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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 08 049 50873 Office: VERMONT SERVICE CENTER Date: MAR 04 2010

IN RE: Petitioner:
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:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 an institution approved by the Texas State Board of Educator Certification to provide an alternative/accelerated teacher preparation (A/ATP) program for teacher-certification candidates already holding a bachelor's degree. To employ the beneficiary as a Bilingual Instructor, the petitioner filed this petition to classify her 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 cited three independent grounds for denying the petition, namely, the petitioner's failures (1) to substantiate its assertion, at Part B (Fee Exemption and/or Determination) of the Form I-129 H-1B Data Collection Supplement, that it is exempt from the ACWIA (American Competitiveness and Workforce Opportunity Act) filing fee; (2) to substantiate its assertion, at Part C (Numerical Limitation Exemption Information) of the Form I-129 H-1B Data Collection Supplement, that it is exempt from the statutory annual limitation on the number of H-1B petitions filed for the related fiscal year (the H-1B cap); and (3) to establish that the proffered position is a specialty occupation within the meaning of the term as defined by section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), and the implementing regulations at 8 C.F.R. § 214.2(h)(4).

The AAO finds that the appeal fails to establish or identify any error in the director's decision to deny the petition for its failure to establish that the proffered position is a specialty occupation. Accordingly, the petitioner's appeal on that aspect of the decision will be dismissed.

Upon review of the entire record as supplemented by the Form I-290B and the documents submitted with it on appeal, the AAO finds that the director's determination that the petitioner failed to establish the proffered position as a specialty occupation is correct. Therefore, the appeal will be dismissed, and the petition will be denied. As this action is dispositive of the appeal, the AAO will not address and therefore not disturb the director's negative determinations regarding the petitioner's claimed exemptions from the ACWIA fee and the H-1B cap.

To determine whether a petitioner has established a specialty occupation, the AAO applies the following statutes and regulations to the evidence of record about the proffered position.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R.

§ 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner asserts, at part 3 of the Form I-290B, that the petitioner "feels that [the director] made an error in concluding" that the petitioner "do[es] not qualify under the special [sic] occupation title 8 C.F.R. [§] 214.2(h)(4)(iii)." However, neither this nor any statement in any of the documents submitted on appeal identifies specifically how any aspect of the record of proceeding appears to show that the director misconstrued the facts or misapplied a statutory, regulatory, or precedent-decision standard in reaching his conclusion that the proffered position is not a specialty occupation.

At section II of its February 15, 2008 letter in support of the appeal, the petitioner states that "the beneficiary has completed a baccalaureate degree which is the minimum requirement for entry into that particular position." However, a beneficiary's credentials are not an element of proving a position's specialty occupation status. Further, to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(1) the proffered position must require not just any baccalaureate degree, but one in a specific specialty that is directly related to the services to be performed in the proffered position.[1] Therefore, this section of the letter does not specify an erroneous application of law or regulation to the evidence of record.

Section II of the petitioner's letter in support of the appeal next asserts that the beneficiary "is in an Education Track Program within the Texas State Education Certification Board," and that "[t]his is a

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[1] The foreign-education credentials evaluation upon which the petitioner relies opines that the beneficiary has "completed education equivalent to a Bachelor of Legal Studies awarded by a regionally accredited university in the [United States]." However, the record's "Job Description" document indicates that the "function" of the proffered position is "[t]o serve as a Spanish Instructional Teacher," and there is no indication that the proffered position requires proficiency in or the teaching of legal studies. In fact, the record's document entitled "Bilingual Instructor Work Schedule/Full Time" indicates that the beneficiary would teach Math, Reading, and Writing.

complex and unique position that requires [a] candidate [who] is fluent in Spanish and has passed the Texas Oral Proficiency Test." These assertions also do not allege a misapplication of an H-1B specialty occupation standard by the director. The petitioner does not identify how the beneficiary's participation in an Education Track Program and/or the position's requirement for fluency in Spanish satisfies any H-1B specialty occupation standard. Further, aside from the petitioner's failure to articulate how the record establishes the proffered position as "unique and complex," neither section 214(i)(l) of the Act nor the implementing regulations at 8 C.F.R. § 214.2(h)(4) ascribe specialty occupation status to a position on the basis of uniqueness and complexity alone. In this regard, it should be noted that the second alternate criterion at 8 C.F.R. § 214.2(h)(4)(iii)(2) is satisfied only when the particular proffered position is shown to be "so complex or unique" that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty; and the specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(4) is satisfied only when the petitioner establishes that the specific duties are "so specialized and complex" that their performance requires knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty.

The next assertion at section II of the petitioner's letter in support of the appeal is that the petitioner "requires the baccalaureate degree and the Texas Spanish Test." This declaration also fails to identify a misapplication by the director of section 214(i)(l) of the Act or any specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner neither alleges, nor identifies any evidence of record indicating, that the degree required by the proffered position must be in a specific specialty closely related to the position's performance requirements. Further, the petitioner does not identify a nexus between the Spanish fluency requirement and any specialty occupation criterion.

The appeal letter's final assertion about the merits of the petition is:

> The nature of this position is so complex because it requires the theoretical and practical application of a [sic] highly specialized knowledge, which the beneficiary already possesses as a requirement of the Texas, [sic] State Board of Educators Certification (SBEC), as mention[ed] above.

While the petitioner's statement includes some language from section 214(i)(l) of the Act and 8 C.F.R. § 214.2(h)(4)(h), it does not assert a misapplication of any specific specialty-occupation standard. Again, there is no statutory or regulatory criterion for classifying a position as a specialty occupation because of complexity alone. In this regard, the AAO again notes that the second alternate criterion at 8 C.F.R. § 214.2(h)(4)(iii)(2) is satisfied only when the particular proffered position is shown to be "so complex or unique" that it can be performed only by an individual with a degree in a specific specialty, and that the specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(4) is satisfied only when the petitioner establishes that the specific duties are "so specialized and complex" that their performance requires knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty. Moreover, pursuant to section 214(i)(l) of the Act, to merit recognition as a specialty occupation a proffered position must require not only "theoretical and practical application of a body of highly specialized knowledge," but also "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 evidence of record does not establish these requirements as aspects of the proffered position.

The record reflects that the beneficiary is participating in, but has not yet completed, a State approved program for alternative certification of teachers, and that her teaching would partially fulfill the program's requirements. In its undated memorandum opening with the heading "Qualification of the Beneficiary," the petitioner states, in part:

> State Law dictates that the position of Bilingual Teachers requires a Bachelor's [degree] in any field. The State of Texas does not require that the university degree be in education or in another specific field. . . .

As the record of proceeding contains no documentary evidence that the requirements of the proffered position exceed those set by the State of Texas, the documentation filed in support of the petition establishes that the proffered position does not require a bachelor's degree, or the equivalent, in a specific specialty. Consequently, the position does not qualify as a specialty occupation under the H-1B provisions of the Act and the implementing regulations at 8 C.F.R. § 214.2(h).

The AAO observes that the director included in his decision a "note" stating, in part, that "[t]he portion of the petition requesting change of the alien's nonimmigrant status is denied." Pursuant to 8 C.F.R. § 248.3(g), however, there is no provision for an appeal from the denial of application for a change of status. As this office does not have jurisdiction over the director's decision regarding the beneficiary's request for a change of status, this issue will not be reviewed.

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.