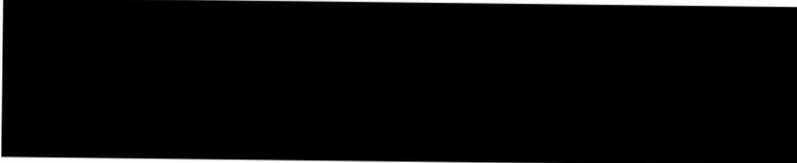


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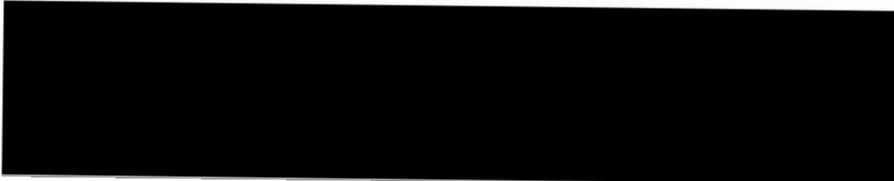
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FILE: EAC 06 164 51300 Office: NEBRASKA SERVICE CENTER Date: **AUG 15 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

A handwritten signature in black ink that reads "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and dismissed a subsequent motion. 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 Buddhist worship hall that seeks to employ the beneficiary as a Japanese language teacher. The petitioner, therefore, 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 director denied the petition on the basis of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel contends that the director erred in denying the petition.

The record of proceeding before the AAO contains (1) the 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; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 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 proposed position.

In its April 18, 2006 letter of support, the petitioner stated the following:

[The petitioner] is offering the Beneficiary the position of Teacher, Japanese Language. The position involves the creation of curriculum and teaching of the subject to both secondary school students as well as adults. In this position she will design the curriculum, plan course offerings, develop teaching methodology[,] and teach the courses for our students. She will administer tests and grade scores. She will also review the progress of students and advise accordingly. Teacher is a professional position and we require a teacher with a minimum of a bachelor’s degree to teach such courses. This is a part time position where the hours will vary depending upon the enrollment in such classes. We seek approval of up to 18 hours per week.

The petitioner stated that the duties of the proposed position are similar to those of Self-Enrichment Educational Teachers, as such positions are defined by the Department of Labor.

In its October 17, 2006 response to the director’s request for additional evidence, the petitioner stated that the majority of the beneficiary’s students would be primary and secondary students, and that the duties of the proposed position are similar to those of secondary school teachers, as those positions are defined by the Department of Labor.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The AAO agrees with the director’s determination, as well as that of the petitioner at the time the petition was filed, that the duties of the proposed position are similar to those of self-enrichment education teachers, as such positions are discussed in the *Handbook*. It disagrees with the petitioner’s assertion in its response to the director’s request for additional evidence, and counsel’s assertion on appeal, that the duties of the proposed position are similar to those of secondary school teachers. First, the AAO notes that the petitioner is not a secondary school, so by its very nature it will not employ a secondary school teacher. Also, the beneficiary would teach Japanese language courses to persons of all ages, not just to secondary school students. The beneficiary’s students would be enrolling in her courses on a voluntary basis only; there is no indication that they would be attending as part of an effort to earn a high school diploma.

At page 287, the *Handbook’s* discussion of the duties and responsibilities of self-enrichment teachers states the following:

Self-enrichment teachers provide instruction in a wide variety of subjects that students take for fun or self-improvement. Some teach a series of classes that provide students with useful life skills . . . Others provide group instruction intended solely for recreation . . . Some teachers conduct courses on academic subjects such as literature, foreign language, and history . . . The classes self-enrichment teachers give seldom lead to a degree and attendance is voluntary. . . .

Self-enrichment teachers may also teach classes offered through religious institutions. .

All self-enrichment teachers must prepare lessons beforehand and stay current in their fields. . . .

Students in self-enrichment programs attend by choice so they tend to be highly motivated and eager to learn.

Having determined that the duties and responsibilities of the proposed position are similar to those of self-enrichment teachers, the AAO turns next to the *Handbook's* description of the educational credentials necessary for entry into the field. At page 288, the *Handbook* states the following:

In general, there are few educational or training requirements for a job as a self-enrichment teacher beyond being an expert in the subject taught . . . Some self-enrichment teachers are trained educators or other professionals who teach enrichment classes in their spare time.

Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires a demonstration that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the type of position being proffered. The *Handbook* explains unequivocally that “there are few educational or training requirements” for this type of position. A bachelor’s degree, or its equivalent, in a specific field of study is, however, not the normal entry requirement for this type of position.

The AAO will accord no weight to the information counsel submits from the Department of Labor’s *O*Net* system. *O*Net* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. Its assessment (the JobZone classification) does not specify the particular type of degree, if any, that a particular position would require. Again, 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 proposed position.

Similarly, the AAO accords no weight to the information counsel submits from the *Dictionary of Occupational Titles (DOT)* and *Standard Occupational Classification System (SOC)*. As is the case with *O*Net*, the *DOT* and *SOC* are not persuasive sources of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The *DOT's* assessment (the SVP rating) is meant only to indicate the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and does not specify the particular type of degree, if any, that a position would require. The information from the *SOC* is unpersuasive as well, for the same reason. Accordingly, the AAO accords no weight to this information.

For all of these reasons, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. However, the petitioner has submitted no evidence to establish eligibility under this prong.

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a bachelor's degree, or its equivalent, in a specific field of study. It finds no evidence that would support such a finding, as the position proposed in the petition is similar to the self-enrichment teacher positions described in the *Handbook*, which does not require a degree in a specific field of study.

Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine the petitioner's ability to meet this 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. However, the petitioner has submitted no evidence to establish eligibility under this criterion.

A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to have a higher degree of knowledge and skill than that normally expected of self-enrichment teachers in other, similar organizations. Therefore, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. There is no information in the record to support a finding that the proposed position is more specialized and complex than the self-enrichment teacher positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the AAO turns to counsel's assertion that the director's denial of the petition constituted a violation of the Free Exercise Clause of the First Amendment of the Constitution. In his February 9, 2007 appellate brief, counsel states the following:

[T]he Church's Japanese language school serves an important religious function in that it enables its parishioners and the children of its parishioners to learn the Japanese language and the Japanese culture. The Church's foundational religious practices and religious texts are written in Japanese. The founder of the Church's denomination was a famous 13th century Japanese thinker whose philosophy and practices are recorded in the original Japanese language. By knowing the Japanese language and culture, the Church's religious practices are understood more fully and the Church and its parishioners' First Amendment rights to the free exercise of their religion are fully protected.

The Service's decision to deny the Church the right to hire a Japanese language that would function in a key supporting role to the religious practices of the Church is an impermissible regulation of religion. . . .

The Service's decision has the effect of establishing a law respecting an establishment of religion in violation of the First Amendment of the United States Constitution. The teaching of the Japanese language and culture, knowledge of which are critical to understand the doctrines of the Church's religious practices and beliefs, is an important element of exercising the Church's religion. Because the Service's decision is unconstitutional, it cannot stand and must be reversed.

The AAO finds counsel's assertions deficient. The criteria for establishing that a proposed position qualifies for classification as a specialty occupation are set forth at section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), and at 8 C.F.R. § 214.2(h)(4)(iii)(A). As set forth above, the petitioner has failed to meet any of those criteria. That the petitioner is a religious organization does not exempt it from those requirements. If counsel is contending that those laws are themselves unconstitutional, then the argument is misplaced. The AAO observes that, like the Board of Immigration Appeals, this office cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).¹

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Accordingly, the AAO will 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 sustained that burden.

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

¹ Moreover, the record does not indicate that the petitioner has employed a Japanese language teacher in the past. It is unclear to the AAO how, if presence of a Japanese language teacher is necessary in order for the free exercise of the petitioner's parishioners, its current and past parishioners have been able to exercise their religion freely between the time the petitioner was established in 1889 and the present time.