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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 01 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,

for 
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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.

On the Form I-129 visa petition the petitioner stated that it is a day care firm with 12 employees. To employ the beneficiary in what it designates as a preschool teacher position, the petitioner endeavors 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means 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, 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 a particular position 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.

With the visa petition, counsel submitted a letter, dated March 31, 2009, from the petitioner's president. That letter stated the duties of the proffered position as follows:

Educating children by introducing scientific, mathematical concepts using less structured approach, including small-group lessons, one on one instruction, and learning through creative activities such as art, dance and music. Capitalize on children's play to further language and vocabulary development. Be responsible for planning the curriculum, organizing and managing the classroom environment designed to promote the physical, cognitive, emotional, creative and social skills of enrolled children. Conduct on-going assessments and evaluations of children.

The AAO observes that the petitioner's president's description of the duties of the proffered position does not include any responsibilities related to special education. As to the education required for the position, the petitioner's president stated:

To ensure that the professional duties mentioned above are competently carried out, the petitioner requires that the person filling the position have, at a minimum, a Bachelor of Science in Kindergarten Education or a related field.

The petitioner's president provided no other explanation of the requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty.

Because the evidence submitted was insufficient to demonstrate that the visa petition was approvable, the service center, on April 16, 2009, issued an RFE in this matter, requesting additional evidence to demonstrate that the proffered position qualifies as a specialty occupation.

In response to the RFE, counsel submitted his own letter of May 12, 2009, in which he provided his own description of the duties of the proffered position. Counsel included special education duties in his description. Counsel did not reveal his basis for his description of those duties and the inclusion of special education responsibilities.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. Absent any basis, counsel's own description of the duties of the proffered position will be accorded no weight and not considered further.¹

¹ Further, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner may not offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated

Counsel also submitted vacancy announcements, which were printed from popular job search websites.

One of the vacancy announcements submitted was placed by [REDACTED] [REDACTED]s for a [REDACTED] and an Assistant Teacher. That announcement states that the positions require bachelor's degrees, but not that the degrees must be in any specific specialty.

Another vacancy announcement was placed for a Kindergarten Teacher by [REDACTED] [REDACTED]. Although that announcement states that the position requires a bachelor's degree, it does not indicate that the degree must be in any specific specialty.

Another announcement was placed by an unidentified school in Santa Monica, California for a Preschool Teacher. The sixth page of that announcement states that the position requires a bachelor's degree in child development or early education or a related field.

Another announcement was placed for an Early Childhood Education Teacher by the [REDACTED] [REDACTED] a private, nonprofit organization which, with 450 employees and eight program sites in Maryland, Washington, D.C., and West Virginia, is clearly much larger than the petitioner. That announcement indicates that the position requires a bachelor's degree, but not that it needs to be in any specific specialty.

Another announcement was placed by the [REDACTED] [REDACTED] for a Preschool Teacher. That announcement states that the position requires a bachelor's degree, but not that the degree must be in any specific specialty.

Another announcement was placed for Pre-School and Toddler Teachers by [REDACTED] [REDACTED]. The announcement states, "BACHELOR'S DEGREE A PLUS," but not that a bachelor's degree is a minimum requirement or that the degree should be in any specific specialty.

Another announcement was placed by the [REDACTED] [REDACTED] in Columbus, Ohio for a Summer Preschool Teacher. That announcement states that the position requires a degree in education, but not that the degree must be a minimum of a bachelor's degree or the equivalent.

job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed qualifies as an H-1B position. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The new job description provided in response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added generic duties to the job description. Even if the petitioner, rather than counsel, had offered this modification of the petitioner's claim in response to the RFE, the AAO would not consider it.

The director denied the visa petition on May 28, 2009 finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation within the meaning of the relevant statutes and regulations.

On appeal, counsel stated, "In support of the petition, the petitioner provided an extensive job description which specifically explained and set forth the requirement for a degree." Counsel asserted that the responsibility of the proffered position is extremely high because the beneficiary would develop and implement an overall curriculum and would also identify children with emotional and developmental issues and develop and implement individualized curricula for them. Counsel asserted that this level of responsibility requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

The AAO notes that the special education requirements cited by counsel were included in counsel's own description of the duties of the proffered position, submitted in response to the RFE, but not included in the description provided by the petitioner's president, submitted with the visa petition. As was explained above, counsel's description of the proffered position, submitted in response to the RFE, is of no evidentiary value and will not be considered.²

Counsel stated that the proffered position is more complex than other preschool teacher positions because, "The position contemplates a potential teacher who is in complete control of the classroom from developing the teaching curriculum and implementing it to modifying it and dealing with parents."

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ The *Handbook* addresses Preschool Teacher positions in the section entitled Teachers-Preschool, Except Special Education.

The *Handbook* describes the duties of Preschool Teachers as follows:

Preschool teachers nurture, teach, and care for children who have not yet entered kindergarten. They provide early childhood care and education through a variety of teaching strategies. They teach children, usually aged 3 to 5, both in groups and one on one. They do so by planning and implementing a curriculum that covers various

² Further, neither the petitioner's job description, nor the supporting labor condition application, nor the Form I-129 indicates that the beneficiary would perform the duties or be paid the wages of a special education teacher.

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed November 29, 2010.

areas of a child's development, such as motor skills, social and emotional development, and language development.

Preschool teachers play a vital role in the development of children. They introduce children to reading and writing, expanded vocabulary, creative arts, science, and social studies. They use games, music, artwork, films, books, computers, and other tools to teach concepts and skills.

Preschool children learn mainly through investigation, play, and formal teaching. Preschool teachers capitalize on children's play to further language and vocabulary development (using storytelling, rhyming games, and acting games), improve social skills (having the children work together to build a neighborhood in a sandbox), and introduce scientific and mathematical concepts (showing the children how to balance and count blocks when building a bridge or how to mix colors when painting). Thus, an approach that includes small and large group activities, one-on-one instruction, and learning through creative activities such as art, dance, and music, is adopted to teach preschool children. Letter recognition, phonics, numbers, and awareness of nature and science are introduced at the preschool level to prepare students for kindergarten.

Preschool teachers often work with students from varied ethnic, racial, and religious backgrounds. With growing minority populations in most parts of the country, it is important for teachers to be able to work effectively with a diverse student population. Accordingly, some schools offer training to help teachers enhance their awareness and understanding of different cultures. Teachers may also include multicultural programming in their lesson plans, to address the needs of all students, regardless of their cultural background.

The AAO finds that the proffered position is a Preschool Teacher position as described in the *Handbook*. The handbook describes the educational requirements of Preschool Teacher positions as follows:

The training and qualifications required of preschool teachers vary widely. Each State has its own licensing requirements that regulate caregiver training. These requirements range from a high school diploma and a national Child Development Associate (CDA) credential to community college courses or a college degree in child development or early childhood education.

Different public funding streams may set other education and professional development requirements. For example, many States have separate funding for prekindergarten programs for 4-year-old children and typically set higher education degree requirements for those teachers, including those providing prekindergarten in a child care center. Head Start programs must meet Federal standards for teacher

requirements. For example, by 2011 all Head Start teachers must have at least an associate degree.

Some employers may prefer workers who have taken secondary or postsecondary courses in child development and early childhood education or who have work experience in a child care setting. Other employers require their own specialized training. An increasing number of employers require at least an associate degree in early childhood education

The AAO observes that the duties described in the petitioner's president's March 31, 2009 letter of support appear to be consistent with the duties of preschool teachers as described in the *Handbook*, and that the *Handbook* makes plain that Preschool Teacher positions do not normally require a minimum of a bachelor's degree or the equivalent in a specific specialty. Further, neither the petitioner's description of the position nor any other evidence in the record of proceeding establishes that the beneficiary's services in this particular proffered position would require the attainment of at least a bachelor's degree in a specific specialty closely related to the duties of the position. The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The vacancy announcements submitted are the only evidence the petitioner provided pertinent to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Some of those vacancy announcements do not indicate that the positions described require a bachelor's degree. Many indicate that the positions require a bachelor's degree, but not that the degree must be in any specific specialty. Further, none of those vacancy announcement were shown to be representative of a common degree requirement for positions parallel to the proffered position among day-care firms similar to the petitioner.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence pertinent to other people whom the petitioner has hired to work as preschool teachers, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner's president's March 31, 2009 letter described the duties of the proffered position. That description was consistent with the duties of preschool teachers described in the *Handbook*, duties which the *Handbook* indicates may or may not, in an individual instance, require a bachelor's degree. Nothing in that description differentiates the proffered position from a typical preschool teacher position not requiring at least a bachelor's degree in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position or its duties are so complex, unique, or

specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument submitted on appeal has not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

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. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.