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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
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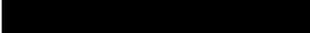
Date: DEC 15 2011

Office: CALIFORNIA SERVICE CENTER

FILE: 

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:

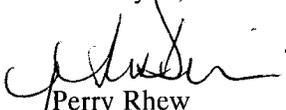


INSTRUCTIONS:

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 Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner states that it is a religious radio station that seeks to employ the beneficiary as its chaplain. Thus, the petitioner endeavors to classify the beneficiary 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).

In denying the petition, the director determined that the proffered position was not a specialty occupation. On appeal, counsel for the petitioner submits a Notice of Appeal (Form I-290B) along with a brief and additional evidence in support of the petitioner's claim that the position of chaplain within its organization is a specialty occupation.

The primary issue in this matter is whether the proffered position is a specialty occupation.

Section 214(i)(1) of 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which [(1)] 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 [(2)] 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 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.

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 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 in the United States, as required by the Act.

In a letter of support dated May 12, 2009, the petitioner explains that it is a nonprofit, tax-exempt religious radio station affiliated with [REDACTED]. Regarding the proffered position, the petitioner claims that as chaplain, the beneficiary would, in part, perform the following duties:

- Minister to listeners seeking biblical instruction and spiritual support;
- Coordinate the [REDACTED] prayer line and prayer needs email account with [REDACTED] Religion Department resources; and
- Oversee student interns.

The petitioner further indicates that the proffered position requires specialty knowledge in religion or theology, an established sense of spiritual calling to the ministry, and a commitment to the beliefs and practices of the Seventh-Day Adventist Church. The petitioner states that the position requires a bachelor's degree in religion, biblical studies, theology or its equivalent.

Finding that the record contained insufficient evidence of eligibility, the director issued an RFE on June 3, 2009. The director requested, in relevant part, that the petitioner submit a detailed description of the work to be done, including the specific job duties, level of responsibility, number of hours per week performing the work duties and the minimum training, and experience necessary to perform the proposed duties. The director also requested additional evidence of the beneficiary's qualifications, including evidence of ordination. Finally, the director requested evidence relating to the beneficiary's immigration status.

The petitioner responded to the director's request on June 26, 2009. The petitioner provided additional details regarding the proffered position, including a job posting listing the following duties:

- Minister to [REDACTED] listeners and fulfill requests for biblical instruction and support;
- Minister and support the spiritual needs of [REDACTED] employees;
- Oversee the student internship program;
- Assist with [REDACTED] events such as the Station's Prayer and Praise Days;
- Monitor the current Spiritual Help Line where listeners can leave prayer requests and requests to learn more about the Bible;
- Facilitate weekly time periods when people can call in for prayer, linking the team of radio pastors and station interns with the listeners;
- Help facilitate and respond to speaking engagement requests;
- Develop and administer a class in Media Evangelism at Columbia Union College;
- Help pastors partner with [REDACTED] and Christian artists as an outreach tool and to assist at promotional events; and
- Form a team of Seventh-Day Adventist pastors and train them to be appropriate "first contacts."

See Exhibit D to Petitioner's Response to RFE. The petitioner stated again that a bachelor's degree in religion or a related field is required for the position of chaplain. *Id.*

On July 13, 2009, the director denied the petition. The director found that the evidence of record failed to establish that the proffered position was a specialty occupation. The director noted that the duties of the proffered position do not amount to the duties of a minister, and do not demonstrate the unique or complex nature of the position or differ from similar positions that do not require a bachelor's degree. The director further noted that many of the listed duties were administrative in nature. Finally, the director indicated that the petitioner failed to establish that the beneficiary was ordained as is required for ministers within the Seventh-Day Adventist denomination and as evidenced by the denomination's Working Policy document submitted by the petitioner.

On appeal, counsel for the petitioner cited to the U.S. Department of Labor's (DOL) description of the clergy positions in the *Directory of Occupational Titles* and the *Occupational Outlook Handbook (Handbook)*, and claimed that such occupations qualify as specialty occupations. The appeal is accompanied, in part, by excerpts from *O*Net* Online and a number of letters in support of the petition.

Upon review of the record, the AAO concurs with the director's decision and finds that the petitioner has established none of the four supplemental eligibility criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the petitioner has failed to establish that the proffered position is a specialty occupation.

The AAO will first consider the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(I): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors often considered by USCIS when determining these criteria 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)).

In determining whether a position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty or its equivalent as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations.

The petitioner contends that it seeks to employ the beneficiary as its chaplain. From the description of duties provided, it appears that the proffered position most closely resembles that of a director of religious activities and education programs as described in the *Handbook*. This position is described in the *Handbook* as follows:

Direct and coordinate activities of a denominational group to meet religious needs of students. Plan, direct, or coordinate church school programs designed to promote religious education among church membership. May provide counseling and guidance relative to marital, health, financial, or religious problems.

While the *Handbook* does not have a dedicated section devoted entirely to this profession, the AAO notes that this description, which is excerpted from *O*Net*, is representative of the position in which the petitioner seeks to employ the beneficiary. The *Handbook* further states that the most significant source of education or training for this occupation is a Bachelor's degree.

The *O*Net* report cited by petitioner relates to the position of "clergy." The *O*Net* description of the duties of "clergy" includes conducting religious worship and performing other spiritual functions, as well as providing spiritual and moral guidance and assistance to members. The *O*Net* report indicates that a bachelor's degree is required for the occupation of "clergy," but not in any specific specialty closely related to the duties of the occupation. Moreover, the duties of the proffered position of chaplain within the petitioner's organization do not fully correspond to the duties of clergy as stated in the *O*Net*. The petitioner's chaplain is not required to conduct religious worship or perform spiritual functions, and indeed is not ordained and therefore not authorized to perform such duties.

As discussed above, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) requires a showing that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The *O*Net* report states that most, but not all, of the occupations included in the category of director of religious activities and education require a bachelor's degree. Moreover, there is no requirement that a degree in a specific specialty be held for entry into this category of occupations or for "clergy" positions. The *O*Net* reports are not probative of the proffered position being a specialty occupation. Therefore, the evidence submitted does not establish that a minimum of a bachelor's degree in a specific specialty or its equivalent is required for the proffered position.

When a job, like that of a chaplain, can be performed by individuals with a variety of educational qualifications, without further specification, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as

requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Based on the above discussion, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of chaplain under 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 alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

In this matter, the petitioner submitted a number of letters from professionals with the Seventh-Day Adventist Church stating that a degree requirement is common for chaplains within the petitioner's industry. The duties of many of the positions described in these letters are equivalent to those of a university or hospital chaplain, whose duties more closely resemble those of a minister. The duties of a radio station chaplain, as described by the petitioner, are not those of a minister. Moreover, a small sampling of positions is statistically insignificant and is therefore insufficient evidence to establish that a bachelor's degree in a specific specialty is a minimum entry requirement for the proffered position in the United States, especially when compared to available statistics-based evidence such as the Bureau of Labor Statistics' *Handbook* that does not support such a finding.

Moreover, the petitioner fails to submit evidence to address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2): that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The AAO observes that the petitioner has indicated that the beneficiary is qualified to perform the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-baccalaureate, non-specialty occupation employment. Consequently, the submitted evidence fails to establish that the proffered position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires the petitioner to establish that it normally requires a degree or its equivalent for the position.

The petitioner has not submitted evidence to demonstrate that it has a history of hiring only degreed individuals for the position. The petitioner indicates that its chaplain reports to [REDACTED]

The petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees in a specific specialty. Accordingly, the AAO finds that proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).¹

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As already discussed in this decision, the information set forth in both the *Handbook* and the *O*Net* report and the evidence in the record show that the proffered position is not an occupation that would require at least a bachelor's degree in a specific specialty or its equivalent. Neither the descriptions of the proffered position and its duties nor any other evidence in the record of proceeding establishes the degree of specialization and complexity required by this criterion.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

¹ To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.