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U.S. Department of Homeland Security
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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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: JUL 01 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:
[Redacted]

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 \$585. 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 director of the Vermont Service Center 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.

The petitioner is a private religious nursery school with 22 employees. It seeks to employ the beneficiary as a part-time teacher 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 concluding that the petitioner failed to establish that the proffered position qualifies as an H-1B specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's Request for Additional Evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial of the petition due to abandonment; (5) counsel's motion to reopen and reconsider; (6) the director's denial letter; and (7) Form I-290B with petitioner's supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

First, the AAO will discuss the procedural history regarding this case. The H-1B petition was filed on April 2, 2007 with the Vermont Service Center. An RFE was issued by the director on July 18, 2007, requesting evidence that a baccalaureate degree in a specific field of study is a standard minimum requirement for the proffered position, which should include: a copy of the job posting used to solicit applications, a more detailed description of the proffered position; and information regarding the credentials of other individuals employed in the proffered position. The RFE stated that a response must be received by October 13, 2007. Counsel submitted a timely response to the RFE on October 12, 2007.

On January 23, 2008, the director issued a denial due to abandonment, stating that the petitioner did not submit a timely response to the RFE. Counsel then filed a Motion to Reopen and Reconsider the January 23, 2008 decision, which was granted. However, the director denied the petition on January 20, 2009, because the petitioner failed to demonstrate that the proffered position is a specialty occupation.

On appeal, the petitioner states as follows:

When this brief was originally submitted over two and a half years ago [the beneficiary] was employed as a classroom aid. [The beneficiary] presently holds the title of Lead Teacher in the early childhood program at [the petitioner's facility]. [The beneficiary's] educational courses in special education are essential to the program being able to accommodate children with social Emotional and educational challenges.

In addition, the beneficiary is a full time employee, working a full day and her salary has more than doubled since the original paperwork was submitted.

[The petitioner] requires all its Lead Teachers to have an undergraduate degree in education or a related field unless grandfathered more than five years ago.

The petitioner does not submit supporting evidence regarding its claimed policy for all Lead Teachers to have an undergraduate degree in education or a related field unless grandfathered more than five years ago. Going on record without supporting documentary evidence is not sufficient for purposes 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)). Regardless, as the petition was filed for a part-time teacher and not for a "Lead Teacher," the petitioner's requirements for its lead teachers is irrelevant to this proceeding.

With the appeal, the petitioner submits a copy of a Teacher's Letter of Agreement, signed by the beneficiary and the petitioner, dated September 1, 2008. The petitioner also submits a copy of a certificate of attendance the beneficiary received for attending a course on strategies for children with special needs, dated November 19, 2008. Both of these documents are dated after the petition was filed on April 2, 2007.

By the petitioner's own admission, the nature of the position now offered to the beneficiary has materially changed since the petition was originally filed. Although the job title is the same, the originally proffered position description of nursery school teacher did not entail working as a full-time Lead Teacher with an emphasis on special education. As the position description presented on appeal materially changes the scope and nature of the position for which the petition was filed, this information and documentation provided by the petitioner will not be considered on appeal. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition and in response to the RFE.

Next, the AAO affirms the director's finding that the petitioner failed to establish that the proffered position is a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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:

An 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 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), 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.

To make its determination whether the employment as described by the petitioner qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty 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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner is a private religious nursery school that seeks the beneficiary's services as a teacher. In the support letter submitted with the petition, the petitioner describes the position duties as follows:

[The beneficiary] will teach basic skills such as color, shape, number and letter recognition, personal hygiene, and social skills. She will establish and enforce rules for behavior, and policies and procedures to maintain order among students and will observe and evaluate children’s performance, behavior, social development, and physical health. [The beneficiary] will instruct students individually and in groups, adapting teaching methods to meet students’ varying needs and interests. She will read books to entire classes or to small groups. She will provide a variety of materials and resources for children to explore, and use, both in learning activities and in imaginative play, and will plan and conduct activities for a balanced program of instruction, demonstration, and work time that provides students with opportunities to observe, question, and investigate.

In response to the RFE, counsel stated that the beneficiary’s duties are divided as follows:

- Prepare lesson plans (30%);
- Teach children in class room, read books to children, and review children’s work (60%); and
- Meet with parents to discuss children’s work and progress (10%).

Counsel also stated that the school employs 22 teachers (including the beneficiary) and provided information about their credentials. Of the 21 teachers listed, eight have at least a bachelor’s degree in education, four do not have a degree, one has a bachelor’s degree in child psychology, one has a bachelor’s degree in fine arts, one has a bachelor’s degree with no specialty provided, one has a bachelor’s degree in occupational therapy, one has a bachelor’s degree in human development, one has a bachelor’s degree in communication arts, one has a bachelor’s degree in human services, one has a bachelor’s degree in French, and one has a bachelor’s degree in liberal arts. Counsel stated that a job posting was not placed.

According to the *Handbook*, 2010-11 online edition, section on Teachers – Preschool, except Special Education, “[s]ome employers may prefer workers who have taken secondary or postsecondary courses in child development and early childhood education or who have work experience in a child care setting. Other

employers require their own specialized training. An increasing number of employers require at least an associate degree in early childhood education.” Therefore, the *Handbook* indicates that working as a preschool teacher does not normally require a bachelor’s degree in a specific specialty and therefore is not a specialty occupation.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner did not submit any expert opinions or other documentation evidencing that private non-profit religious schools similar to the petitioner require a bachelor’s degree in a specific specialty for their preschool teachers. The petitioner does not provide any job-vacancy advertisements evidencing a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

The petitioner has also not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “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.” The evidence of record does not refute the *Handbook's* information to the effect that a bachelor’s degree in a specific specialty is not a requirement for preschool teacher positions. Moreover, as mentioned previously, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than teaching positions that can be performed by persons without a specialty degree or its equivalent, particularly in parallel positions in organizations similar to the petitioner.

Next, as the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). As mentioned previously, the petitioner employs some teachers who do not have a bachelor’s degree and others who have bachelor’s degrees in a wide range of fields. It also should be noted

that the beneficiary has a U.S. bachelor's degree in general studies, which further indicates that the petitioner does not require a bachelor's degree in a *specific specialty* for the proffered position.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The record does not demonstrate that the proffered duties are more specialized and complex than preschool teaching positions that are not usually associated with a bachelor's degree in a specific specialty. Indeed, on appeal the petitioner indicates that the petition was filed for the beneficiary to work as a classroom aide.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Accordingly, the AAO shall not disturb the director's denial of the petition.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that the petitioner did not submit any information regarding the licensing requirements of preschool teachers in Connecticut and so insufficient evidence has been provided to determine whether the beneficiary would qualify under Connecticut state rules regarding preschool teachers even though, according to the *Handbook* section on Teachers – Preschool, except Special Education:

[t]he training and qualifications required of preschool teachers vary widely. Each State has its own licensing requirements that regulate caregiver training. These requirements range from a high school diploma and a national Child Development Associate (CDA) credential to community college courses or a college degree in child development or early childhood education.

Going on record without supporting documentary evidence is not sufficient for purposes 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)). Additionally, the petitioner has not demonstrated how the beneficiary's U.S. bachelor's degree in general studies qualifies her to perform the duties of an H-1B specialty occupation, which requires at least a bachelor's degree or equivalent experience in a *specific specialty*. As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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.

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