

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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

**PUBLIC COPY**



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



*D2*

DATE: **SEP 01 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,

*for*   
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California 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 is a charter school in the State of Texas that seeks to employ the beneficiary as a kindergarten teacher. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the position was not a specialty occupation. On appeal, former counsel for the petitioner submitted a brief and additional evidence contending that the director's findings with erroneous, and stating that the proffered position is in fact a specialty occupation.<sup>1</sup>

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; (5) the Form I-290B and former counsel's brief and additional evidence in support of the appeal; and (6) newly-retained counsel request to expedite the appeal and accompanying evidence. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job 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 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 requires [1] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited

---

<sup>1</sup> Subsequent to the appeal filed on November 23, 2009, newly-retained counsel for the petitioner entered his appearance and requested expedited processing of the appeal. Counsel submitted evidence to demonstrate that the beneficiary obtained a Texas Educator Certificate on January 28, 2011, the effect of which will be discussed in the body of this decision.

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 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 (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 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. *Cf. 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.

With the petition, the petitioner submitted documentation such as an advertisement for open positions within its school, which were identified as "Principal, 6<sup>th</sup> thru 12<sup>th</sup>;" "Bilingual Certified Teachers PreK – 6;" and "Certified Teachers PreK – 12 All Subjects." Moreover, the petitioner submitted an unexecuted copy of its Teacher Contract with the beneficiary, which indicated that the contract was conditioned upon the teacher providing "the certifications, service records, teaching credentials, and other records and information required by the Employer and the State of Texas." No additional details regarding the duties of the proffered position were provided.

In an RFE dated October 5, 2009, the director requested evidence demonstrating that the beneficiary had been certified to teach in the State of Texas. In a response submitted via former counsel on October 28, 2009, the petitioner stated that according to the Texas Education Agency, charter schools in Texas only required teachers to possess a high school diploma as the minimum requirement for entry into a teaching position, unless that position required teaching in the field of special education or in a bilingual setting. The petitioner indicated that, since the beneficiary would not be teaching special education or bilingual classes, she was qualified to teach at the petitioner's charter school without a Texas teaching license.

On November 5, 2009, the director denied the petition, determining that the petitioner had failed to establish that the proffered position was a specialty occupation. Specifically, the director found that as a result of the fact that the minimum requirement to teach in a Texas charter school was simply a high school diploma, the petitioner could not establish that the proffered position was a specialty occupation requiring at least a bachelor's degree or higher, or its equivalent, in a specific specialty as required under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). The director further noted that the petitioner had failed to establish eligibility under any of the remaining criteria included under 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the director's conclusions were erroneous, and contends that the proffered position is in fact a specialty occupation. Former counsel submitted affidavits from both the human resources manager and the president of the petitioner attesting to the fact that it requires its teachers to possess bachelor's degrees, as well as a copy of its employee policy handbook which it contends supports this same contention. Newly-retained counsel subsequently submitted a copy of the beneficiary's recently obtained teaching license to further demonstrate her qualifications for the proffered position.

In reviewing the record, the AAO observes that the critical element is not the title of the position or 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.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree in a specific specialty.

The director noted that, while the *Handbook* indicated that a baccalaureate level of training is normally required for kindergarten teachers, the proffered position was not a specialty occupation since the Texas Education Agency indicated that teachers in charter schools such as the petitioner were not required to hold at least a minimum of a bachelor's degree for entry into the position. The AAO concurs with the director's conclusion, but also notes that, contrary to the director's general statement, the *Handbook* does not require at least a bachelor's degree, or its equivalent, for entry into the position of kindergarten teacher in private schools. Specifically, the *Handbook* states as follows:

The traditional route to becoming a public school teacher involves completing a bachelor's degree from a teacher education program and then obtaining a license. However, most States now offer alternative routes to licensure for those who have a college degree in other fields. Private school teachers do not have to be licensed but may still need a bachelor's degree.

\* \* \*

Private schools are generally exempt from meeting State licensing standards. For secondary school teacher jobs, they prefer candidates who have a bachelor's degree in the subject they intend to teach, or in childhood education for elementary school teachers. They seek candidates from among recent college graduates, as well as from those who have established careers in other fields.

*Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos318.htm> (last accessed July 12, 2011).

Therefore, while the *Handbook* indicates that private schools *prefer* candidates that have a bachelor's degree in the subject they intend to teach, there is no requirement that a candidate possess at least a bachelor's degree or higher, or its equivalent, in a specific specialty as a minimum requirement for entry into the position of kindergarten teacher in a private school.

As the *Handbook* does not indicate that a bachelor's degree or higher, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the position, this DOL resource does not lend support to the proffered position's being a specialty occupation.

When a job, like that of a kindergarten teacher in a private school, 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.

The petitioner has therefore 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 as described in the record of proceeding. Accordingly, the petitioner has not established 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 at least 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 proffered position; and (2) located in organizations that are similar to the petitioner.

Factors often considered by USCIS when determining these criteria 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*, 71 2 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has failed to submit any documentary evidence to establish that a requirement for at least a bachelor's degree in a specific specialty or its equivalent is common to the petitioner's industry in positions that are both parallel to the proffered position and located in organizations that are similar to the petitioner. Consequently, the petitioner has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner may satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) by evidence establishing that the duties of the proffered position are so complex or unique that only an individual with at least a bachelor's degree, or the equivalent, in a specific specialty can perform them. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist her 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-occupation employment. What's more, the AAO finds that the evidence in the record of proceeding does not convey in which respects, if any, the proffered position is relatively complex or unique, and so much so, that it could only be performed by a person equipped with at least a bachelor's degree, or the equivalent, in a specific specialty that is attuned to such particular complexity or uniqueness.

The petitioner has thus failed to establish the proffered position as a specialty occupation under either alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position. On appeal, the petitioner submits an affidavit from [REDACTED] Human Resources Manager for the petitioner, who states that "at a minimum, candidates for kindergarten teaching positions at [the petitioner] must have a bachelor's degree." She further contended that "all teachers at [the petitioner] have a bachelor's degree and some have a masters degree." This statement is corroborated by a second affidavit from [REDACTED] Chief Executive Officer and Superintendent for the petitioner, who also claims that candidates for kindergarten teacher must have a bachelor's degree. [REDACTED] further states that "most all" teachers at the petitioner have at least a bachelor's degree.

Despite the statements set forth in the affidavits, there is no documentary evidence demonstrating that the petitioner currently and previously has hired only degreed individuals for the position of kindergarten teacher. The record contains no evidence, such as the educational credentials and payroll records, of the petitioner's past and current kindergarten teachers which would demonstrate that the petitioner has consistently hired only degreed individuals for the position. Moreover, there is no evidence that the claimed degree-requirement is for a degree in a specific specialty. 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 AAO notes that while a petitioner may believe or otherwise assert that a proffered 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 self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree in a specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, 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.

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, or its equivalent, in a specific specialty. The AAO finds that the duties of the position described encompass routine duties associated with teaching kindergarten in a private school. While the petitioner claims that the duties of the proffered position are sufficiently complex, the record does not contain explanations or clarifying data sufficient to elevate the position to one that is so specialized and complex that the knowledge to perform these additional tasks is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO finds that, to the extent that they are described, the duties do not convey either the need for the beneficiary to apply a particular body of highly specialized knowledge in a specific specialty, or a usual association between such knowledge and the attainment of a particular educational level in a specific specialty. As the petitioner has not established that the proffered position's specific duties require the application of specialized and complex knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific discipline or its equivalent, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO determines that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this basis.

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.