

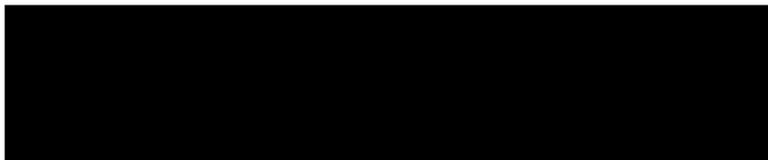
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U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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DATE: **JUL 06 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,

*for Michael T. Kelly*  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the California Service Center 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.

The petitioner is nonprofit church and education organization with no employees with an alleged gross annual income of \$17,246. It seeks to employ the beneficiary as a part-time (20-30 hours per week) art director and instructor 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 concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner response to the RFE; (4) the director's denial; and (5) Form I-290B with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of 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.

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.

To make its determination whether the employment as described by the petitioner qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty.

Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

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 generally *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, as required by the Act.

In its letter dated April 1, 2009, the petitioner states as follows:

We require the Art director to focus on mediums of expressing our religious communion through designing layout for church brochures, books, posters, and illustrative materials for religious education. Furthermore, the art director will coordinate all outreach activity from concept to designing the framework to express to secular and community to detailed story boards that tells the greatness and the gift the bible offers and what God has laid out for us. This bestowment requires painting Christian murals, designing banners for our forms, designing information booklets as well as service brochure, pamphlets, magazines, etc.

The Art Director is also responsible for teaching art to our congregational member's younger generation through Saturday outreach programs and ongoing vacation programs to teach painting skills focusing on Christian theme ranging from children to adult classes. This medium is run by contributions from the church as well as congregational members and participants of the program in the form of donations as well as offerings.

\* \* \*

Our church [has been] running the [art academy] with volunteers from congregational members but the [art academy] has grown in students and in contribution that it can stand out as its subdivision organization apart from [the petitioner].

[The beneficiary] is offered the dual role of Art Director for our church and Art

Instructor for the [art academy]. Because our church and academy budget is limited, we are only able to offer part-time employment and require more dedication from [the beneficiary] and other volunteer teachers. As the organization expands, we anticipate increasing [the beneficiary's] time and recruiting additional teachers as the class sizes expands.

The petitioner does not state the minimum requirements for the position in this letter. The petitioner states that the beneficiary will work 20-30 hours per week at an hourly wage of \$27.43.

The petitioner also submitted an education evaluation along with copies of the beneficiary's education documents indicating that he has the equivalent of a bachelor of fine arts degree with a concentration in art education from an accredited college or university in the United States.

On April 18, 2009, the director issued an RFE requesting additional evidence that the job offered is a specialty occupation.

In response to the RFE, the petitioner states as follows:

[T]herefore, although [the academy] has no salaried employee, [the beneficiary] will be the art director/teacher for structured discipline such for oil painting, fine arts drawing, painting techniques as well as offer college level instructions in interior/exterior/cityscape/landscape/figure/drawing as well as sculpture. *As the enrollment increases*, [the beneficiary] will create educational program and curriculum suited for the targeted audience and recruit additional staffs as necessary on part time and full time basis. . . .

Although service requested similar organization requiring, *we are not able to find similar organizations in the community vicinity and only offerings are public institutions*, therefore private nonprofit organization offering the curriculum outlined will be beneficial to the community and the students. . . .

(Emphasis added.)

In its RFE response, the petitioner also provided an expanded, more detailed listing of the proposed duties, which the AAO has simplified below to capture their general nature in an economical fashion:<sup>1</sup>

- Teach art, primarily in portfolio classes, review course curriculum, administer field trips, and coordinate calendar of events (40% of time);
- Develop academic curriculum and schedule, develop and expand portfolio class, develop adult fine arts class, evaluate course offerings and requirements, and select texts and syllabus (20% of

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<sup>1</sup> Of course, the AAO reviewed and considered the complete list in its entirety, just as it appears in the record of proceeding.

- time);
- Recruit volunteer and part-time teachers for youth/senior art programs, train volunteer teachers, and develop and devise academic expansion plan (20% of time); and
  - Select medias of advertising and develop financial strategies (20%) of time.

The petitioner states that it requires at least a BA in Fine Arts or Education for the proffered position.

The petitioner also submitted photos of its facilities, evidence that teachers at private institutions are not required to be certified, a copy of the petitioner's 2008 tax return indicating that it operated at a loss of \$21,945 for that year, the petitioner's brochure for its art academy, which states that students aged 7 to adult are taught during evenings and weekends, an organizational chart that indicates the petitioner already has an education director as well as a Sunday School director, and copies of class schedules along with other documents pertaining to the petitioner's business.

The director denied the petition on June 8, 2009, finding that the proffered position is not a specialty occupation, but is that of a self-enrichment teacher.

On appeal, counsel argues that the proffered position is not a self-enrichment teacher, but instead is a combination of an administrator of an educational institution as well as an art director.

The AAO notes that the proffered position is only part-time at 20 to 30 hours per week and, therefore, it seems doubtful that the beneficiary would spend the majority of his time overseeing an art program in addition to teaching art. According to the description of duties, the majority of the petitioner's time will be spent teaching, while 20% of the beneficiary's time will be spent devising an advertising campaign. Although the petitioner states that 40% of the time will be spent developing the academic curriculum and recruiting teachers for expansion, the petitioner also indicates that these duties will not be performed until the enrollment increases. Therefore, because the petitioner has not established the extent, if any, by which enrollment will increase, and also given that the petitioner is operating at a loss with no employees, the petitioner has failed to demonstrate that the beneficiary will actually spend 40% of his time developing the academic curriculum and recruiting teachers for expansion. A visa petition may not be approved based on speculation of future eligibility. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Instead, it seems more likely that the majority of the beneficiary's time will be spent teaching art to students in the evenings, on weekends, and during vacation periods, as well as designing brochures for the petitioner's art program. Moreover, as stated in the petitioner's organizational chart, the petitioner already has both an Education Director and a Sunday School Director. Therefore, the AAO disagrees with counsel that the petitioner has demonstrated that the proffered position is a combination of an education administrator and an art director.

Instead, the AAO concurs with the director that the proffered position as developed in the record of proceeding is most akin to that of a self-enrichment teacher as described in the *Handbook*. This

being said, that is, that the evidence of record conveys self-enrichment teaching as the essential nature of the proffered position, the AAO wishes to emphasize that it finds that the full panoply of proposed duties listed by the petitioner - even where they extend beyond teaching *per se* - does not indicate a requirement for any higher degree of knowledge in art or education than that which the *Handbook* indicates for self-enrichment teachers.

The *Handbook* describes “Teachers – Self-Enrichment” as follows:

Self-enrichment teachers provide instruction in a wide variety of subjects that students take for fun or self-improvement. Some teach a series of classes that provide students with useful life skills, such as cooking, personal finance, and time management. *Others provide group instruction intended solely for recreation, such as photography, pottery, and painting.* Many others provide one-on-one instruction in a variety of subjects, including dance, singing, or playing a musical instrument. Some teachers conduct courses on academic subjects, such as literature, foreign language, and history, in a non-academic setting. *The classes self-enrichment teachers give seldom lead to a degree and attendance is voluntary, but dedicated, talented students sometimes go on to careers in the arts.*

Self-enrichment teachers may have styles and methods of instruction that differ greatly. Most self-enrichment classes are relatively informal. Some classes, such as pottery or sewing, may be largely hands-on, with the instructor demonstrating methods or techniques for the class, observing students as they attempt to do it themselves, and pointing out mistakes to students and offering suggestions to improve techniques. Other classes, such as those involving financial planning or religion and spirituality, may center on lectures or might rely more heavily on group discussions. *Self-enrichment teachers may also teach classes offered through religious institutions, such as marriage preparation or classes in religion for children.*

Many of the classes that self-enrichment educators teach are shorter in duration than classes taken for academic credit; some finish in 1 or 2 days or several weeks. These brief classes tend to be introductory in nature and generally focus on only one topic—for example, a cooking class that teaches students how to make bread. Some self-enrichment classes introduce children and youth to activities, such as piano or drama, and may be designed to last anywhere from 1 week to several months.

Many self-enrichment teachers provide one-on-one lessons to students. The instructor may only work with the student for an hour or two a week, but tells the student what to practice in the interim until the next lesson. Many instructors work with the same students on a weekly basis for years and derive satisfaction from observing them mature and gain expertise. The most talented students may go on to paid careers as craft artists, painters, sculptors, dancers, singers, or musicians.

*All self-enrichment teachers must prepare lessons beforehand and stay current in their fields.* Many self-enrichment teachers are self employed and provide instruction as a business. As such, they must collect any fees or tuition and keep records of students whose accounts are prepaid or in arrears. Although not a requirement for most types of classes, teachers may use computers and other modern technologies in their instruction or to maintain business records.

(Emphasis added). The *Handbook's* description is therefore very close to the description of the proffered position.

The *Handbook* also states that “[f]ew self-enrichment education teachers are full-time salaried workers and that “[m]ost either work part time or are self-employed. . . .”

Additionally, the *Handbook* describes self-enrichment teachers' courses as follows: “*Many classes for adults are held in the evenings and on weekends to accommodate students who have a job or family responsibilities. Similarly, self-enrichment classes for children are usually held after school, on weekends, or during school vacations.*” (Emphasis added.) An evaluation of the duties and the environment in which these self-enrichment teachers instruct, plus the fact that the proposed instruction is for self-improvement and not academic credit, as well as the fact that the proffered position entails teaching adults as well as children, means that the proffered position is closest to the *Handbook's* description on self-enrichment teachers.

Under the *Handbook's* description of self-enrichment teachers, “In general, there are few educational or training requirements for a job as a self-enrichment teacher beyond being an expert in the subject taught. To demonstrate expertise, however, self-enrichment teachers may be required to have formal training in disciplines, such as art or music, where specific teacher training programs are available.” In other words, a bachelor's degree in a specific specialty is not required, but the self-enrichment teacher must still have a level of expertise in the subject taught.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 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 assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that 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.

As earlier noted, in determining whether there is such a common degree requirement, factors often considered by USCIS 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)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner did not submit any expert opinions or other documentation evidencing that organizations similar to the petitioner require a bachelor's degree in a specific specialty for their art directors. The advertisements submitted by the petitioner in response to the RFE are not probative for these proceedings because they are not placed by organizations that are parallel to the petitioner.

The AAO next finds that the petitioner does not provide any evidence of a common degree-in-a-specific-specialty requirement in positions that is both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “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.” The evidence of record does not refute the *Handbook's* information to the effect that the spectrum of credentials acceptable for self-enrichment teacher positions extends below at least a bachelor's degree, or the equivalent, in a specific specialty. Moreover, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than teaching positions that can be performed by persons without a specialty degree or its equivalent, particularly in parallel positions in organizations similar to the petitioner.

Next, as the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. It is not self-evident that the duties that the petitioner ascribes to the proffered position have the degree of specialization and complexity required to establish that their performance requires the type and level of knowledge that would satisfy this criterion; and the record lacks independent evidence of such specialization and complexity.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason, the petition will be denied.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.