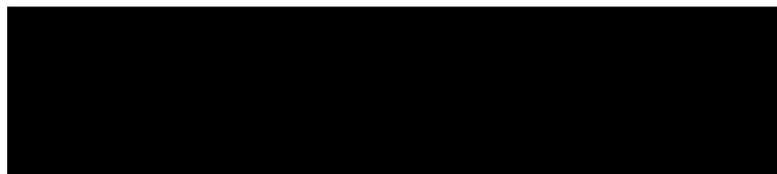


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



D2

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 03 2010

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)

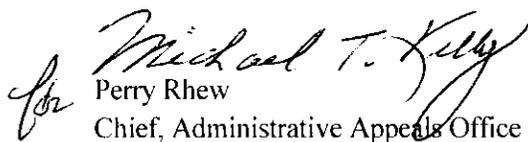
ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, under "Type of Business," the petitioner described itself only as a non-profit organization. In order to employ the beneficiary in a position it designates as a financial literacy director, the petitioner endeavors 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 denied the petition, finding that its approval is barred by the numerical cap on H-1B visa petitions. On appeal, the petitioner implied that the beneficiary may be exempt from the numerical cap as one employed at an institution of higher education.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the request for evidence issued by the service center, (3) the petitioner's response to the request for evidence, (4) the director's denial letter; and (5) the Form I-290B and the petitioner's brief and attached exhibits in support of the appeal.

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. The petition was filed for an employment period to commence in December 2008. The 2009 fiscal year (FY09) extends from October 1, 2008 through September 30, 2009. The instant petition is therefore subject to the 2009 H-1B cap, unless exempt. Further, on April 8, 2008, U.S. Citizenship and Immigration Services (USCIS) issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY09. The petitioner filed the instant visa petition on January 12, 2009. Unless this visa petition is exempt from the cap, therefore, it cannot be approved. At issue in this matter, therefore, is whether the beneficiary qualifies for an exemption from the FY09 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

Section 214(g)(5) of the Act states, in pertinent part:

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or otherwise provided [H-1B status] who -

- (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity.

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

(C) has earned a master's or higher degree from a United States institution of higher education . . . until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

On the Form I-129 Data Collection Supplement, the petitioner indicated, at Part C, that it is a nonprofit organization or entity related to or affiliated with an institution of higher education. However, the petitioner provided no evidence that it is, as claimed, related to or affiliated with such an institution.

On February 11, 2009 the service center issued a request that the petitioner provide evidence pertinent to its claimed relationship or affiliation with an institution of higher education. In a letter dated March 11, 2009, the petitioner's executive director responded that the petitioner ". . . does not meet the criteria to be associated with an educational institution . . ." The director therefore found that the petitioner is not exempt from the cap described at section 214(g)(1)(A) of the Act, and that the cap had been filled prior to the filing of the petition, and denied the petition accordingly.

The approvability of the instant visa petition hinges upon the petitioner demonstrating that, pursuant to section 214(g)(5) of the Act, the cap does not apply to the beneficiary. The record contains no evidence, nor even an assertion, that the petitioner is a nonprofit research organization or a governmental research organization. The petitioner has not, therefore, shown that the beneficiary is exempt from the cap pursuant to section 214(g)(5)(B) of the Act. Further, the record contains no indication that the beneficiary has earned a master's or higher degree from a United States institution of higher education. The petitioner has not, therefore, shown that the beneficiary is exempt from the cap pursuant to section 214(g)(5)(C) of the Act. The approvability of the instant visa petition stands or falls, then, on the petitioner demonstrating that the beneficiary is exempt from the cap pursuant to section 214(g)(5)(A) of the Act.

The petitioner's executive director admitted, in her March 11, 2009 letter, that the petitioner is not associated with an institution of higher education. On appeal, the petitioner's director stated, ". . . the petitioner . . . does not concur that [the petitioner] is not an institution of higher education."¹ Thus, although she did not explicitly assert that the petitioner is an institution of higher education, she implied that it might be. However, the petitioner's director provided no information, evidence or argument that the petitioner itself qualifies as an institution of higher education within the meaning of

¹ The person who signed that letter as the petitioner's director and took exception to the finding that the petitioner is not an institution of higher education is the same person who signed the March 11, 2009 letter as the petitioner's executive director and admitted that the petitioner is not associated with an institution of higher education.

section 214(g)(5)(A) of the Act or pertinent to the petitioner's relationship with any institution or higher education.

As was noted above, 20 U.S.C. § 1001 defines the phrase "institution of higher education" for the purpose of section 214(g)(5) of the Act. The statute at 20 U.S.C. § 1001 defines that phrase as follows:

§ 1001. General definition of institution of higher education

(a) Institution of higher education

For purposes of this chapter, other than subchapter IV, the term "institution of higher education" means 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, or persons who meet the requirements of section 1091 (d)(3) of this title;
- (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, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;
- (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.

(b) Additional institutions included

For purposes of this chapter, other than subchapter IV, the term "institution of higher education" also includes—

- (1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a) of this section; and
- (2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1), admits as regular students individuals—
 - (A) who are beyond the age of compulsory school attendance in the State in which the institution is located; or

(B) who will be dually or concurrently enrolled in the institution and a secondary school.

(c) List of accrediting agencies

For purposes of this section and section 1002 of this title, the Secretary shall publish a list of nationally recognized accrediting agencies or associations that the Secretary determines, pursuant to subpart 2 of part G of subchapter IV of this chapter, to be reliable authority as to the quality of the education or training offered.

The petitioner has provided no evidence that it qualifies as an institution of higher education pursuant to the definition of 20 U.S.C. § 1001 or that it is related to or affiliated with such an institution within the meaning of section 214(g)(5) of the Act. The AAO finds, therefore, that the petitioner has not demonstrated that the beneficiary is exempt from the FY09 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A). As the petitioner has not demonstrated that the beneficiary is exempt from the cap the petition may not be approved. Accordingly, the director's decision to deny the petition shall not be disturbed.

The record suggests other issues that were not raised in the decision of denial.

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

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 a particular position 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 instant case involves a position that the petitioner designates a “financial literacy director” position. Various submissions suggest that the duties of the proffered position consist mostly of teaching remedial personal economics to underprivileged members of the congregations of various local churches. Those duties suggest that the position would require only a fundamental knowledge of personal finance and taxation, rather than a minimum of a bachelor’s degree or the equivalent in a specific specialty.

With the petition, the petitioner submitted an undated, unsigned, unattributed statement indicating that the duties of the proffered position include teaching courses in “individual finance, budgeting, savings and asset investment, banking and insurance, taxes, home purchase and home ownership,” and that the incumbent must be bilingual in English and Spanish. That unattributed statement indicates that the position necessarily requires at least a bachelor’s degree in business, accounting, or finance, but does not explain why the duties of the position could not be adequately performed by a person without such a degree.

The record contains a vacancy announcement pertinent to a nearby position, assistant director of the Bethlehem Economic Development Center. The description of the duties of that position accords closely to that of the proffered position in the instant case. The petitioner cited that announcement as evidence that the proffered position requires a minimum of a bachelor’s degree or the equivalent in a specific specialty. As to the educational requirements of that other position, the announcement states, “The incumbent should have a bachelor’s degree in a related field or equivalent experience in relevant aspects of non-profit, faith-based ministries and agencies.” That announcement is very poor support for the proposition that the proffered position in this case requires a minimum of a bachelor’s degree or the equivalent in business, accounting, or finance, as the position it announces does not appear to require such a degree.

The petitioner provided printouts of several sections of O*Net OnLine. One is for Adult Literacy, Remedial Education, and GED Teachers and Instructors. Another is for Directors, Religious Activities and Education. The final section is for Personal Financial Advisors. The petitioner suggested that those sections demonstrate that a minimum of a bachelor’s degree or the equivalent in a specific specialty is necessary for positions like the proffered position in the instant case.

The AAO recognizes the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook* (the *Handbook*) as an authoritative source on the duties and educational requirements of a wide variety of occupations.²

The O*Net section provided by the petitioner pertinent to Directors, Religious Activities and Education indicates that it is in Job Zone Four, that is, that it requires considerable preparation. It does not suggest, however, that such positions require a minimum of a bachelor’s degree or the

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are to the 2010 – 2011 edition available online, accessed September 13, 2010.

equivalent in business, accounting, or finance. The *Handbook* does not contain a section related specifically to Directors, Religious Activities and Education.

As to the education required for Teachers – Adult Literacy and Remedial Education, the *Handbook* states:

In most States, adult education teachers need at least a bachelor's degree, although some programs prefer or require a master's degree. Programs may also prefer to hire those with teaching experience, especially with adults.

That passage does not suggest that such a position requires a degree in any specific specialty. If the proffered position in the instant case were correctly classified as such a position, that would be very poor support for the proposition that it requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

As to the education required for personal financial advisor positions, the *Handbook* states:

A bachelor's or graduate degree is strongly preferred for personal financial advisors. Employers usually do not require a specific field of study for personal financial advisors, but a bachelor's degree in accounting, finance, economics, business, mathematics, or law provides good preparation for the occupation.

Initially, the AAO notes that a strong preference for a bachelor's degree is not a requirement. Further, requiring a degree in accounting, finance, economics, business, mathematics, or law would not indicate that such a position requires a degree **in a specific specialty**. If the proffered position were correctly characterized as a personal financial advisor position, that would be very poor support for the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

The evidence in the record does not support the assertion in the unattributed statement that the proffered position requires a minimum of a bachelor's degree or the equivalent in business, accounting, or finance. The petitioner has not merely failed to demonstrate that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty; the petitioner has failed even to allege that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

For all of those reasons, the petitioner has failed to show that the proffered position is a position in a specialty occupation. The visa petition will be denied for this additional reason.

Further, the AAO notes that the Labor Condition Application (LCA) submitted to support the visa petition is valid for employment from December 17, 2008 to December 17, 2011. On the visa petition, however, the petitioner asked to employ the beneficiary from December 31, 2008 to December 31, 2011. Because the LCA is not valid for employment after December 17, 2011, the

visa petition would not have been approved for any period after that date even if the petitioner had demonstrated that it was otherwise approvable.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).

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. The appeal will be dismissed and the petition denied.

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