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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529 2090



U.S. Citizenship  
and Immigration  
Services

12

[Redacted]

FILE: [Redacted]

Office: [Redacted]

Date: **APR 04 2011**

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 \$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 The director's decision will be withdrawn and the case will be remanded for further consideration and action.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 a kindergarten teacher and 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 because the director found that the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment and because the petitioner did not submit all the documentation requested in the director's Request for Additional Evidence (RFE) that was issued on April 20, 2010. 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 petitioner did not submit all the documentation requested in the RFE.

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 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 copies of paystubs for its workers.

The AAO finds the petitioner's explanations for the discrepancies and omissions specifically identified by the director to be reasonable in light of the corroborating evidence submitted. Additionally, on appeal, the petitioner has submitted its [REDACTED] which is valid through June 30, 2015. Consequently, the petitioner has demonstrated that there is a reasonable and credible offer of employment and that it responded adequately to the director's concerns. 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 (5<sup>th</sup> 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.

Additionally, 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.

The petitioner has not yet provided sufficient documentation to demonstrate that the proffered position of kindergarten teacher is a specialty occupation and that the beneficiary qualifies to perform the duties of the proffered position. The AAO notes that the petitioner’s offer letter to the beneficiary as well as the support letter state that the minimum requirement for the proffered position is a Bachelor’s Degree in [REDACTED] or in a quantitative field. However, the beneficiary has the U.S. equivalent of a bachelor’s degree in [REDACTED] which typically pertains to children who are not yet in kindergarten.

The petitioner did not submit any documentation regarding [REDACTED] minimum degree and licensing requirements for [REDACTED] teachers. Further, the petitioner did not submit

any documentation demonstrating that the beneficiary has a teaching license for the proffered position or is exempt from having such a license.

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. Evidence regarding [REDACTED] minimum education requirements for [REDACTED] [REDACTED] if any.
2. Information and corroborating evidence regarding the educational credentials of the petitioner's other [REDACTED] teachers.
3. An explanation of how coursework taken by the beneficiary is relevant to the duties that must be performed for the proffered position and how an [REDACTED] education degree is required to perform the duties of the proffered position;
4. Any other documentation the petitioner wishes to provide evidencing that the proffered position is a specialty occupation requiring both (a) the 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.
5. A copy of a valid license for the beneficiary to work as a [REDACTED] teacher for the petitioner in [REDACTED] or documentation that the beneficiary is exempt from having a license in that state.

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.

**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.