

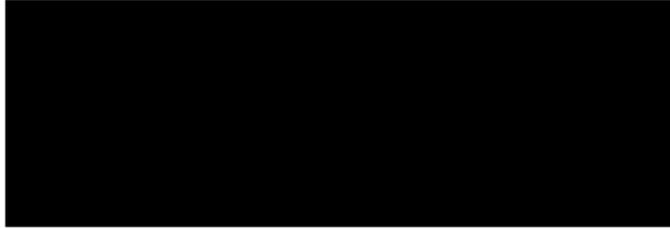
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



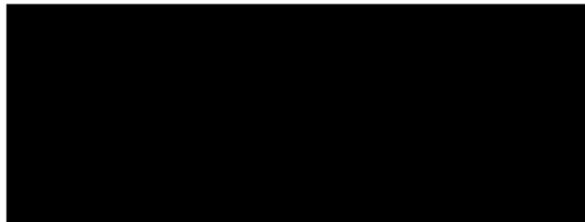
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Date: **OCT 03 2011** Office: VERMONT SERVICE CENTER FILE:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, 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 states that it is a nonprofit religious and educational institution that seeks to employ the beneficiary as its religious minister/teacher. Thus, the petitioner 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).

In denying the petition, the director determined that: (1) the proffered position was not a specialty occupation and (2) the beneficiary was not qualified to perform the duties of a specialty occupation. On appeal, counsel for the petitioner submits Form I-290B along with a brief and additional evidence in support of the petitioner's claimed eligibility for the benefit sought.

The primary issue in this matter is whether the proffered position is a specialty occupation.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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 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 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 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 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 in the United States, as required by the Act.

In a letter of support dated November 18, 2009, the petitioner explained that it was a nonprofit, tax-exempt religious and educational institution serving the Houston, Texas community. Regarding the proffered position, the petitioner claimed that as religious minister/teacher, the beneficiary would perform the following duties:

- Teach academic, religious, social and motor skills in an Islamic environment school;
- Prepare course objectives and outline a course of study following curriculum guidelines;
- Lecture on Islamic studies using audio and video teaching aids;
- Prepare, administer and correct exams;
- Assign lessons, correct papers, and hear oral presentation;
- Lead congregational prayers, deliver speeches and sermons on Friday prayers, conduct marriage ceremonies, and perform funeral services;
- Pray and promote spirituality amongst students and the community;
- Read from sacred texts for the instruction of the congregation;
- Write articles, give speeches and teach about religious issues;
- Instruct people seeking to convert to Islam;
- Counsel individuals and groups regarding their spiritual, emotional, and personal needs;
- Visit people in homes, hospitals, to provide comfort and support;
- Teach and train leaders of church, community and youth groups;
- Administer religious rites or ordinances.

The petitioner concluded by stating that the required qualifications for the proffered position include a bachelor's degree in religious studies or a related field.

Finding that the record contained insufficient evidence of eligibility, the director issued an RFE on March 5, 2010. The director requested, in relevant part, evidence showing that a bachelor's degree in a specific field of study is the standard minimum requirement for the job offered, a detailed description of the proffered position, an organizational chart, and information pertaining to the beneficiary's qualifications.

The petitioner responded to the director's request on April 16, 2010. The petitioner provided additional details regarding the proffered position and indicated that it currently did not employ any other individuals in the position of religious minister/teacher. It further claimed that the duties of the proffered position are intertwined and that without the necessary academic background, the beneficiary would not be able to perform any of the assigned duties. The petitioner stated that the proffered position consisted of about 45% teaching duties and 45% congregational ministry duties, 5% of information sharing and 5% training duties.

On August 9, 2010, the director denied the petition. The director found that the evidence of record failed to establish that the proffered position was a specialty occupation. The director noted that the proffered position involved teaching and ministerial duties, but that the petitioner had not submitted any evidence to establish the educational or experience requirements for a minister. The director also noted that the petitioner had failed to demonstrate that a degree in a specific specialty is the minimum entry requirement for the position. The director further found that the evidence did not establish that the beneficiary is qualified to perform the teaching duties of the proffered position.

On appeal, counsel for the petitioner cited to the U.S. Department of Labor's (DOL) description of the occupations of Director of Religious Activities and Education, and of Clergy, as set forth in *O*Net* Online, and claimed that an industry standard requiring a degree had thus been established. Finally, counsel submitted several copies of job advertisements that he claimed were similar positions in the petitioner's industry which required a degree in order to perform the associated duties of the position.

Upon review of the record, the AAO concurs with the director's decision and finds that the petitioner has established none of the four supplemental eligibility criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the petitioner has failed to establish that the proffered position is a specialty occupation.

The AAO will first consider the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors often considered by USCIS when determining these criteria include: whether the DOL's *Occupational Outlook Handbook (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)).

In determining whether a position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty or its equivalent as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations.

The petitioner contends that it seeks to employ the beneficiary as its religious minister/teacher. From the organizational chart provided, it appears that the proffered position most closely resembles that of a director of religious activities and education programs as described in the *Handbook*. This position is described in the *Handbook* as follows:

Direct and coordinate activities of a denominational group to meet religious needs of students. Plan, direct, or coordinate church school programs designed to promote

religious education among church membership. May provide counseling and guidance relative to marital, health, financial, or religious problems.

While the *Handbook* does not have a dedicated section devoted entirely to this profession, the AAO notes that this description, which is excerpted from *O*Net*, is representative of the position in which the petitioner seeks to employ the beneficiary. The *Handbook* further states that the most significant source of education or training for this occupation is a Bachelor's degree.

However, as further stated in the *O*Net* report, not all of the occupations included in this category require a bachelor's degree, and there is no requirement that a candidate possess a degree in a specific specialty for the occupations that do require a degree. The *O*Net* report cited by petitioner states that "[m]ost of these occupations require a four-year bachelor's degree, but some do not."

As discussed above, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) requires a showing that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The *O*Net* report states that most, but not all, of the occupations included in this category of director of religious activities and education require a bachelor's degree. Moreover, there is no requirement that a degree in a specific specialty be held for entry into the proffered position. Therefore, despite counsel's contentions to the contrary, the evidence submitted does not establish that a minimum of a bachelor's degree in a specific specialty or its equivalent is required for the position of director of religious activities or education programs.

In addition, the *O*Net* report for positions described as clergy states that "[m]ost of these occupations require graduate school." The *O*Net* report does not, however, indicate that a degree is the standard minimum entry requirement for the position. Further, the *O*Net* reports submitted do not indicate that the degree normally required by the cited occupations must be in a specific specialty closely related to the duties of that occupation. Therefore, the *O*Net* reports are not probative of the proffered position being a specialty occupation.

When a job, like that of a religious minister/teacher, can be performed by a range of degrees, without further specification, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. §

214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Based on the above discussion, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of religious minister/teacher under 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.

In this matter, while the petitioner submitted five job postings in support of the contention that a degree requirement is common within the petitioner's industry, none of the postings satisfy the regulatory requirements. The position of [REDACTED]

that a bachelor's degree is "preferred," not that one is required. The positions of [REDACTED]

advertised by [REDACTED] respectively, indicate that a master's degree is minimally required but the positions advertised are fundamentally different from that of the proffered position, a religious minister/teacher in a non-profit religious and educational institution. The remaining posting for a part-time director of religious education simply requires the incumbent to possess a college degree in a related field "or relevant experience." In other words, the position does not require a bachelor's degree, and certainly not one in a specific field of study, since in lieu of a degree, "relevant experience" is acceptable without necessitating that such experience be equivalent to a bachelor's or higher degree in a specific specialty.

These organizations advertising for positions similar to the proffered position accept a range of academic qualifications, including anything from significant experience to a four-year degree in an unspecified discipline to a preference for a degree in a specific discipline. The petitioner has not established, based on the submitted advertisements for positions similar to the proffered position, that a degree requirement in a specific discipline or its equivalent is the common minimum entry requirement in the industry. The petitioner has not established that similar organizations routinely employ and recruit only degreed individuals with a major in a specific discipline. Even if it had, a small sampling of job postings is statistically insignificant and is therefore insufficient evidence to establish that at least a bachelor's degree in a specific specialty is a minimum entry requirement for the proffered position in the United States, especially when compared to available statistics-based evidence such as the Bureau of Labor Statistics' *Handbook* that does not support such a finding.

Moreover, the petitioner fails to submit evidence to address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2): that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist him in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-baccalaureate, non-specialty employment. Consequently, the submitted evidence fails to establish that the proffered position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires the petitioner to establish that it normally requires a degree or its equivalent for the position.

In response to the RFE, the petitioner stated that it does not employ other individuals in the position of religious minister/teacher and did not provide any evidence to demonstrate that it has a history or hiring only degreed individuals for the position.

Further, the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees in a specific specialty. Accordingly, the AAO finds that proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).¹

¹ To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As already discussed in this decision, the information set forth in both the *Handbook* and the *O*Net* report and the evidence in the record show that the proffered position does not rise to the level of an occupation that would require at least a bachelor's degree in a specific specialty or its equivalent. Despite counsel's contentions on appeal that sufficient evidence has been submitted throughout the record to establish the complexity of the proffered position, neither the descriptions of the proffered position and its duties nor any other evidence in the record of proceeding establishes the degree of specialization and complexity required by this criterion.

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.

The second issue in this matter is whether the beneficiary is qualified to perform the duties of a specialty occupation. Most directors should, and will, first determine whether a job is a specialty occupation before deciding whether the individual is qualified for the job. A beneficiary's credentials to perform a particular job, therefore, are relevant only when the job is found to be a specialty occupation. In this matter, however, while the director analyzed the proffered position to determine whether it met the definition of a specialty occupation, the director also concluded that the beneficiary was not qualified to perform the duties of such an occupation. Although the beneficiary's qualifications are generally a moot issue since the proffered position is not a specialty occupation, the AAO will nevertheless review this issue.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required degree, the petitioner must show that the beneficiary possesses both (1) experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director found that the beneficiary was not qualified to perform the teaching duties which comprise 45% of the duties of the proffered position. Counsel does not address this finding in the petitioner's appeal brief. The petitioner submitted copies of the beneficiary's foreign education certificates and transcripts, as well as an evaluation conducted by Alien Prevailing Wage Determination, Inc., to demonstrate that the beneficiary's foreign education is equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). The evaluation provided by Alien Prevailing Wage Determination, Inc. states that "[t]he combination of [the beneficiary's] academic credits equates fully to the Bachelor of Arts in Religious Studies degree with a specialization in Islamic Studies in the United States."

As discussed previously, however, a 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 proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty. As such, absent a finding that a baccalaureate or higher degree, or its equivalent, in a specific specialty, is required and a determination of what that degree must normally be, it could not normally be determined whether the director's findings were correct regarding the lack of a foreign degree equivalent to a U.S. bachelor's degree in a specific specialty. However, in this case it can be found that, due to the petitioner's reliance in part on the non-equated teaching experience to qualify

the beneficiary for the proffered position, the director's finding is correct insofar as the petitioner failed to establish that the beneficiary has at least a bachelor's or higher degree in a specific specialty or its equivalent related to the teaching duties which comprise almost half the responsibilities of the religious minister/teacher position. Accordingly, the director's decision to deny the petition on this additional basis shall not be disturbed.

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.