while public institutions of higher education are controlled by the Board of Regents, Boards of Trustees or Governors, and the Texas Higher Education Coordinating Board. Counsel's assertion that the P-16 Council constitutes a board that controls both public institutions of higher education and public primary and secondary schools is not supported by the record. The sections of the Texas Education Code establishing the powers and duties of the P-16 Council indicate that the council is to be primarily an advisory organization that recommends action to, but does not own or control, public institutions of higher education or public primary and secondary schools.[13] Consequently, the AAO finds that the petitioner has not met the first prong of 8 C.F.R. 214.2(h)(19)(iii)(B).

The AAO next considers whether the petitioner has established that it is a related or affiliated nonprofit entity pursuant to the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): operation by an institution of higher education. As already noted, in Texas, public institutions of higher education and public primary and secondary schools, in spite of some coordinated activities, are operated separately under the control of different agencies and boards. The evidence in the record does not show that an institution of higher education operates the petitioner within the common meaning of this term. As depicted in the record, the contractual relationship that exists between the petitioner and Richland College (and other universities mentioned in the record) limits the administration and control by an institution of higher education of the petitioner to teacher training programs and programs for advanced students. It may not be inferred from associations of such a limited scope that the petitioner is being operated by an institution of higher education. According, the AAO finds that the petitioner has not met the second prong of 8 C.F.R. 214.2(h)(19)(iii)(B).

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[13] *See*, e.g., section 61.076(f) of the Texas Education Code:

> The council shall examine and *make recommendations* regarding the alignment of secondary and postsecondary education curricula and testing and assessment. *This subsection does not require the council to establish curriculum or testing or assessments standards.* (emphasis added)

*See also* section 61. 076(g):

> The council shall *advise* the [Texas Higher Education Coordinating Board] and the State Board of Education on the coordination of postsecondary career and technology activities, career and technology teacher education programs offered or proposed to be offered in the colleges and universities of this state, and other relevant matters . . . . (emphasis added)

Finally, the AAO considers whether the petitioner has established that it is a related or affiliated nonprofit entity pursuant to the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): attached to an institution of higher education as a member, branch, cooperative, or subsidiary. In the supplementary information to the interim regulation now found at 8 C.F.R. § 214.2(h)(19)(iii)(B), the former INS stated that it drafted the regulation "drawing on generally accepted definitions" of terms.[14]

It is evident from the foregoing discussion of the evidence that the petitioner, when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms. Nonetheless, the petitioner operates the alternative teacher certification program in collaboration with a qualifying institution of higher education. This collaboration involves a close relationship with a qualifying institution of higher education consistent with the terms in the third prong. The intent of AC21 is to exempt those employees from the H-1B cap that "directly and predominantly further the essential purposes" of institutions of higher education.[15] The record reflects that one of the essential purposes of institutions of higher education in the State of Texas is to train primary and secondary school teachers. The record also establishes that the *TeacherTrak* alternative certification program is managed jointly by the petitioner and an institution of higher education. Thus, while the petitioner is not attached to an institution of higher education within the meaning of the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B), it operates a program that is.

The AAO finds that it is consistent with the language of 8 C.F.R. § 214.2(h)(19)(iii)(B) and the intent of AC21 that individuals employed in such a program be exempt from the H-1B cap. However, such an exemption is limited to the employees of the petitioner directly involved in the jointly managed program that directly and predominantly furthers the essential purposes of the institution of higher education, which in this case includes the teachers to be employed in the *TeacherTrak* alternative certification program, and cannot be claimed for other employees not directly employed in or through this program. Thus, the petitioner has met the third prong of 8 C.F.R. 214.2(h)(19)(iii)(B), and the beneficiary is exempt from the H-1B numerical cap for FY06.

The AAO therefore disagrees with the director that the petition does not qualify for an exemption from the H-1B cap under section 214(g)(5)(A) of the Act. Accordingly, the AAO withdraws the director's decision that the petition must be denied because the H-1B cap for FY06 has been reached.

## THE PROFFERED POSITION IS A SPECIALTY OCCUPATION

The AAO now turns to the question of whether the proffered position is a specialty occupation. The AAO disagrees with the director that the proffered position is not a specialty occupation pursuant to section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), and 8 C.F.R. § 214.2(h)(4)(iii)(A) because the petitioner has failed to show that it requires a bachelor's or higher degree in the specific specialty (or its equivalent) for entry into the position.

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[14] 63 FR 65657 at 3.

[15] Aytes Memo at 3.

The petitioner is seeking the beneficiary's services as a bilingual teacher. Evidence of the beneficiary's duties includes the Form I-129 petition and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail the following:

1. using instructional strategies, such as:
    a. developing lesson plans that fulfill the requirements of the district's curriculum program,
    b. preparing lessons that reflect accommodations for differences in student learning styles,
    c. presenting subject matter according to the guidelines established by Texas Education Agency, board policies and administrative regulations,
    d. planning and using appropriate instructional and learning strategies, activities, materials and equipment that reflects understanding of the learning styles and needs of students assigned,
    e. conducting assessment of student learning styles and using the results to plan instructional activities,
    f. working cooperatively with special education teachers to modify curricula as needed for special education students according to guidelines established in Individual Education Plans, and
    g. working with other staff members to determine instructional goals, objectives, and methods according to district requirements;
2. fostering student growth and development, which includes:
    a. helping students analyze and improve study habits and methods,
    b. conducting ongoing assessment of student achievement through formal and informal testing,
    c. assuming responsibility for extracurricular activities as assigned, and
    d. being a positive role model for students;
3. maintaining classroom management and organization, which means:
    a. creating a classroom environment conducive to learning,
    b. managing student behavior in accordance with the Student Code of Conduct and the student handbook,
    c. taking all necessary and reasonable precautions to protect the students, equipment, materials and facilities, and
    d. assisting in the selection of books, equipment and other instructional materials;
4. using effective communication skills by:
    a. establishing and maintaining open communication through parent conferences,
    b. maintaining a professional relationship with colleagues, students, parents and community members, and
    c. presenting information accurately and clearly;
5. maintaining professional growth and development through:
    a. working with other members of the staff to determine instructional goals, objectives, and methods according to district requirements,
    b. keeping informed of and complying with state, district, and school regulations and policies for classroom teacher,
    c. compiling, maintaining and filing all physical and computerized reports, records and documents, and
    d. attending and participating in faculty meetings and serving on staff committees as required,

e. working cooperatively with special education teachers to modify curricula as needed for special education students according to guidelines established in Individual Education Plans (IEP),
f. planning and supervising assignments of teacher aide(s) and volunteer(s),
g. assuming responsibility for extracurricular activities as assigned, and
h. sponsoring outside activities approved by the campus principal.

Section 214(i)(l) of 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.

USCIS 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.

The director noted that the petitioner submitted a general job description that did not include the subjects or grades the beneficiary will teach. The director stated that as a consequence, the record did not contain sufficient evidence for USCIS to "determine what subjects and education credits are required for the proffered position." The director found that the proffered position was not a specialty occupation because the record indicated that a baccalaureate degree in any field of study was acceptable, and because the beneficiary would be hired under a "conditional" certification that allows her to work as a "teacher intern" prior to receiving teacher certification from the State of Texas.

The AAO routinely reviews the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), 2006-2007 edition, to determine if a bachelor's degree in a specific specialty is a minimum entry requirement for an occupation. The *Handbook* indicates that all states require public school teachers to be licensed. It also states that 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.

The record indicates that the State of Texas requires candidates for teaching positions in public primary or secondary schools to have a degree in any academic major and to complete specialized courses and teacher training in order to become certified.[16] The AAO finds that the combination of a bachelor's degree and specialized training resulting in state certification constitutes the equivalent of a bachelor's degree in a specific specialty. Thus, the position of bilingual teacher can be considered a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The record indicates that the proffered position does not require teacher certification from the State of Texas, but can be performed by an individual with a "probationary certificate". The beneficiary will take part in the *TeacherTrak* alternative certification program, a program created to "alleviate the critical need for bilingual teachers" in Texas by recruiting qualified individuals from Mexico.[17] Through the *TeacherTrak* program, a candidate for teacher certification completes "additional courses in the specialized teaching area (including bilingual education)" and takes the appropriate certification exams while employed in a teaching intern position in the United States under a "probationary certificate".[18] A probationary certificate is granted only after a candidate completes 200 clock hours of pre-internship training in Mexico. This training consists primarily of weekend courses, which are either face-to-face or online courses covering topics such as the following:

- Foundations of Education (generic teaching methodology)
- Foundations of Bilingual Education (theory and practice)
- Reading From Writing Letters to Literature
- English Language Arts
- Bilingual Language Arts
- Multicultural Education
- English as a Second Language
- Content Area Instruction
- Classroom Management
- Behavior Management

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[16] Excerpts from Texas State Board of Education webpage, "How to Become a Teacher in Texas", (May 5, 2006).

[17] Excerpts from the *International Candidate/Intern Handbook 2006-2007*, [redacted] Accelerated Teacher Certification.

[18] Open Ltr. from [redacted]., Reg. Dir. of Educator Preparation Services for [redacted] (May 18, 2006).

In addition, the candidate must complete the following courses from a participating Mexican University: Mathematics, Science, American History, English Composition, Conversational English I and Conversational English II. The candidate must also demonstrate English proficiency through interviews and coursework and/or testing.

Upon completion of pre-internship training, participants in the *TeacherTrak* program may be employed in a teaching internship in a Texas public school. Interns "receive teacher salary and benefits and...serve in the same roles and responsibilities as a teacher." Interns complete additional in-service training and are evaluated repeatedly during the duration of the internship. Interns must achieve two consecutive successful semesters of internship in the same district to complete the internship. Interns also receive preparation to take the appropriate certification exams for the subject and grade level in which they will be teaching.

Public primary and secondary teaching positions may be specialty occupations even where such positions do not require a bachelor's degree in a specific specialty, as long as state certification is also mandatory. The decision to certify teachers, and the determination of what requirements must be met for certification, are matters uniquely within the expertise and control of state governments. The essential inquiry is whether the state has granted, through a formal certification or licensure process of its choosing, an individual the right to teach students in its public schools. Although the proffered position can be performed by a college graduate possessing only a "probationary certificate" from the State of Texas, the record indicates that the duties of the proffered position, as well as the salary and benefits, are the same as those of a certified teacher. In this case, the state requires pre-internship training that must be completed before an individual can be granted probationary certification and offered the proffered position. Given the particular circumstances of this case, the AAO finds that the proffered position is a specialty occupation. Accordingly, the director's decision on this issue is withdrawn.

**THE BENEFICIARY IS QUALIFIED TO PERFORM THE DUTIES OF A SPECIALTY OCCUPATION**

The AAO now turns to the question of whether the beneficiary is qualified to perform the duties of a specialty occupation. The AAO disagrees with the director that the beneficiary is not qualified to perform services in a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The petitioner submitted evidence, including an evaluation from [redacted] and a report from [redacted] Director of Student Records at [redacted] University, and former Senior Credentials Evaluator at HR Analytical Services, indicating that the beneficiary has a foreign degree that is equivalent to a

baccalaureate degree from a U.S. college or university. The record also shows that the beneficiary has completed pre-internship training to obtain probationary certification to teach in the Texas public schools. As stated above, the AAO finds that the proffered position of teacher intern, as offered in Texas public schools in conjunction with the *TeacherTrak* alternative certification program, is a specialty occupation. The record indicates that the beneficiary has been accepted into the program and granted a probationary certificate to perform services as bilingual generalist teacher in the State of Texas. Thus, the petitioner has established that the beneficiary is qualified to perform the duties of a specialty occupation pursuant to Section 214(i)(2) of the Act and 8 C.F.R. § 214.2(h)(4)(iii)(C). According, the director's decision on this issue will be withdrawn.

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 met that burden.

**ORDER:** The director's decision is withdrawn. The petition is approved.

[redacted] (Withdraw)