

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2

MAY 05 2009

FILE: WAC 07 146 52535 Office: CALIFORNIA SERVICE CENTER Date:

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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, a tutoring school that is also engaged in the sale and export of dental equipment and products, seeks to employ the beneficiary as a 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 because he determined that the proffered position is not a specialty occupation. On appeal, counsel states that the position is a specialty occupation, and submits additional documentation.

Section 214(i)(1) of 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.

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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner’s letter of support; (3) the director’s request for supporting documentary evidence dated May 8, 2007; (4) the petitioner’s response to that request; (5) the director’s notice of intent to deny (NOID) the petition dated September 5, 2007; (6) the petitioner’s response to the NOID dated October 16, 2007; (7) the director’s denial dated November 15, 2007; and (8) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a teacher. Specifically, the petitioner’s letter of support dated April 2, 2007 states that the beneficiary, in the proffered position, would “teach basic academic subjects to students requiring remedial work, using special help programs to improve scholastic level.” The petitioner stated that a baccalaureate degree in elementary education, childhood education, or related discipline or its equivalent is minimally required to enter into the proffered position.

The director, after issuing a request for supporting documentation, found the evidence submitted to be insufficient to establish that the proffered position was that of a specialty occupation. Consequently, the

director issued a NOID on September 5, 2007, advising the petitioner of the deficiencies in the record and affording it the opportunity to establish eligibility under the regulations. In its response, the petitioner simply restated the claims set forth in the initial letter of support and resubmitted documentation that had previously been included with the petition.

The director found that the proffered position was not a specialty occupation, concluding that the petitioner had failed to establish that the petitioner established any of the four criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). Relying on the detailed discussion set forth in the NOID, which cited to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the proffered position is a specialty occupation, and contends that the director's findings were erroneous. Specifically, counsel asserts that the beneficiary is amply qualified for the position and that the petitioner would not hire anyone with less than a baccalaureate degree or its equivalent to fill the position. In support of these contentions, counsel resubmits the previously-submitted supporting documentation that accompanied the NOID.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by USCIS when determining these criteria include: 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. In this matter, the AAO notes that the director likened the proffered position to that of an Adult Literacy and/or Remedial Education teacher, as defined by the *Handbook*. Specifically, the *Handbook* states:

Remedial education teachers, more commonly called adult basic education teachers, teach basic academic courses in mathematics, languages, history, reading, writing, science, and other areas, using instructional methods geared toward adult learning. They teach these subjects to students 16 years of age and older who demonstrate the need to increase their skills in one or more of the subject areas mentioned. Classes are taught to appeal to a variety

of learning styles and usually include large-group, small-group, and one-on-one instruction. Because the students often are at different proficiency levels for different subjects, adult basic education teachers must make individual assessments of each student's abilities beforehand. In many programs, the assessment is used to develop an individualized education plan for each student. Teachers are required to evaluate students periodically to determine their progress and potential for advancement to the next level.¹

On appeal, counsel contends that the director's reliance on the *Handbook's* definition of remedial education teachers is incorrect, and asserts that contrary to the director's findings, the petitioner's school does not just teach or instruct students who require remedial work, but rather provides instruction after regular school hours to students temporarily in the United States as a result of their parents' employment. The petitioner asserts that the purpose of the petitioner's "tutorial" school is to instruct students, typically between the ages of 10 to 16 years of age, in academic studies taught at public and private schools in Japan so that the students will not fall behind upon their return home.

Upon review, the AAO concurs with the petitioner's contention that the director's classification of the position as akin to that of an adult/remedial education teacher is inappropriate. In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the discussion of teachers in general and finds that the proffered position is more akin to that of a middle or secondary school teacher. As described by the 2008-2009 edition of the *Handbook*:

Middle school teachers and secondary school teachers help students delve more deeply into subjects introduced in elementary school and expose them to more information about the world. Middle and secondary school teachers specialize in a specific subject, such as English, Spanish, mathematics, history, or biology. They also may teach subjects that are career oriented. Vocational education teachers, also referred to as career and technical or career-technology teachers, instruct and train students to work in a wide variety of fields, such as healthcare, business, auto repair, communications, and, increasingly, technology. They often teach courses that are in high demand by area employers, who may provide input into the curriculum and offer internships to students. Many vocational teachers play an active role in building and overseeing these partnerships. Additional responsibilities of middle and secondary school teachers may include career guidance and job placement, as well as follow-ups with students after graduation.²

As stated above, the AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With reference to middle and secondary school teachers, the *Handbook* does not indicate that such teachers are required to have a baccalaureate degree in a specific specialty, but rather that such individuals have coursework in educational practice and theory. Thus, the *Handbook* does not establish that the proffered position requires a baccalaureate degree in a specific specialty

¹ *Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos289.htm.

² *Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos069.htm.

for entry into the position.

Regarding parallel positions in the petitioner's industry, the petitioner has provided no vacancy announcements or job postings similar to that of the proffered position. Although the petitioner asserts that there are at least 30 similar tutorial schools in the Southern California area, the petitioner failed to submit evidence that other schools employing teachers in parallel positions either require these individuals to have a degree. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In support of the petition, in response to the NOID, and again on appeal, the petitioner submits a copy of what appears to be a job posting for a teaching position at its school. However, there is no date on this posting nor is there evidence that this typed statement has in fact been published and used as a basis for hiring qualifying candidates. While the petitioner submits an organizational chart indicating that it employs one other teacher who has a “Bachelor Degree,” it submits no documentation to establish the academic credentials of this other teachers in its employ. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)). Therefore the petitioner has not met this criterion

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

Counsel for the petitioner continually asserts, in both the response to the NOID and on appeal, that the duties of the proffered position are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Counsel asserts that it is imperative for its teachers to possess a bachelor's degree due to the complexity of the duties of the position, since teachers are required to teach more than one subject at various grade levels. Counsel further notes that a teacher who had not attained a bachelor's degree or its equivalent in experience would “never be able to make professional academic decisions,” among other tasks.

However, counsel's statements generally discuss his own opinions with regard to the qualifications necessary for a teacher at the petitioner's school, and are unsupported by independent documentary evidence. Without documentary evidence to support these claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the description of the duties of the proffered position does not specifically identify any tasks that are so specialized or complex that only a degreed individual could perform them. Instead, the duties of the proffered position appear routine for any middle or secondary school teaching position. To the extent that they are depicted in the record, 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. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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