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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**

D2



FILE: WAC 10 129 51326 Office: CALIFORNIA SERVICE CENTER

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 The director's decision will be withdrawn and the case will be remanded for further consideration and action.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 on June 10, 2010, because she found that the petitioner failed to demonstrate 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 employee 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, sufficient evidence was submitted to explain 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 the discrepancies and omissions specifically identified 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 general 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. 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 English Language Education or in a quantitative field. However, the beneficiary has the U.S. equivalent of a bachelor’s degree in Education with a specialization in English. Additionally, the petitioner has not presented evidence that Ohio requires its ESL teachers in public community schools to have at least a bachelor’s degree or the equivalent in a specific specialty. Although the proffered position may require at least a bachelor’s degree or the equivalent, it is not clear that a community school ESL teacher in Ohio is required to have at least a bachelor’s degree or the equivalent in a specific specialty.

Further, the AAO notes that under the Elementary and Secondary Education Act, also known as the No Child Left Behind Act of 2001 (hereinafter "NCLB"), Pub. L. No. 107-110, 20 United States Code §§ 6301 et seq., ESL teachers in public schools (including publicly funded charter schools) must demonstrate subject-matter competency in the core academic subjects they teach,¹ unless they do not directly instruct students in core matter subjects or if their role is limited to providing highly qualified teachers with consultation on the adaptation of curricula, the use of behavioral supports and interventions, or the selection of appropriate accommodations. In addition, they do not need to meet highly qualified requirements in a subject area if they assist students with study or organizational skills and reinforce instruction that the child has already received from a teacher who is highly qualified in that core subject. *See No Child Left Behind: A Toolkit for Teachers*, U.S. Department of Education, Office of the Deputy Secretary, Washington, D.C. (2004).² Therefore, if the beneficiary will teach any core academic subjects at the petitioner's school, he must demonstrate that he is highly qualified under NCLB.

Accordingly, the AAO hereby requests the petitioner to provide the following evidence in order for it to determine whether the proffered position is a specialty occupation and whether the beneficiary qualifies to perform the duties of a specialty occupation:

1. Evidence regarding Ohio's minimum education requirements for community school ESL teachers.
2. Information and corroborating evidence regarding the educational credentials of the petitioner's other ESL teachers, if any.
3. 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 for entry into the occupation in the United States.
4. Evidence that the beneficiary either meets the Highly Qualified Teacher (HQT) requirements under NCLB, or is exempt from HQT requirements.

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.

¹ According to NCLB § 9101(11), "The term 'core academic subjects' means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography."

² Available at http://www2.ed.gov/teachers/nclbguide/nclb-teachers-toolkit.pdf?bcsi_scan_1CFAD6D3D20A37D6=0&bcsi_scan_filename=nclb-teachers-toolkit.pdf.

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.