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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
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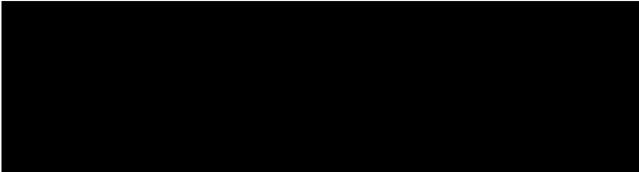
IN RE:

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. Rhew
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 Montessori school. To employ the beneficiary in what it designates as a 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. In support of these contentions, counsel submitted a brief and additional evidence.

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 and attached exhibits 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 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.

With the visa petition, counsel submitted an undated letter from the petitioner's director. That letter provides the following description of the duties of the proffered position:

- Teach classes in basic reading, writing, arithmetic, art, and music to students through use of the Montessori Method (Overall Responsibility).
- Deliver daily instruction in language and mathematics (25%).
- Integrate curricular activities into classes, including computer-based lessons, cooperative learning, games and exploration activities, and incorporate the Montessori Method. Design curriculum and effective class plans and rationale for language and mathematics subjects (20%).
- Develop alternative measures of assessment, such as problem-based learning projects and games (15%).
- Participate in the training of fellow Montessori teachers (15%).
- Design, administer, and grade tests that reflect the Montessori Method (10%).
- Tutor students after school, as needed (10%).
- Attend parent/teacher interviews, institutes, and in-service training as required (5%)

The petitioner's director stated, without explanation or analysis, that those duties require a bachelor's degree in education, early childhood education, or a related field.

The petitioner's director also cited the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as evidence that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook's* assessment of the educational qualifications of the proffered position will be addressed further below. However, the AAO here notes that it finds that neither the petitioner's descriptions of the proffered position nor of the duties comprising it elevate it above private-school teacher positions for the same grade level that the *Handbook* indicates as not requiring a minimum of a bachelor's degree in a specific specialty. The AAO does note that the Montessori Method will be used, but the record of proceeding does not establish that training or certification in that method requires a bachelor's degree in any specific specialty.

The service center issued a request for evidence (RFE) in this matter on May 28, 2009. However, the evidence requested and the evidence provided in response are not directly relevant to the subsequent basis for denying the petition.

¹ 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 8, 2010.

On June 25, 2009, the director denied the visa petition, finding that the evidence does not demonstrate that the petitioner would employ the beneficiary in a specialty occupation.

On appeal, counsel asserted that the visa petition was incorrectly denied based on the false finding that it is a position for a preschool teacher, asserting that it is, instead, a kindergarten teacher's position. Counsel asserted that the *Handbook* makes clear that kindergarten teacher's positions require a bachelor's degree. Counsel quoted the *Handbook* as stating, "Private school teachers do not need to be licensed but still need a bachelor's degree."

Counsel did not indicate what edition of the *Handbook* he was quoting, but the AAO notes that the current edition states that requirement somewhat differently. The current issue of the *Handbook* considers kindergarten teacher positions in the section entitled Kindergarten, Elementary, Middle, and Secondary Teachers, and states:

Public school teachers must be licensed, which typically requires a bachelor's degree and the completion of an approved teacher education program; private school teachers do not have to be licensed but may still need a bachelor's degree.

[Emphasis supplied.]

The *Handbook* does not demonstrate that kindergarten teacher positions in private schools require a bachelor's degree. Further, that same section of the *Handbook* does not indicate that those teaching positions that do require a bachelor's degree require that the degree be in any specific specialty. The *Handbook* offers no support for the petitioner's position that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty, nor does any other evidence in the record suggest that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The petitioner 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 petitioner provided no evidence pertinent to the hiring practices of similarly-sized private schools filling similar positions. The petitioner has not, therefore, 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 companies, 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).

Next, the AAO finds that the petitioner has not satisfied the second alternate prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), for the petitioner has not shown that "its particular position is so complex or unique that it can be performed only by an individual with a degree." The record of proceeding contains no evidence demonstrating that the proffered position has the requisite complexity or uniqueness. In particular, the petitioner has not demonstrated that the proffered position has attributes of complexity or uniqueness that would materially distinguish it from private-school

teacher positions for the same grade level that the *Handbook* indicates may be performed by persons without a bachelor's degree, or the equivalent, in a specific specialty.

The record contains no evidence pertinent to the educational background of others the petitioner has hired for the same position. 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).

Finally, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), as the record of proceeding does not establish that the nature of the specific duties is "so specialized and complex that knowledge required to perform [them] is usually associated with the attainment of a baccalaureate or higher degree." To the extent that the duties are specified in the record of proceeding, it is not evident that they have the requisite level of specialization and complexity, so as to be usually associated with at least a bachelor's degree in a specific specialty, as required by this criterion and the related sections of the Act. The AAO finds nothing about the duties as described in the record of proceeding that materially distinguishes them from like duties that the *Handbook* indicates may be performed in private schools by persons either without a bachelor's degree or without one in a specific specialty directly related to the proffered position. Accordingly, the AAO finds no evidentiary basis for finding that the performance of the proposed duties would require knowledge usually associated with at least a bachelor's degree in a specific specialty. Although the petitioner provided a fairly detailed description of the duties of the proffered position, the record does not demonstrate that those duties, or any of them, could not be performed by a person with less than a bachelor's degree in some specific requisite specialty.

The petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to any of the alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Because the petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation, the appeal must be dismissed and the petition denied on this basis.

The record of proceeding presents an additional issue that was not addressed in the decision of denial, namely, the petitioner's failure to establish that the beneficiary is qualified to serve in an occupation requiring at least a bachelor's degree in a specific specialty. As will be discussed below, the petitioner's reliance upon the educational evaluation that it obtained was misplaced, for the record of proceeding fails to establish that the evaluation's author qualifies as competent to render such an evaluation under the governing USCIS regulations, that is, as an "official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience."

With the visa petition counsel provided an evaluation of the beneficiary's employment experience intended to demonstrate that the beneficiary's experience is equivalent to a minimum of a bachelor's degree or the equivalent in a specific specialty. That evaluation was prepared by a full-time faculty member at South University in West Palm Beach, Florida. It states:

[The beneficiary's] over thirteen years of professional work experience in the field of early childhood education is equivalent to a U.S. degree of Bachelor of Arts in Early Childhood Education awarded by a regionally accredited college or university in the United States.

It further states:

Southern University is a regionally accredited university that grants credit based on an individual's education, training and/or work experience. Furthermore, as part of my current responsibilities at the university, I have the authority to grant college level credit for training and/or work experience.

If the proffered position had been shown to be a specialty occupation, it would be because it had been demonstrated to require a minimum of a bachelor's degree or the equivalent in a specific specialty, e.g. childhood education. In that event, for the petition to be approved, the petitioner would be obliged to demonstrate that the beneficiary had a minimum of a bachelor's degree or the equivalent in that particular specialty. See section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2),

In the instant case, the evidence does not show that the beneficiary has a bachelor's degree, and the petitioner is obliged to rely on the beneficiary's training and experience to show that the beneficiary has the equivalent of such a degree. For that purpose, the petitioner provided the evaluation described above.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or

registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Subparagraph (2) is inapplicable in this case, because the record contains no results of any such examinations. Subparagraph (3) is inapplicable because the petitioner is seeking to show that the beneficiary is qualified for the proffered position through experience alone, rather than through her education. Subparagraph (4) is inapplicable, because the record contains no such evidence of certification or registration from any such professional association or society. Subparagraph (5) is inapplicable because USCIS has not found that the beneficiary has acquired the equivalent of the degree required by the specialty occupation through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. The only criterion pursuant to which counsel argues that the beneficiary qualifies is that found in subparagraph (1).

The professor who provided the evaluation described above stated that, as a result of the beneficiary's employment experience, she now has the equivalent of a bachelor's degree in early childhood education earned at a U.S. institution of higher learning. The professor further stated that the university at which she is a faculty member grants credit based on, *inter alia*, work experience, and that she has the authority, as part of her position with the university, to grant college level credit for, *inter alia*, work experience.

The record, however, contains no evidence to corroborate that professor's assertion that the university has such a program or that she has such power. USCIS will not accept a faculty member's opinion as to the college-credit equivalent of a particular person's work experience or training, unless authoritative, independent evidence from the official's college or university, such as a letter from the appropriate dean or provost, establishes that the official is authorized to grant academic credit for that institution, in the pertinent specialty, on the basis of training or work experience.

The petitioner has not demonstrated that the beneficiary is qualified for the proffered position. The appeal will be dismissed and the visa petition denied on this additional basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).



Page 9

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.