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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services



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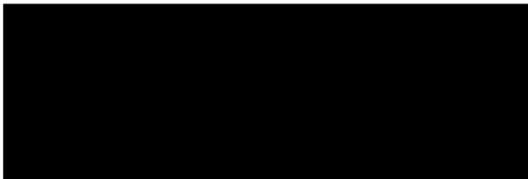
FILE: WAC 10 131 52258 Office: CALIFORNIA SERVICE CENTER Date: **APR 04 2011**

IN RE: Petitioner:
Beneficiary:



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:

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 nonimmigrant visa petition was denied by the service center director and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded for further consideration and action.

The petitioner is a non-profit educational institution/charter school. It seeks to employ the beneficiary as an ESL teacher and to classify him 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, concluding that the petitioner failed to establish that there is a reasonable and credible offer of employment and that the petition and the evidence submitted is credible and sufficient to establish that the petitioner will comply with the terms and conditions of employment. The director based her decision on *discrepancies in the petitioner's documentation.*

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The AAO first turns to the director's basis for denial, in which she determined that the petitioner failed to establish that there is a reasonable and credible offer of employment and that the petition and the evidence submitted is credible and sufficient to establish that the petitioner will comply with the terms and conditions of employment.

On appeal, counsel for the petitioner asserts that USCIS did not give the petitioner an opportunity to respond to the director's findings regarding discrepancies in the documentation submitted by the petitioner. Counsel includes a letter from the petitioner explaining the discrepancies along with supporting documentation. The petitioner explains the discrepancies found by the director as follows:

- The wages listed on the Forms W-2 of the petitioner's employees represent only taxable wages and not tax deferred deductions such as retirement plan, health, and dental insurance premium deductions. The petitioner submitted copies of the H-1B employees' paystubs on appeal, listing these deductions. Additionally, not all of the H-1B workers listed by the director were employed for the full calendar year. When the deductions and dates of employment are taken into account, the salaries paid to these H-1B workers meets or exceeds the proffered wages.
- On appeal, the petitioner explained that the number of employees and gross annual income amounts previously provided varied because the petitioner's fiscal year is different from its calendar year.
- Additionally, on appeal, the petitioner submitted a letter from the Office of Community Schools in Ohio stating that the petitioner's Community School Contract is automatically renewed each year and can only be terminated for "good cause," subject to due process.

The AAO finds the petitioner's explanations for any discrepancies and omissions found by the director to be reasonable in light of the corroborating evidence submitted. Consequently, the *petitioner has demonstrated that there is a reasonable and credible offer of employment and the*

petitioner is likely to comply with the terms and conditions of employment. Therefore, the basis for the director's decision will be withdrawn.

However, beyond the decision of the director, the AAO finds that the petition is not approvable in that the evidence is insufficient to establish that the proffered position is more likely than not a specialty occupation and that the beneficiary is qualified to perform the duties of 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 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.

(Emphasis added.)

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 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner has not presented evidence that its ESL teachers require at least a bachelor’s degree or the equivalent in a *specific specialty* to perform the duties of this occupation. In fact, in response to the RFE, counsel states the following:

The Service requested evidence showing that a Bachelor’s degree “in a specific field of study” is the minimum requirement for the position. However, the state of Ohio does not require that a Bachelor’s degree be in a specific field of study. Merely having a Bachelor’s degree is the minimum requirement to teach in this charter school. . . .

Further, the AAO notes that the petitioner's support letter states that the minimum requirement for the proffered position is a Bachelor's Degree in English Language Education or in a quantitative field. However, the beneficiary has the U.S. equivalent of a bachelor's degree in Secondary Education with a major in Foreign Language Instruction.

While the proffered position may in fact require at least a bachelor's degree or the equivalent, it appears that an ESL teacher at the petitioner's school in Ohio is not required to have at least a bachelor's degree or the equivalent in a *specific specialty*, which is required to establish that the proffered position is a specialty occupation.

Further, Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license “prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(B), if a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, *H classification may be granted.*

Where licensure is required in any occupation, 8 C.F.R. § 214.2(h)(4)(v)(E) specifies that the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. This regulation also provides that an alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year, unless he or she has (1) obtained a permanent license in the state of intended employment, or (2) continues to hold a temporary license valid in the same state for the period of the requested extension.

The AAO notes that the beneficiary’s teaching license is only valid until June 30, 2011, even though the petitioner has requested that H-1B classification be granted through September 8, 2013.

The director may request such additional evidence as is deemed necessary in rendering a decision, however the AAO notes that requesting that the petitioner provide the following evidence may assist the director in determining whether the proffered position is a specialty occupation and whether the beneficiary qualifies to perform the duties of a specialty occupation:

1. Information and corroborating evidence regarding the educational credentials of the petitioner’s current and prior ESL teachers, if any.
2. Any other documentation the petitioner wishes to provide evidencing that the proffered position is a specialty occupation requiring both (a) theoretical and practical application of a body of highly specialized knowledge and (b) at least a bachelor’s degree in a *specific specialty* or its equivalent for entry into the occupation in the United States.
3. Evidence that the beneficiary has obtained a license to teach ESL at the petitioner’s school in Ohio beyond June 30, 2011, as the petitioner has requested that the beneficiary be granted H-1B status through September 8, 2013.

Therefore, the matter is remanded to the director in order to determine whether the proffered position is a specialty occupation and whether the beneficiary qualifies to perform the duties of a *specialty occupation.*

The director's decision will be withdrawn and the matter will be remanded so that the director can determine whether the proffered position is a specialty occupation and whether the beneficiary qualifies to perform the duties of a specialty occupation. If the petitioner demonstrates to the director's satisfaction that the proffered position is a specialty occupation, then the director shall approve the petition; in that case, however, the director may only approve the petition for one year or through the end date that the beneficiary's temporary license is valid, whichever is longer, unless sufficient evidence is submitted to demonstrate that the beneficiary possesses either a permanent license or a temporary license valid until September 8, 2013.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.