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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
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Services

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FILE: WAC 08 135 50740 Office: CALIFORNIA SERVICE CENTER Date: MAY 28 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 \$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 California 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 public school district in Oregon. It seeks to employ the beneficiary as a bilingual Instructional Assistant and Interpreter. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On October 21, 2008, the director denied the petition determining that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker. On appeal, the petitioner asserts that it was previously unable to provide a Department of Labor (DOL) Form ETA-9035E Labor Condition Application (LCA) and now submits an LCA certified by the DOL on December 16, 2008.

The record of proceeding before the AAO contains: (1) the Form I-129 filed April 11, 2008 and supporting documentation; (2) the director's July 23, 2008 request for additional evidence (RFE); (3) the petitioner's submission in response to the RFE; (4) the director's denial decision; and (5) the Form I-290B, letter from the petitioner together with a letter from [REDACTED] and an LCA certified December 16, 2008 in support of the appeal. The AAO has considered the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS) on April 11, 2008.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition

was filed. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

In the instant matter, the petitioner requested H-1B employment, but did not submit an LCA in support of this request. In response to the director's RFE issued July 23, 2008, which requested evidence of the petitioner's certified LCA along with documentation establishing that the beneficiary was either certified to teach in the State of Oregon or is exempt from having a teaching credential, the petitioner did not submit a certified LCA demonstrating eligibility at the time of filing. Instead, the petitioner submitted a letter stating as follows:

[Y]ou also requested a Labor Condition Application. The District did not complete an application. We contacted your office regarding this request for information. The person we spoke with explained that the application is related to positions in the professional, technical or managerial occupation area. The work [the beneficiary] is doing is not in one of those categories. . . .

As no certified LCA was submitted (indeed, the LCA was not even filed with the DOL until after the appeal was filed), the director denied the petition.

As referenced above, the regulations require that before filing a Form I-129 in support of an H-1B petition, a petitioner must obtain a certified-LCA from the DOL and the LCA must include the beneficiary's anticipated employment. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA *at the time of filing*. In this matter, the petitioner failed to provide any LCA and, further, on appeal, does not submit a certified LCA to establish that it had complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i).

Although the petitioner submits a copy of an LCA on appeal, the LCA is DOL-certified on December 16, 2008, a date subsequent to the filing of the Form I-129. Thus, the record does not show that, at the time of filing, the petitioner had obtained a certified LCA in the occupational specialty claimed in the petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The record establishes that, at the time of filing, the petitioner had not obtained a current certified LCA in the claimed occupational specialty and, therefore, as determined by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

For the reason discussed above, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the proffered position is not a specialty occupation.

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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means 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, a proposed 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’s memorandum submitted with the petition states the following:

[The beneficiary] was originally hired as a Music teacher and did an outstanding job establishing the first Music Technology course at Jefferson Middle School and working with the JMS Middle School Choir. [The beneficiary] presently is working with [REDACTED] as an Instructional Assistant. She works with a diverse group of students, predominantly, [sic] Korean, in the instruction of English which aids their academic success in the classroom. She is one of very few instructors who actually speaks Spanish, German, French, and Korean. She is also certified to work as a substitute teacher for Music. . . .

A letter from the petitioner dated February 23, 2006, describes the proffered position as follows:

[The beneficiary] is working at [REDACTED], which is the school that serves the most Korean students in the District. She is working six hours a day, five days a week, as a bilingual instructional assistant. In this role she is helping Korean-speaking elementary students adjust to and understand the classroom structure and setting. She works with students in language arts, math, science and social studies.

With [REDACTED] Korean-based company’s annual employment rotations, [REDACTED] has enrolled many new Korean students every year. [The beneficiary] helps these new students and their parents with registration and communication with the school by interpreting, translating, writing, and making phone calls. Whenever the teachers or parents need to have conferences, [the beneficiary] arranges and participates in the conferences. [The beneficiary] also helps with District-wide conferences that involve Korean language students. In the fall of 2006, she went to eight different schools to interpret for conferences.

The AAO takes administrative notice of administrative rules established by Oregon’s Teacher Standards and Practices Commission. According to Oregon Administrative Rule 584-005-0005 (July 1, 2008), the definition of an instructional assistant is as follows: “A non-licensed position of employment in a school district assigned to assist a licensed teacher in a supportive role in the classroom working directly with students.” In other words, the beneficiary will not be working as a teacher, but as a teaching assistant/interpreter.

The AAO also takes note of the following discussion in the *Handbook*, 2010-11 online edition, regarding teaching assistants:

Teacher assistants provide instructional and clerical support for classroom teachers, allowing teachers more time for lesson planning and teaching. They support and assist children in learning class material using the teacher's lesson plans, providing students with individualized attention. Teacher assistants also supervise students in the cafeteria, schoolyard, and hallways, or on field trips; they record grades, set up equipment, and help prepare materials for instruction. Teacher assistants also are called teacher aides or instructional aides. Some assistants refer to themselves as paraprofessionals or paraeducators.

Some teacher assistants perform exclusively non-instructional or clerical tasks, such as monitoring nonacademic settings. Playground and lunchroom attendants are examples of such assistants. Most teacher assistants, however, perform a combination of instructional and clerical duties. They generally provide instructional reinforcement to children, under the direction and guidance of teachers. They work with students individually or in small groups—listening while students read, reviewing or reinforcing class lessons, or helping them find information for reports. At the secondary school level, teacher assistants often specialize in a certain subject, such as math or science. Teacher assistants often take charge of special projects and prepare equipment or exhibits, such as for a science demonstration. Some assistants work in computer laboratories, helping students to use computers and educational software programs.

In addition to instructing, assisting, and supervising students, teacher assistants may grade tests and papers, check homework, keep health and attendance records, do typing and filing, and duplicate materials. They also stock supplies, operate audiovisual equipment, and keep classroom equipment in order.

Many teacher assistants work extensively with special education students. As schools become more inclusive and integrate special education students into general education classrooms, teacher assistants in both general education and special education classrooms increasingly assist students with disabilities. They attend to the physical needs of students with disabilities, including feeding, teaching grooming habits, and assisting students riding the school bus. They also provide personal attention to students with other special needs, such as those who speak English as a second language and those who need remedial education. Some work with young adults to help them obtain a job or to help them apply for community services that will support them after their schooling ends. Teacher assistants help assess a student's progress by observing the student's performance and recording relevant data.

Although the majority of teacher assistants work in primary and secondary educational settings, others work in preschools and other child care centers. Often, one or two assistants will work with a lead teacher in order to better provide the individual attention

that young children require. In addition to assisting in educational instruction, teacher assistants supervise the children at play and assist in feeding and other basic care activities.

Teacher assistants also work with infants and toddlers who have developmental delays or other disabilities. Under the guidance of a teacher or therapist, teacher assistants perform exercises or play games to help the child develop physically and behaviorally.

Regarding the training, other qualifications, and advancement for social workers, the *Handbook* reports:

Many teacher assistants need only a high school diploma and on-the-job training. However, a college degree or related coursework in child development improves job opportunities. In fact, teacher assistants who work in Title 1 schools—those with a large proportion of students from low-income households—must have college training or proven academic skills. They face Federal mandates that require assistants to hold a 2-year or higher degree, have a minimum of 2 years of college, or pass a rigorous State or local assessment.

A number of colleges offer associate degrees or certificate programs that either prepare graduates to work as teacher assistants or provide additional training for current teacher assistants.

All teacher assistants receive some on-the-job training. Teacher assistants need to become familiar with the school system and with the operation and rules of the school they work in. Those who tutor and review lessons must learn and understand the class materials and instructional methods used by the teacher. Teacher assistants also must know how to operate audiovisual equipment, keep records, and prepare instructional materials, as well as have adequate computer skills.

The AAO also notes the *Handbook's* discussion regarding the duties of interpreters and translators that provides:

Interpreters and translators facilitate the cross-cultural communication necessary in today's society by converting one language into another. However, these language specialists do more than simply translate words—they relay concepts and ideas between languages. They must thoroughly understand the subject matter in which they work in order to accurately convey information from one language into another. In addition, they must be sensitive to the cultures associated with their languages of expertise.

Although some people do both, interpreting and translation are different professions. Interpreters deal with spoken words, translators with written words. Each task requires a distinct set of skills and aptitudes, and most people are better suited for one or the other. While interpreters often interpret into and from both languages, translators generally translate only into their native language.

Regarding the training for interpreters and translators, the *Handbook* reports:

The educational backgrounds of interpreters and translators vary. Knowing at least two languages is essential. Although it is not necessary to have been raised bilingual to succeed, many interpreters and translators grew up speaking two languages.

In high school, students can prepare for these careers by taking a broad range of courses that include English writing and comprehension, foreign languages, and basic computer proficiency. Other helpful pursuits include spending time abroad, engaging in direct contact with foreign cultures, and reading extensively on a variety of subjects in English and at least one other language.

Beyond high school, there are many educational options. Although a bachelor's degree is often required for jobs, majoring in a language is not always necessary. An educational background in a particular field of study can provide a natural area of subject-matter expertise. However, specialized training in how to do the work is generally required. Formal programs in interpreting and translation are available at colleges nationwide and through nonuniversity training programs, conferences, and courses. Many people who work as conference interpreters or in more technical areas—such as localization, engineering, or finance—have master's degrees, while those working in the community as court or medical interpreters or translators are more likely to complete job-specific training programs.

The description of the duties of the proffered position contains elements of both a teaching assistant and an interpreter/translator. The *Handbook* description of teaching assistants indicates that only a high school diploma is required. Regarding translators and interpreters, it appears that even if a bachelor's degree is required, this degree does not need to be in a specific specialty.

In this matter, the petitioner fails to describe how much of the beneficiary's time will be spent as a teaching assistant and how much time as an interpreter/translator. Given the brief description of duties provided and the lack of evidence to demonstrate how the beneficiary's role and qualifications would be similar or different to other instructional assistants employed by the petitioner, it is not possible to determine based on the title of the position or the duties as described that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The petitioner in this matter has not provided evidence that the duties of the proffered position encompass the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in a specific specialty. 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)). The petitioner has not demonstrated that the proffered position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The petitioner has not submitted any expert opinions, job announcements, or documentation regarding other Oregon public schools. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

Neither does the petitioner provide sufficient information to distinguish the proffered position as more complex or unique than similar, but non-degreed, employment, as required by the second prong of the second criterion. The petitioner does not identify which duties are more unique or specialized than the duties performed by non-degreed individuals in the same field. The record does not contain evidence that establishes either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), whether the petitioner normally requires a degree for the position, the AAO notes that the petitioner has not provided evidence about other instructional assistants it has hired. The critical element is not the title of the position or 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 has not submitted evidence to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Turning to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the description of the duties in the record does not substantiate that the duties are sufficiently specialized or complex to require knowledge usually associated with the attainment of at least a baccalaureate degree in a specific field of study. The petitioner has not provided examples of specific duties that are either specialized or complex. Accordingly, the petitioner has failed to classify the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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, in any event, the petitioner did not submit copies of the beneficiary's credentials or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). Moreover, the petitioner stated that the beneficiary has a degree in music, but failed to explain how the degree in music is relevant to the proffered position. Although the beneficiary may have been originally hired by the petitioner to be a music teacher, it appears that the petitioner no longer intends to employ the beneficiary in such a capacity. As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.