

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



D2

DATE: **OCT 06 2011** OFFICE: CALIFORNIA 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 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 remain denied.

The petitioner claimed on the Form I-129 to be a nonprofit Buddhist temple with three employees. It seeks to employ the beneficiary as a Buddhist monk 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).¹ The director denied the petition on the basis of her determination that the petitioner had failed to demonstrate that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request for additional evidence; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director's ground for denying this petition.

The sole issue before us on appeal is whether the proposed position qualifies for classification 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 [1] 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 [2] the attainment of a bachelor's degree or higher in a

¹ The beneficiary previously held R-1 nonimmigrant status as a religious worker. In her September 10, 2009 letter responding to the director's request for additional evidence, counsel confirmed that the instant petition was not filed in error and that the petitioner indeed seeks to classify the beneficiary as an H-1B nonimmigrant worker pursuant to section 101(a)(15)(H)(i)(b) of the Act.

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 proposed 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.

In its May 24, 2009 letter of support, the petitioner stated that the petitioner would serve the Mongolian community of Denver, Colorado by providing Buddhist religious services. Specifically, he would perform the following duties:

- Conducting daily religious ceremonies including morning mantras; mantras and chants in the Mongolian language; mantras and chants in the Tibetan language on requested themes; lectures and discussions on the teachings of Buddha; and consultations on Astro Science;
- Going to the homes of those in need of personal relief to perform Buddhist ceremonies;
- Conducting blessings;
- Participating in teachings, prayers, ceremonies, and rituals; and
- Conducting religious services including marriages, funerals, and daily chanting rituals.

In a chart submitted with counsel's September 10, 2009 response to the director's August 14, 2009 request for additional evidence, the petitioner stated that the beneficiary would spend twenty-five percent of his time preparing and conducting religious services; twenty-five percent of his time preparing and delivering Buddhist teachings; fifteen percent of his time visiting people in their homes, hospitals, and other institutions in order to provide advice, religious services, and religious comfort; twelve percent of his time conducting religious education classes and leading service, prayer, and study groups; ten percent of his time monitoring the daily operations of the temple and providing instructions to subordinates; five percent of his time participating in cultural interfaith, social, and welfare activities and motivating people to become involved in community services; four percent of his time hoisting weekly or monthly meetings in order to plan future activities; three percent of his time performing funeral, marriage, a special memorial services pursuant to Buddhist traditions; and one percent of his time performing other duties.

In making our determination whether the proposed position qualifies as a specialty occupation, we turn first 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 Department of Labor's *Occupational Outlook Handbook (Handbook)*, a resource upon which we routinely rely 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)).

In order to determine whether a particular job qualifies as a specialty occupation, we do not rely simply upon a proposed position's title. The specific duties of the 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 beneficiary, 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

In reaching our conclusion regarding the degree requirements of the proposed position, we have relied upon the 2010-2011 edition of the *Handbook*, comparing the position's duties against those described for clergy members. The *Handbook* states the following regarding with regard to members of clergy:

Conduct religious worship and perform other spiritual functions associated with beliefs and practices of religious faith or denomination. Provide spiritual and moral guidance and assistance to members.

Handbook, 2010-11 ed., available at [REDACTED] (last accessed September 19, 2011). While the *Handbook* indicates that the "most significant source of postsecondary education or training" for members of clergy is a master's degree, it does not indicate that any specific field of study is required. *See id.* This is to be expected, as it would not be reasonable to suggest that Buddhist, Christian, Muslim, Jewish, and Hindu members of clergy, of whom all would apparently be encompassed within the *Handbook's* definition, would all possess educational credentials from the same field of study: even if they all were required to possess a minimum of a bachelor's degree or equivalent, the degrees would not come from the same specialties. As the *Handbook* does not indicate that a degree in a specific specialty is a minimum entry requirement for members of clergy, its findings do not aid the petitioner in establishing its proposed position as a specialty occupation.

Nor is the information from the Department of Labor's *Occupational Information Network (O*NET™ Online)* particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as *O*NET™ Online's* JobZone assignments make no mention of the specific field of study from which a degree must come. As was noted previously, USCIS 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. With regard to the Specialized Vocational Preparation (SVP) rating, we note that an SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, USCIS 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 proposed position.

Our conclusion that a bachelor's degree in a specific specialty is not a normal minimum entry requirement is bolstered by the September 9, 2009 letter from Professor [REDACTED], Director of both the Center on Rights Development and the Human Trafficking Clinic at the University of Denver, as well as a [REDACTED] who stated that "it is true that in both the Buddhist and Christian tradition one can become a monk or a nun without a higher education. . . ."²

For all of these reasons, we find that the petitioner has failed to demonstrate that its proposed position qualifies for classification as a specialty occupation under the requirements of the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We turn next to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The petitioner has not satisfied the first of the two alternative prongs at 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, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports a requirement for at least a bachelor's degree in a specific specialty. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree a minimum requirement for entry. The petitioner submits three letters as evidence that the industry routinely employs and recruits only degreed individuals:

² Professor d'Estree's statement was made as part of his larger assertion that although one may become a Buddhist monk without a bachelor's degree, "only those who have a B.A., or significantly higher, would be considered to be a [REDACTED]." On appeal, counsel argues similarly that "a degree requirement is common among [REDACTED]." However, the petitioner did not propose to hire the beneficiary as a [REDACTED] when it filed the petition or established that [REDACTED] are interchangeable terms. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. On appeal, a petitioner cannot offer a new position to the beneficiary or materially change a position's title. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

- The letter from Professor d'Estree discussed above;
- A September 2, 2009 letter from Dr. [REDACTED], the Administrative Director of Religious Studies at Naropa University, located in Boulder, Colorado as well as an ordained Buddhist minister; and
- A March 4, 2009 letter from [REDACTED], the Ambassador of Mongolia to the United States.

None of these letters establish that the petitioner's degree requirement is common among parallel positions in similar organizations. As discussed, Professor d'Estree acknowledged that one may become a Buddhist monk without a bachelor's degree. While Dr. [REDACTED] does state that a degree is necessary to perform the duties of the proposed position, he does not indicate that the degree must come from a specific specialty. Furthermore, his conclusion that one must possess a degree in order to become a monk conflicts directly with Professor [REDACTED] contrary statement. Finally, Ambassador Bekhbat does not state that a minimum of bachelor's degree in a specific field of study is required in order to become a Buddhist monk. Accordingly, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has 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 duties of the proposed position are similar to those of members of clergy as outlined in the *Handbook*, and the *Handbook* does not indicate that a baccalaureate degree in a specific field, or its equivalent, is a normal minimum entry requirement for these positions. The duties proposed by the petitioner appear no more complex or unique than those outlined by the *Handbook*; to the contrary, the duties proposed by the petitioner largely mirror those outlined in the *Handbook*. The duties discussed by the petitioner appear no more unique, complex, or specialized than those discussed in the *Handbook*. As the evidentiary shortcomings of the letters submitted by the petitioner were discussed previously, we find that the evidence of record does not refute the *Handbook's* information indicating that a bachelor's degree from a specific field of study is the normal minimum entry requirement for positions such as the one proposed here.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, we normally review the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.³ The

³ Even if a petitioner believes or otherwise assert that a proposed position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any job so long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the

petitioner, however, has submitted no such evidence of a past hiring history of requiring its Buddhist monks to possess a minimum of a bachelor's degree in a specific field of study.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of its proposed 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 in the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not a normal minimum entry requirement for employment as a Buddhist monk. So does Professor [REDACTED]. The petitioner has failed to differentiate the duties of the proposed position from those described in the *Handbook* and, as such, has failed to indicate the specialization and complexity required by this criterion. The evidence of record does not distinguish the duties of the proposed position as more specialized and complex than those of clergy members who do not possess at least a bachelor's degree in a specific field. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1)-(4), and this petition was properly denied.

Finally, we note counsel's assertion made on appeal that in denying this petition, the director violated the petitioner's rights under the Establishment Clause of the Constitution.⁴ Specifically, counsel argues that "[b]y denying this petition, USCIS is essentially dictating to [the petitioner] what it (the [petitioner]) may and may not require of its religious leaders." We are not persuaded. First, the director did not "dictate" to the petitioner what it may and may not require of its religious leaders when she denied this petition; she merely found that it had failed to satisfy the statutory and regulatory criteria necessary to accord nonimmigrant status to the beneficiary under section 101(a)(15)(H)(i)(b) of the Act.

The petitioner has failed to demonstrate that the proposed position qualifies for classification as a specialty occupation. Accordingly, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(H)(i)(b) of the Act and this petition must remain denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.

proposed position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

⁴ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." See U.S. Const. amend. I.