

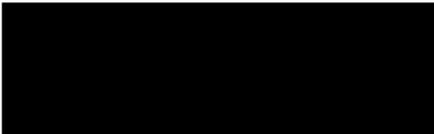
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2000  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



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FILE: [REDACTED] Office: VERMONT SERVICE CENTER

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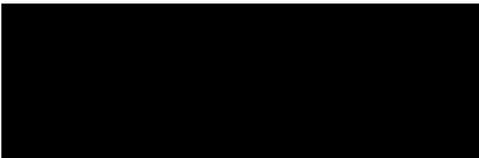
**MAR 02 2011**

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 T. Kelly*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the Vermont 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 a private household. It seeks to employ the beneficiary as a part-time private teacher/tutor 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 qualifies as an H-1B 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's response to the RFE; and (4) Form I-290B with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The AAO affirms the director's finding that the petitioner failed to establish that the proffered position is 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.

The petitioner is a private household that seeks the beneficiary's services as a private teacher/tutor. In the support letter submitted with the petition, the petitioner describes the proffered position as follows:

I would like to employ [the beneficiary] as a Private Teacher/Tutor for my two children, who are ages 5 and 3. In this position she will be responsible for teaching my children all subjects, including foreign languages such as Spanish and Portuguese. Also, she will be responsible for the following:

- Teach my children using a variety of teaching methods including lectures, demonstrations, visual aids and other materials to supplement presentations.
- Prepare course objectives and outline a course of study.
- Assign lessons and administer tests to evaluate my children's progress.
- Record test results and provide report of progress directly to me.
- Administer appropriate discipline and discuss any problems with me.

The person who fills this position should have at least a Bachelor Degree, preferably in Education. This is the same requirement as set by the local school districts, and I believe it is important to adhere to the same regulations.

The petitioner submitted an education evaluation finding that the beneficiary's foreign education is equivalent to a Bachelor of Education degree from an accredited institution of higher education in the United States.

On May 20, 2009, the director issued an RFE to elicit evidence that the proffered position is a specialty occupation. The director noted that the proffered position appears to be that of a preschool teacher.

In response to the RFE, the petitioner stated that the beneficiary will be working as a kindergarten teacher even though her younger child is three-years-old because her “youngest is not far behind [her older child.]” The petitioner breaks down the beneficiary’s duties as follows:

- Teach the two children using a variety of teaching methods including lectures, demonstrations, visual aids, etc. (50%);
- Prepare course objectives and outline a course of study (25%);
- Assign lessons and administer tests (10%);
- Record test results and provide progress reports (10%); and
- Administer discipline and discuss problems (5%).

The petitioner submitted documentation regarding Virginia public school teaching licensing requirements and Highly Qualified Teacher (HQT) requirements under the Elementary and Secondary Education Act, also known as the No Child Left Behind Act of 2001 (hereinafter “NCLB,” Pub. L. No. 107-110, 20 United States Code §§ 6301 et seq.). It should be noted that the petitioner is not a public school and is therefore not subject to laws regulating the Virginia public schools or NCLB, regardless of the petitioner’s stated qualifications. Additionally, the petitioner did not present evidence that the beneficiary has a license to teach in Virginia, even though the petitioner stated that her requirements are the same as those of public schools, which require a teaching license for kindergarten teachers.

The director denied the petition on August 18, 2009.

On appeal, counsel argues that the proffered position is a specialty occupation because the sponsored employment carries the same duties as those of teachers in public school settings. Counsel cites to an earlier unpublished AAO decision in support of this argument where the AAO found that a bilingual education teacher is a specialty occupation. However, the earlier AAO decision can be distinguished from this case because the petitioner in the decision cited by counsel was a public school system, not a private household, and because the AAO found in that earlier case that the proffered position’s duties as well as the salary and benefits were the same as a state certified public school teacher, which is not the case here as the petitioner is a private household. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel further argues:

Without providing any supporting evidence, USCIS summarily concludes that the private nature of the teaching setting somehow vitiates the need for a bachelor’s degree. The evidence holds to the contrary, however. Petitioner has stated in her

letter of support that she seeks to impose on Beneficiary the same education, training and experience requirements as that imposed by the Commonwealth of Virginia upon any other teacher candidate.

As the petitioner does not require that the person who fills the proffered position hold a state teaching license or certification to teach, the AAO does not find counsel's statement that the petitioner imposes on the beneficiary the same requirements imposed by the Commonwealth of Virginia upon its teachers to be supported by the evidence.

According to the *Handbook*, 2010-11 online edition, section on Teachers – Preschool, except Special Education, “[s]ome employers may prefer workers who have taken secondary or postsecondary courses in child development and early childhood education or who have work experience in a child care setting. Other employers require their own specialized training. An increasing number of employers require at least an associate degree in early childhood education.” Therefore, the *Handbook* indicates that working as a preschool teacher does not normally require a bachelor's degree in a specific specialty and therefore is not a specialty occupation.

Even if the petitioner could demonstrate, which it did not do, that the private teacher/tutor will primarily teach at a level appropriate for kindergarten, rather than preschool, the 2010-11 online edition of the *Handbook's* section on private school teachers states: “[p]rivate school teachers do not have to be licensed but *may* still need a bachelor's degree.” [Emphasis added.] Because the *Handbook* does not indicate that a bachelor's degree *in a specific specialty* is normally required for kindergarten teachers in a private school setting, the *Handbook* does not establish that a kindergarten teacher outside of the public school system is a specialty occupation.

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 alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

Again, 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 documentation evidencing that private households similar to the petitioner require a bachelor's degree in a specific specialty for their pre-school/kindergarten teachers. The petitioner does not provide any documentation evidencing a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

The petitioner has also 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 a bachelor's degree in a specific specialty is not a requirement for preschool teacher positions or for kindergarten teachers in a private school setting. Moreover, as mentioned previously, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than private teaching positions that can be performed by persons without a specialty degree or its equivalent, particularly in parallel positions in households similar to the petitioner.

Next, as the record has not established a prior history of 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). The petitioner did not state whether she previously employed a private teacher/tutor.

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. The record does not demonstrate that the proffered duties are more specialized and complex than household teaching positions that are not usually associated with a bachelor's degree in a specific specialty.

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).

Accordingly, the AAO shall not disturb the director's denial of the petition.

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.