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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: **JAN 09 2012** 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:

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,

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 remain denied.

The petitioner is a Montessori transition school providing care to two- to six-year olds. It was established in 2006, employs two personnel, and claims an earned gross annual income of \$156,000 when the petition was filed. It seeks to employ the beneficiary as a [REDACTED] to classify her 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).

The director denied the petition determining that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, Notice of Appeal or Motion, with the petitioner's letter and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means 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 [(2)] 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, a proposed position must also meet one of the following criteria:

- (I) 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 at 387. 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), 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.

In the October 29, 2009 petition submitted in support of the petition, the petitioner stated:

The Montessori Lead Teacher will formulate extensions of Montessori materials and curriculum development. She will be responsible for holding parent interactions and conferences and tracking the development of each child. She will also prepare food for each meal and lead the children in circle, work and play time. She will serve as a guide or director to facilitate the children’s learning in accordance with the Montessori philosophy.

The petitioner noted that in order to become a Montessori teacher, one needs a Bachelor of Arts in Communication, Education, or a similar subject.

On November 4, 2009, the director issued an RFE requesting that the petitioner provide additional information regarding the nature of its business and a more detailed description of the proffered position and any other evidence that would establish the proffered position as a specialty occupation.

In response, prior counsel for the petitioner, in a December 9, 2009 letter, stated that the American Montessori Society requires at a minimum a BA/BS degree as a pre-requisite to receive a full American Montessori Society credential and that “[l]ike other teaching positions in the State of California, there is no specific major or field requirement to become a teacher so long as the individual possesses a 4 year college degree and appropriate teaching credentials.” Counsel added that this practice is also in force with the Montessori school system and is strictly followed by the petitioner. The record also included a more detailed description of the responsibilities of a lead Montessori teacher and special education specialist. The record further included information regarding the requirements of the Montessori Teacher Education Center and advertisements from various Montessori schools. The advertisements do not include a requirement that the successful candidate possess a bachelor’s degree in a specific discipline.

The director denied the petition on January 8, 2010.

On appeal, the petitioner reiterates that it requires the successful candidate to hold a bachelor of arts degree like most other Montessori schools in California. The petitioner also provides information on Montessori teaching training courses which require applicants to have a bachelor’s degree and additional advertisements indicating that the successful applicants should have an early childhood certificate or a bachelor’s degree. The petitioner also included information from the websites of other Montessori schools which listed the credentials of the faculty and staff.

In a separate letter dated March 29, 2010, the petitioner added that it needed the beneficiary to lead a new preschool and thus the beneficiary would be a Montessori lead teacher and onsite director.

Preliminarily, the AAO finds that 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 the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm’r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998).

Moreover, the petitioner indicates that to perform the duties of the proffered position, that one needs generally a bachelor’s of arts degree in communication, education or a similar subject. Such a claim that the duties of the proffered position may be performed by an individual with

degrees in disparate disciplines is tantamount to an admission that the proffered position is not in fact a specialty occupation. Moreover, other than initially stating that degrees in different disciplines would be acceptable, the petitioner subsequently states that the requirement to perform the duties of the position only requires a bachelor's degree with no degree specification. To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, however, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree 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).¹ The director's decision must therefore be affirmed and the petition denied on this basis alone.

Further, the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*,² an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, which is routinely relied upon by USCIS, does not report that proffered position is a specialty occupation. As the director observed, the proffered position falls within the purview of the *Handbook's* discussion in its chapter on preschool teachers. Regarding the education and training of preschool teachers, the position in this matter, the *Handbook* states in pertinent part:

The training and qualifications required of preschool teachers vary widely. Each State has its own licensing requirements that regulate caregiver training. These requirements range from a high school diploma and a national Child Development Associate (CDA) credential to community college courses or a college degree in child development or early childhood education.

* * *

¹ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

Some 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

As evident in the excerpts above, the *Handbook's* information on educational requirements for a preschool teacher does not indicate that a bachelor's degree in a specific discipline is a requirement. As the *Handbook* indicates no specific degree requirement for employment as a preschool 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. We have reviewed the advertisements from other Montessori preschools, the information from other Montessori preschools' websites which identify the educational credentials of their employees, and the requirements to take courses at the Montessori Training Center. However, the information provided does not establish that Montessori preschools have made a degree requirement in a specific discipline a minimum entry requirement and that Montessori preschools routinely employ and recruit individuals with a degree in a specific discipline. The petitioner has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed and consistent information to distinguish the proffered position as unique from or more complex than

other preschool teacher positions that can be performed by persons without a specialty degree or its equivalent.

The petitioner also fails to establish that it normally requires a bachelor's degree in a specific specialty. The record does not include specific information supported by documentation that the petitioner normally hires only individuals with specific degrees to perform the duties of the proffered position. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties as generically described requires a higher degree of specialized knowledge than would normally be required of other preschool teachers not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. Although some Montessori schools may prefer a bachelor's degree and others require a bachelor's degree of its teachers, there is no evidence that the Montessori schools require its teachers to have a bachelor's degree in a specific discipline. The petitioner has not provided evidence that its proffered position is more specialized or complex than other Montessori lead teachers. Nor has the petitioner provided evidence that the duties of its proffered position include duties that are so specialized or complex that the duties would require the beneficiary to have a bachelor's or higher degree in a specific discipline. 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 therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The appeal will be dismissed and the petition denied for the above stated reason. 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 remains denied.