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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

[Redacted]

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: FEB 02 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,

*Michael T. Kelly*  
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 appeal will be dismissed. The petition will be denied.

The petitioner is a children's academy which provides day care and educational services, and seeks to employ the beneficiary as its director. The petitioner, therefore, 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).

The director denied the petition, finding that the petitioner had failed to demonstrate that the proffered position was a specialty occupation. On appeal, counsel for the petitioner submits a brief and additional evidence, contending that the director's findings were erroneous.

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 director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

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 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.

The petitioner is seeking the beneficiary’s services as its director. According to the petitioner’s January 5, 2005 “Employment Opportunity Posting Notice,” the duties of the proffered position are as follows:

**JOB SUMMARY**

Directs the entire operations of the school and is directly responsible for implementing and supervising programs that follow the center[’]s educational goals, beliefs and procedures in all activities. Additional responsibilities include optimizing revenues and minimizing expenses.

**NATURE OF WORK**

Performs the duties of Director by:

- A. Interacting with parents and children to maintain personalized child-care satisfaction.
- B. Inspecting the school for quality assurance at every aspect and level.
- C. Recruiting, interviewing, and staffing the school with quality employees according to company policy and state statutes resulting in a 100% staffed posture at all times.
- D. Training, developing, and retention of entire school staff.
- E. Doing merit and performance evaluations.
- F. Controlling payroll costs according to agreed upon constraints by scheduling staff for hours to be worked in compliance with staff to child ratios.
- G. Maintaining security of company moneys and timely reporting of bank deposits including zero losses and 100% collection of weekly accounts receivable.
- H. Completing and planning seasonal calendars.
- I. Scheduling and conducting monthly staff meetings.
- J. Complying with state and local services and other regulatory agency rules. Conducting fire drills.
- K. Maintaining records that pertain to the administration of the child care center in accordance with applicable federal, state and local laws.
- L. Maintaining current records and files regarding account receivable, Family Central, enrollment, daily and weekly close-out reports.
- M. Planning and implementing procedures that leads to wholesome interpersonal relationships between staff members.
- N. Implementing procedures for meeting with individual staff members to solve any problems that may occur.
- O. Conducting annual special events such as: graduation, Harvest Night, parent/teacher conference, etc.

- P. Overseeing the ordering, securing and distribution of educational supplies.
- Q. Coordinating with appropriate state agencies for child abuse and maltreatment.
- R. Ensuring optimum conditions and cleanliness of the center, grounds, vehicles and equipment.
- S. Maintaining enrollment to 90% of capacity and knowing the name of every parent and child.
- T. Conducting tours of the facility to prospective families.
- U. Familiarizing parents of newly enrolled children with the center's policies and procedures.
- V. Maintaining a wait list.
- W. Acting as liaison with local school district and community.
- X. Being available for public events and attending professional conferences and educational events.
- Y. Maintaining information flow to staff and management.
- Z. Performing extra duties as assigned.

Works directly for the Executive Director and or CEO and works independently to perform within established policies procedures but will ask for assistance as needed. Structure is somewhat fixed and most work is reviewed weekly.

#### **QUALIFICATIONS**

Bachelor's/Associate's degree in related field plus 1 year experience and or Child Development Associate certificate. Administrator Credential certificate. Commercial Driver's License (CDL). Demonstrated proficiency in child-care procedures. Must be able to anticipate problems and use sound judgment and tact in dealing with children and parents. Must have the ability to acquire a thorough knowledge of the organization's policies and procedures in order to perform specified supervisory and housekeeping duties.

The petitioner also submitted documentation demonstrating that the beneficiary possessed a bachelor's degree in physical education from the Universidade Federal do Parana, Brazil, in 1996.

On September 24, 2008, the director issued a request for evidence, which requested specific evidence in support of the contention that the proffered position required an individual with at least a bachelor's degree in a specific specialty. The director also requested evidence demonstrating how the beneficiary's degree in physical education qualified her to perform the duties of the proffered position, as well as an evaluation of her academic credentials and work experience.

In a response dated October 29, 2008, the petitioner addressed the director's queries. The petitioner submitted additional evidence, including an employee chart supported by resumes, credentials, and pay records for other employees who held the position of director in the petitioner's organization. Additionally, the petitioner submitted job advertisements in support of the contention that a bachelor's degree was the industry standard for entry into the proffered position, and also submitted two expert opinion letters and an evaluation which assessed the beneficiary's education, work experience, and the duties of the proffered position. Regarding the beneficiary's duties, the petitioner provided an updated "Employment Opportunity Posting Notice" dated July 28, 2008, which was identical to the first notice submitted aside from the addition of the following bulleted section at the end of the notice:

- Self motivated, self directed, able to make good judgments, creative, reliable and dependable. Must have the ability to handle all situations in a calm, professional manner.
- 40 hours of HRS mandated course, physical exam, TB test, criminal background check, documentation of U.S. citizenship, affidavit of good moral character, signed statement of having read the child abuse and neglect manual and HIV manual. Signed employment agreement.
- Sincere interest in working with children and knowledgeable regarding children's development and growth.
- Demonstrate the ability to handle crisis situations especially where children are involved, able to respond immediately to any emergency situation.

The director found, and the AAO concurs, that the proffered position of director is not a specialty occupation. The director noted that the minimum requirement for entry into the proffered position was not a baccalaureate degree or its equivalent in a specific specialty, specifically noting that the petitioner would accept an individual with an associate's degree in its job notice. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel for the petitioner contends that the director's decision was erroneous. Counsel asserts that the petitioner demonstrated that three of its eight employees who have held the position of director possess bachelor's degrees, and others have the equivalent of a bachelor's degree based on a combination of education and experience. Counsel also relies on the *O\*Net*, which indicates that most positions in the field of education administration require a bachelor's degree. Counsel concluded by stating that the petitioner has met its burden of proof in these proceedings.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel's assertion that the proffered position is a specialty occupation.

In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the section pertaining to Education Administrators as described by the 2010-2011 edition of the *Handbook*. It has taken particular note of the following section of that discussion:

Education administrators set educational standards and goals and establish the policies and procedures required to achieve them. They also supervise managers, support staff, teachers, counselors, librarians, coaches, and other employees. They develop academic programs, monitor students' educational progress, train and motivate teachers and other staff, manage career counseling and other student services, administer recordkeeping, prepare budgets, and perform many other duties. They also handle relations with parents, prospective and current students, employers, and the community. In a smaller organization such as a small day care center, one administrator may handle all these functions. In universities or large school systems, responsibilities are divided among many administrators, each with a specific function.

\* \* \*

In preschools and child care centers, which are usually much smaller than other educational institutions, the *director* or *supervisor* of the school or center often serves as the sole administrator. The director's or supervisor's job is similar to that of other school administrators in that he or she oversees the school's daily activities and operation, hires and develops staff, and ensures that the school meets required regulations and educational standards.<sup>1</sup>

Regarding the educational requirements for the proffered position, the *Handbook* states as follows:

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<sup>1</sup> *Occupational Outlook Handbook*, 2010-2011 Edition, at [www.bls.gov/oco/ocos007.htm](http://www.bls.gov/oco/ocos007.htm).

Most education administrators begin their careers as teachers and prepare for advancement into education administration by completing a master's or doctoral degree. Because of the diversity of duties and levels of responsibility, educational backgrounds and experience vary considerably among these workers.

***Education and training.*** Principals, assistant principals, central office administrators, academic deans, and preschool directors usually have held teaching positions before moving into administration. Some teachers move directly into principal positions; others first become assistant principals or gain experience in other administrative jobs at either the school or district level in positions such as department head, curriculum specialist, or subject matter advisor.

In most public schools, principals, assistant principals, and school district administrators need a master's degree in education administration or educational leadership. Some principals and central office administrators have a doctorate or specialized degree in education administration. In private schools, some principals and assistant principals hold only a bachelor's degree, but the majority of principals have a master's or doctoral degree.

Educational requirements for administrators of preschools and child care centers vary with the setting of the program and the State of employment. Administrators who oversee preschool programs in public schools often are required to have at least a bachelor's degree. Child care directors who supervise private programs typically are not required to have a degree; however, most States require a preschool education credential, which often includes some postsecondary coursework.<sup>2</sup>

While the *Handbook* indicates that many education administrators such as principals and assistant principals in public schools and school district administrators need a master's degree, and similar employees in private schools require a bachelor's degree, there is no similar requirement for the proffered position. The AAO acknowledges that *Handbook* states that administrators who oversee preschool programs in public schools are generally required to have a bachelor's degree. However, the proffered position in this case is for the director of a private program and, according to the *Handbook*, "child care directors who supervise private programs typically are not required to have a degree." Therefore, since the *Handbook* does not indicate that a degree in a specific specialty is required, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a petitioner to prove that a degree requirement is common to the industry in parallel positions among similar organizations, or the particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining this criterion include 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095 at 1102).

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<sup>2</sup> *Id.*

Regarding parallel positions in the petitioner's industry, the petitioner has provided six job vacancy postings advertised [REDACTED]. One of the postings, for [REDACTED] is for an institute of higher education and thus cannot be deemed to be a parallel position in the same industry as the petitioner. The remaining five postings, while requiring a bachelor's degree or equivalent in early childhood education, education, or a related field, fail to identify the nature and scope of the company for which the position of director is being advertised. While all postings indicate that a bachelor's degree is a requirement, the advertisements are for entities that cannot be deemed similar in scope or focus to the petitioning entity. Moreover, all but one of the postings are for positions outside of the petitioner's home state of Florida, which is significant since, according to the *Handbook*, "most States require a preschool education credential, which often includes some postsecondary coursework."<sup>3</sup> Therefore, the requirements for a preschool director in Texas or California may differ greatly from the industry requirements for a preschool director in Florida. Although the posting for the position [REDACTED] indicates that a master's degree is *preferred*, no educational *requirement* is stated. It cannot be determined from the job postings submitted that a bachelor's degree in a specific specialty is an industry standard among parallel positions in the petitioner's industry. Accordingly, the petitioner has failed to establish the first prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. As discussed above, the *Handbook* states that a director in a privately-operated preschool or day care center is not required to have at least a bachelor's degree for entry into the position. Moreover, according to the position description provided by the petitioner, the duties of the proffered position require the director to perform a variety of general administrative services, and nothing in the list of proposed duties is so unique or complex that the AAO is persuaded that only an individual with a degree could perform such work.

As noted above, the petitioner may also submit evidence that the industry's professional association has made a degree a minimum entry requirement, or submit letters or affidavits from firms or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165. The petitioner, however, has failed to submit such evidence. Although the petitioner submits two evaluation letters from [REDACTED] at Seattle Pacific University, and [REDACTED] of [REDACTED], these letters are evaluations of the beneficiary's personal credentials and not evidence of an industry standard regarding the education standards for directors of privately operated preschools. The petitioner, therefore, has failed to establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant matter, the petitioner has submitted an abundance of

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<sup>3</sup> *Id.*

evidence pertaining to its current directors, along with their educational credentials and evidence of their employment with the petitioner. For the reasons discussed below, however, this evidence is insufficient to establish eligibility for the benefit sought.

According to the organizational chart submitted in response to the RFE, the petitioner employs eight persons in the position of director, and it appears that each director is assigned to a specific city or area in which the petitioner operates. Along with the organizational chart, the petitioner submitted an employee chart listing all eight individuals as well as their educational backgrounds and experience. The AAO notes that, out of the eight directors listed, only three of the employees possess a bachelor's degree or higher. As discussed by the director, [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]; do not hold bachelor's degrees. Although the petitioner submits additional evidence for each of these persons, such as resumes, credentials from the Florida Department of Children and Families Director, and employment applications, these documents, absent further corroborating information, cannot be accepted as evidence that these individuals possess the equivalent of a bachelor's degree.

Most importantly, however, is the petitioner's job posting, which indicates that a bachelor's degree *or* an associate's degree is acceptable for entry into the position. There is no indication by the petitioner that, absent a bachelor's degree, the candidate for the proffered position needs to possess a specific combination of education and experience deemed equivalent to a bachelor's degree, nor has the petitioner shown that such a requirement was in place when it hired its current directors. Therefore, since the petitioner has not established that it routinely requires a degree or its equivalent for the proffered position, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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. The petitioner has not related the listed duties to its preschool and daycare center beyond what is normally encountered in the occupational field. The petitioner has not shown, in relation to its business, that the duties of the proffered position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* reveals that a director in a privately operated preschool is an occupation that does not require a baccalaureate degree as a minimum for entry into the occupation. Thus, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

It should be noted that in the denial, the director addressed the beneficiary qualifications for the position, noting that the petitioner had failed to demonstrate that the beneficiary was qualified to perform the duties of the proffered position since she failed to meet all of the petitioner's requirements as set forth in the job posting. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require bachelor's degree or higher, or its equivalent, in a specific specialty. Therefore, the AAO will not address the beneficiary's qualifications further.

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 on the ground that the proffered position does not qualify as a specialty occupation.

The burden of proof in the proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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