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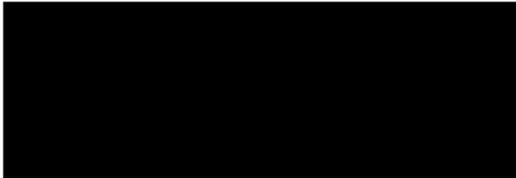
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

*Dr*



FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date: **MAR 02 2011**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 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 non-profit educational institution. It seeks to employ the beneficiary as a pre-school teacher 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) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, with the petitioner's brief and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue that the AAO will consider is whether the 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 Immigration and Nationality Act (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 Virginia-based charitable institution designed to provide affordable preschool and summer enrichment programs and services to economically disadvantaged children. According to the petitioner's Employment Contract with the beneficiary, the position duties are as follows:

- Planning and implementing daily lesson plans, including Individual Education Plans for children under age five;
- Maintaining progress reports, attendance records, and health and safety forms;
- Participating in local and national training sessions and conferences;
- Maintaining a hygienic and safe classroom environment; and
- Initializing, organizing, and maintaining regular communications with parents/guardians.

The petitioner also submitted copies of the beneficiary's foreign education documents and resume, but did not provide a credential evaluation.

On May 8, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation.

In response to the RFE, the petitioner submitted the following:

- An advertisement the petitioner ran for a pre-school teacher. The job duties in the advertisement differ from the duties proffered in the employment contract in that the position in the advertisement includes supervising classroom staff and ensuring compliance with state and local licensing rules. Although the advertisement indicates that a bachelor's degree in early childhood, elementary or family education is required plus one year of experience, the position in the advertisement appears to be supervisory, whereas the proffered position is not.
- Copies of pages from the petitioner's Policy Book, which states that a teacher must have

either a Bachelor's degree or higher in child development, early childhood education, or child and family studies, OR a Bachelor's degree and at least 18 months of previous experience as a full-time preschool or elementary school educator, OR an Associate's degree in child development, early childhood education, or child and family studies and at least three years of previous experience as a full-time preschool or elementary school teacher. According to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), "[f]or purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . ." Therefore, an Associate's degree plus three years of experience is not equivalent to a baccalaureate degree in the specialty. Although the Policy Book states that a lead teacher must have at least a Bachelor's degree or higher in child development, early childhood education, or child and family studies plus one year of experience, nowhere does the petitioner indicate that the proffered position is for a lead teacher.

- Copy of a page from the petitioner's Family Handbook, which states that a teacher must have a Bachelor's degree plus one year of professional childcare experience while an assistant teacher must have a Child Development Associates (CDA) and be currently matriculating in college, or have an Associate's degree. The Family Handbook does not delineate between a lead teacher and a teacher. Although the Family Handbook states that teachers must have at least a Bachelor's degree, it does not state that this degree must be in a specific specialty. Additionally, the information in the Family Handbook contradicts the petitioner's Policy Book, which states that a teacher can have an Associate's degree plus three years of experience.
- Information regarding the petitioner's eight teachers. The petitioner states that three of its teachers have bachelor's degrees in early childhood education, one teacher has a bachelor's degree in business administration, one teacher has a master's degree in teaching, and three teachers have only CDA certification.

The petitioner also states in its response to the RFE that the job posting indicates that the beneficiary will ensure compliance with state and local licensing rules as well as supervise classroom staff. Again, these duties are not stated in the beneficiary's Employment Contract and appear to be more in accordance with a lead teacher. Nowhere in the petition does the petitioner state or indicate that the beneficiary will be employed as a lead teacher. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description provided in the Employment Contract.

The director denied the petition on June 23, 2009.

On appeal, the petitioner argues that because it requires at least a bachelor's degree or the equivalent in childhood education or a related field for the proffered position, the proffered position is a specialty occupation. However, the petitioner's statement of the minimum requirements for the proffered position contradicts its own policy book, which states that a teacher employed by the petitioner may have an associate's degree plus three years of experience. As discussed previously, an associate's degree plus three years of experience is not equivalent to a bachelor's degree under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Additionally, half of the petitioner's teachers either have a bachelor's degree in a field that is not related to education or they do not have at least a bachelor's degree or the equivalent at all. 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)).

The petitioner further argues that Virginia law mandates that pre-school teachers employed by private child care centers employ program leaders (who may be referred to as child care supervisors or teachers) who have at least a bachelor's degree in a child-related field. However, this is not the case. Even if the petitioner could demonstrate that the beneficiary will work as a program leader, according to the Virginia Administrative Code (VAC), which is cited by the petitioner, a bachelor's degree in a child-related field is only one of several criteria that qualifies someone to work as a program leader. *See* 22 VAC § 15-30-260. This section also states that three months of programmatic experience plus a one year early childhood certificate, childhood development credential, or Montessori teaching certificate is acceptable for a pre-school teacher at a private child care center, or even just six months of supervised programmatic experience plus 12 hours of training after being hired is acceptable as an alternative to a bachelor's degree in a child-related field. Therefore, Virginia law does not establish that the proffered position is a specialty occupation.

Additionally, the petitioner argues that it is currently in the process of obtaining accreditation from [REDACTED] which requires that at least 75% of an institution's teachers must have at least a bachelor's degree or the equivalent in early childhood education, child development, elementary education, or early special childhood education by October 2009 and that, by 2012, 100% of the institution's teachers must have a bachelor's degree in one of these fields. The petitioner notes that it has two locations, one is [REDACTED] and states that only one employee in the [REDACTED] where it intends to employ the beneficiary, has a bachelor's degree in a relevant field, while the others hold associate degrees. The petitioner states that this ratio at the [REDACTED] is insufficient for accreditation by [REDACTED] and therefore it requires that the beneficiary hold at least a bachelor's degree or the equivalent in one of the above-listed fields.

The petitioner did not submit any evidence to support its claim that it is seeking [REDACTED] accreditation. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). However, even if the petitioner is seeking [REDACTED] accreditation, the current requirement that 75% of its teachers hold

at least a bachelor's degree in one of the above-listed fields means that 25% of its teachers are not required to hold at least a bachelor's degree. Therefore, a bachelor's degree or its equivalent in a specific specialty was not a normal requirement for [REDACTED] accreditation at the time of filing. Additionally, the petitioner has failed to demonstrate that it must have NAEYC accreditation in order to operate. Therefore, as [REDACTED] accreditation is a preference and not a requirement, and, moreover, because [REDACTED] does not currently require that more than 75% of a member's teachers have at least a bachelor's degree in a specific specialty, the petitioner has failed to demonstrate that its desire to obtain [REDACTED] accreditation is evidence that the proffered position is a specialty occupation.

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.

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.

As the *Handbook* indicates no specific degree requirement for employment as a pre-school teacher, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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 documentation regarding the hiring practices of parallel schools for its pre-school teachers. As a result, the petitioner has not established that parallel businesses routinely require at least a bachelor's degree in a specific specialty.

The petitioner also failed to satisfy 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 there is a spectrum of degrees acceptable for sales manager positions, including degrees not in a specific specialty. Additionally, the petitioner currently employs teachers who do not have at least a bachelor's degree or the equivalent in a specific specialty and its policy does not require that anyone other than its lead teacher(s) hold at least a bachelor's degree in a specific specialty. The petitioner did not state or otherwise provide any evidence that the proffered position is a lead teacher. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than pre-school teaching positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

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). Four of the petitioner's teachers do not have at least a bachelor's degree in a specific specialty related to early childhood education.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO here augments its earlier comments regarding the petitioner's failure to establish this criterion. The AAO does not find that the proposed duties, as described in the Employment Contract, reflect a higher degree of knowledge than would normally be required of sales managers not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. Further, the generalized array of proposed duties do not establish a job that would require the beneficiary to possess qualifications beyond those of a pre-school teacher. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an education evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petition will be denied and the appeal dismissed. 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.