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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: JUN 02 2011 Office: VERMONT 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,

Michael F. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 be denied.

The petitioner, a private institution offering elementary education, seeks to employ the beneficiary as a first grade teacher. 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, determining that the proffered position is not a specialty occupation. On appeal, the petitioner states that the position is a specialty occupation, and submits additional documentation in support of this contention.¹

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 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;

¹ Although the Form I-290B was filed by the petitioner, the office notes that according to a previously-filed entry of appearance, [REDACTED] represents the petitioner. Since no withdrawal of counsel's appearance on behalf of the petitioner is in the record, the office will presume that counsel is still representing the interests of the petitioner in this matter, and will therefore forward notice of the decision on appeal to both counsel and the petitioner. See 8 C.F.R. § 292.5(a).

- (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 (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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner’s letter of support; (3) the director’s request for evidence (RFE); (4) counsel for the petitioner’s response to that request; (5) the director’s denial; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a first grade teacher. Specifically, the petitioner’s letter of support dated August 26, 2008 states that the beneficiary’s job would consist mainly of planning and implementing lessons appropriate for her grade assignment, assessing regularly the academic progress of her students, preparing and submitting reports and attending staff development trainings as called by the school.

In an accompanying document, the petitioner listed the duties of the proffered position as follows:

- ✚ Develop and implement lesson plans that fulfill the requirements of district's curriculum program and show written evidence of preparation as required.
- ✚ Prepare lessons that reflect accommodations for differences in student learning styles.
- ✚ Present subject matter according to guidelines established by Texas Education Agency, board policies, and administrative regulations.
- ✚ Plan and use appropriate instructional and learning strategies, activities, materials, and equipment that reflects understanding of the learning styles and needs of students assigned
- ✚ Conduct assessment of student learning styles, and use result to plan instructional activities.
- ✚ Work cooperatively with special education teachers to modify curricula as needed for special education students according to guidelines established in Individual Education Plans (IEP).
- ✚ Work with other members of staff to determine instructional goals, objectives, and methods according to district requirements.
- ✚ Plan and supervise assignments to teacher aide(s) and volunteer(s).
- ✚ Use technology to strengthen the teaching/learning process.
- ✚ Help students analyze and improve study methods and habits.
- ✚ Conduct ongoing assessment of student achievement through formal and informal testing.
- ✚ Assume responsibility for extracurricular activities as assigned; sponsor outside activities approve[d] by the campus principal.
- ✚ Be a positive model for students, support mission of the school district.
- ✚ Create classroom environment conducive to learning and appropriate for the physical, social, and emotional development of students.
- ✚ Manage student behavior in accordance with Student Code of Conduct and student handbook.
- ✚ Take all necessary and reasonable precautions to protect students, equipment, materials and facilities.
- ✚ Assist in selection of books, equipment, and other instructional materials.
- ✚ Establish and maintain open communication by conducting conferences with parents, students, principals, and teachers.
- ✚ Maintain a professional relationship with colleagues, students, parents, and community members.
- ✚ Use effective communication skills to present information accurately and clearly.
- ✚ Compile, maintain and file al reports, records, and other documents required.
- ✚ Keep informed of and comply with state, district, and school regulations and policies for classroom teachers.
- ✚ Keep informed of and comply with state, district, and school regulations and policies for classroom teachers.
- ✚ Participate in staff development activities to improve job-related skills.

- ✦ Attend and participate in faculty meetings and serve on staff committees as required.
- ✦ Maintain confidentiality.
- ✦ Participate in faculty meetings and special events as assigned.
- ✦ Perform other duties as assigned.

The director, after issuing a request for supporting documentation, found the evidence submitted to be insufficient to establish that the proffered position was that of a specialty occupation, and denied the petition on October 29, 2008.

The director cited to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, and noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner states that the proffered position is a specialty occupation, and contends that the director's findings were erroneous. Specifically, the petitioner asserts that the beneficiary is amply qualified for the position and that the petitioner would not hire anyone with less than a baccalaureate degree or its equivalent to fill the position. In support of these contentions, counsel resubmits the previously-submitted supporting documentation pertaining to the beneficiary's qualifications, as well as information pertaining to a teacher certification program in Dallas, Texas.

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.

At the outset, the AAO notes that the petitioner places undue weight in the fact that the Department of Labor (DOL) certified the Labor Condition Application (LCA). As stated in the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2), "Certification by [DOL] of [an LCA] in an occupational classification does not constitute a determination by that agency that the occupation is a specialty occupation." As that regulation also acknowledges, the service center director shall determine if the petition meets the specialty-occupation and beneficiary qualification requirements of Section 214(i) of the Act.²

² While DOL is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

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; or 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. In this matter, the AAO notes that the director likened the proffered position to that of an elementary school teacher, as defined by the *Handbook* under the section entitled "Teachers – Preschool, Kindergarten, Elementary, Middle, and Secondary." Specifically, the *Handbook* states:

Kindergarten and elementary school teachers play a vital role in the development of children. What children learn and experience during their early years can shape their views of themselves and the world and can affect their later success or failure in school, work, and their personal lives. Kindergarten and elementary school teachers introduce children to mathematics, language, science, and social studies. They use games, music, artwork, films, books, computers, and other tools to teach basic skills.

* * *

Most *elementary school teachers* instruct one class of children in several subjects. In some schools, two or more teachers work as a team and are jointly responsible for a group of students in at least one subject. In other schools, a teacher may teach one special subject—usually music, art, reading, science, arithmetic, or physical education—to a number of classes. A small but growing number of teachers instruct multilevel classrooms, with students at several different learning levels.

Regarding qualifications, the director noted that the *Handbook* states:

The traditional route to becoming a public school teacher involves completing a bachelor's degree from a teacher education program and then obtaining a license. However, most States now offer alternative routes to licensure for those who have a college degree in other fields. Private school teachers do not have to be licensed but may still need a bachelor's degree.

(Italics added.)

The director noted that according to the *Handbook*, a bachelor's degree may be required for teachers in private institutions. However, no requirement that said degree be in a specific specialty is noted.

On appeal, the petitioner asserts that it always hires individuals with at least a bachelor's degree for its teacher positions, noting that it often seeks to hire individuals with degrees in education or college degrees with some credits in education.

Upon review, the AAO concurs with the director's findings. As stated above, the AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With reference to elementary school teachers, the *Handbook* does not indicate that private school teachers are normally required to have a baccalaureate degree in a specific specialty, but rather that such individuals "do not have to be licensed" and "may still need a bachelor's degree. Thus, the *Handbook* does not establish that the proffered position requires a baccalaureate degree in a specific specialty for entry into the position.

Regarding parallel positions in the petitioner's industry, the petitioner has provided one vacancy announcement for a teaching position in the Plano Independent School District. This posting indicates that a bachelor's and/or master's degree is required, as well as teacher certification. There are three problems with this posting. First, there is no evidence to suggest that this position is in a private institution similar to that of the petitioner. Since the posting indicates that it is for an independent school district, it appears that this position is for a public school teacher, a position different from that of the proffered position. Second, even if the posting were for a private school teaching position, the vacancy announcement makes no requirement that the bachelor's or master's degree be in a specific specialty. Third, in contrast to the proffered position, the advertised position requires "teacher certification" and, by implication, whatever additional educational credits may be required beyond a bachelor's degree for such certification.

The petitioner also submits a staff information webpage published by the Dallas North Montessori School, indicating that its preschool director and elementary director possess bachelor's degrees. The page indicates that the preschool director holds a bachelor's degree in psychology, whereas the elementary director holds a degree in fine arts. Again, the fact that other similar organizations employ degreed individuals is insufficient for satisfying this criterion. The evidence submitted does not indicate that the individuals identified on the staff information page, as well as other teachers employed by the Dallas North Montessori School, are *required* to have a degree for entry into their positions. Finally, the positions of preschool director and elementary director differ from the proffered position in this matter, which is that of a first grade teacher. The petitioner, therefore, failed to submit evidence that other private schools employing teachers in parallel positions either require these individuals to have at least a bachelor's degree in a specific specialty. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to establish the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In response to the RFE, the petitioner submits copies of the resumes, diplomas, and pay stubs for three of its employees. Specifically, according to their resumes, these employees

possess a bachelor of science in biology, a bachelor of science in elementary education and a master of arts in education, and a bachelor of secondary education, respectively, from the Philippines. However, the mere attainment of a bachelor's degree or higher by three of its employees does not demonstrate that the petitioner normally requires a degree or its equivalent for the position of first grade teacher. It is further noted that [REDACTED] occupied the position of kindergarten teacher/assistant director, and [REDACTED] occupied the position of pre-K teacher and first grade teacher. The resume and supporting documentation for the third employee, [REDACTED], does not indicate the position she held at the petitioner's institution. Therefore, out of the three individuals for whom information was provided, only one occupied the position of first grade teacher. However, the petitioner submits no job postings indicating that a degree is a prerequisite for entry into the position of first grade teacher, and it does not submit documentary evidence establishing a continuous practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty. There is no evidence that such a prerequisite has been published or advertised and consequently used as a basis for hiring qualified candidates in the past. Therefore the petitioner has not met this criterion

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

The petitioner continually asserts that the duties of the proffered position are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner asserts that it is imperative for its teachers to possess a bachelor's degree due to the complexity of the duties of the position, since "Grade I" teachers are required to have knowledge about the psychology and appropriate approaches of teaching, since such a foundation at that level is critical to future learning.

However, the petitioner's statements generally discuss opinions with regard to the qualifications necessary for a teacher at the petitioner's school, and are unsupported by independent documentary evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the AAO further finds that the description of the duties of the proffered position does not specifically identify any tasks that are so specialized or complex that only a degreed individual could perform them. Instead, the duties of the proffered position appear routine for any elementary school teaching position. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

It is noted that, while not a basis for the denial, the director found that the petitioner failed to submit evidence of the licensing requirements, if any, in the State of Texas for individuals employed in the stated occupation. On appeal, the petitioner states that, while the petitioner's institution is sanctioned by the Texas Educational

Agency, there is no Texas law or regulation requiring private school teachers to be certified or licensed. The AAO notes that this statement corresponds with the *Handbook's* overview with regard to qualifications for elementary school teachers, which indicates that teachers in private schools do not have to be licensed. Since the issue of licensing is not at issue in these proceedings, this matter will not be addressed further.

The burden of proof in these 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.