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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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DATE: **MAY 07 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:

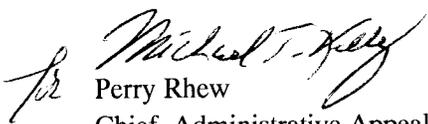


INSTRUCTIONS:

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 be denied.

The petitioner describes itself as a non-profit research organization focusing on Ukrainian and Eastern European-American relations. The petitioner endeavors to employ the beneficiary as a cultural education teacher 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and attached exhibits in support of the appeal.

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 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means 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 specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position;
or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 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), 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 generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Again, the petitioner describes itself as a non-profit research organization, engaging in cultural projects and conducting adoption research. The petitioner provides assistance to families who adopt children from Eastern Europe, including cultural and language instruction. Regarding the proffered position, the petitioner claims that it requires the services of the beneficiary as a cultural education teacher to provide instruction in the areas of Russian and Eastern European languages, culture, traditions, and history.

Regarding the specific duties of the beneficiary, the petitioner stated that her duties would be as follows:

- a) Teach adopted children Russian/English and German languages, culture, traditions and history;
- b) Determine each child's abilities and his parents' expectations in order to meet varying needs and interests;
- c) Teach adults that want to learn about Eastern Europe, its culture, historical heritage and traditions;
- d) Conduct classes, workshops, and provide individual instruction to teach topics and skills such as Russian/English and German literature, folklore, dances, games, writing, etc.;
- e) Monitor children's performance in order to make suggestions for improvement to their parents;
- f) Through organization of different performances, competitions, and national games encourage children's interest in their origins;
- g) Observe children to determine qualifications, limitations, abilities, interests, and other individual characteristics;
- h) Instruct parents individually and in groups about their child's progress; explain that for the best results different teaching methods are being used, such as lectures, discussions and demonstrations;
- i) Prepare materials and classrooms for class activities;
- j) Educate prospective parents on raising children from another country.

The petitioner concluded by stating that the duties set forth above are complex in nature and require the candidate for the position to possess at least a master's degree in education, linguistics, or other related fields.

On December 22, 2009, the director issued an RFE in this matter. Specifically, the director requested additional evidence that the proffered position qualifies as a specialty occupation position, as well as additional information pertaining to the petitioner's business and the beneficiary's education credentials.

In response, counsel and the petitioner submitted additional evidence. In a letter dated January 15, 2010, the petitioner provided an additional discussion of the duties of the proffered position. Specifically, the petitioner expanded the initial descriptions provided and included a breakdown of the percentage of time the beneficiary would devote to each duty. Specifically, the petitioner stated as follows:

- a) Teach adopted children written and spoken Russian/English and German languages, including but not limited to grammar, vocabulary, pronunciation, listening comprehension, teach culture, traditions and history; 60%
- b) Determine each child's abilities and his parents' expectations in order to meet varying needs and interests; 5%
- c) Teach adults that want to learn about Eastern Europe, its culture, historical heritage and traditions; 5%
- d) Conduct classes, workshops, and provide individual instruction to teach topics and skills such as Russian/English and German literature, folklore, dances, games, writing, etc.; 10%
- e) Monitor children's performance in order to make suggestions for improvement to their parents; 5%
- f) Through organization of different performances, competitions, and national games encourage children's interest in their origins; 2%
- g) Observe children to determine qualifications, limitations, abilities, interests, and other individual characteristics; 3%
- h) Instruct parents individually and in groups about their child's progress; explain that for the best results different teaching methods are being used, such as lectures, discussions and demonstrations; 5%
- i) Prepare materials and classrooms for class activities; Educate prospective parents on raising children from another country. 5%

The director denied the petition on January 29, 2010, finding that the proffered position did not qualify as a position in a specialty occupation.

On appeal, counsel contends that the petitioner has sustained its burden of proof, and specifically contends that the petitioner has established eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (3).

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 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, indicates that the proffered position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

A review of the *Handbook* demonstrates that there is no occupational title of cultural education teacher as the position is referred to by the petitioner. However, the section addressing self-enrichment teachers appears to be most closely associated with the duties of the proffered position. The *Handbook* describes this occupational classification under the heading of "Teachers—Self-Enrichment Education" as follows:

Self-enrichment teachers provide instruction on a wide variety of subjects that students take for fun or self-improvement. Some teach classes that provide students with useful life skills, such as cooking, personal finance, and time management. Others provide group instruction intended solely for recreation, such as photography, pottery, and painting. Many others provide one-on-one instruction in a variety of subjects, including singing, or playing a musical instrument. Some teachers conduct courses on academic subjects, such as literature, foreign languages, and history, in a nonacademic setting.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., "Teachers – Self Enrichment Education," <http://www.bls.gov/oco/ocos064.htm> (accessed February 16, 2012). The duties of the proffered position accord very closely with the duties of self-enrichment teachers as described in the *Handbook*. The AAO finds that the proffered position is a position for a self-enrichment teacher as described in the *Handbook*. The *Handbook* describes the educational requirements of self-enrichment teacher positions as follows:

In general, there are few educational or training requirements for a job as a self-enrichment teacher beyond being an expert in the subject taught. To demonstrate expertise, however, self enrichment teachers may be required to have formal training in disciplines such as art or music, where specific teacher training programs are available. Prospective dance teachers, for example, may complete programs that prepare them to teach many types of dance—from ballroom to ballet. Other

employers may require a portfolio of a teacher's work. For example, to secure a job teaching a photography course, an applicant often needs to show examples of previous work. Some self-enrichment teachers are trained educators or other professionals who teach enrichment classes in their spare time. In many self-enrichment fields, however, instructors are simply experienced in the field, and want to share that experience with others.

Id. The *Handbook* indicates that self-enrichment teacher positions do not normally require a minimum of a bachelor's degree or the equivalent in a specific specialty. Further, based upon its review of the entire record of proceeding the AAO finds that neither the duties ascribed to the proffered position nor any other evidence of record establishes that the proffered position is one that would require the practical and theoretical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty, which is an overarching requirement for classification as a specialty occupation under section 214(i)(1) of the Act.

Thus, the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider 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 was previously noted, the *Handbook* does not support the assertion that positions similar to the proffered position require a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence that a professional association of self-enrichment teachers has made a bachelor's degree in a specific field a prerequisite to membership. Counsel submitted no letters or affidavits from firms or individuals in the petitioner's industry to support the assertion that such firms exclusively employ and recruit only persons with at least a bachelor's degree in a specific specialty.

The only evidence in the record pertinent to other organizations' recruitment and hiring practices is a single vacancy announcement submitted for the first time on appeal by [REDACTED] for the position of "Foreign Language Teacher - Mandarin." This company claims in its posting to be "the leading provider of early childhood foreign language education." It further claims to offer services

to 4,000 children at its seven locations as well as through 100 school programs in Chicago, Illinois. The announcement states that the position requires a master's degree, but it does not specify any particular area in which the degree must have been awarded.

Although the position offered in that vacancy announcement requires a master's degree, the posting fails to require that such a degree be in a specific specialty. Additionally, based on the numerous locations and number of students to whom it claims to provide instruction, this position is not in an organization similar to that of the petitioner, a non-profit research center with four employees. Thus, even if that position required a master's degree in a specific specialty, it would not be probative evidence that the proffered position does as well.

Additionally, even if the vacancy announcement provided was for a parallel position in a similar organization and required a minimum of a bachelor's degree or the equivalent in a specific specialty, an announcement for one single vacancy is manifestly insufficient to demonstrate an industry-wide requirement. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.¹

The AAO notes that, on appeal, counsel specifically contends that the petitioner has satisfied the requirements of this criterion, and refers to a copy of the website for an entity called the Russian Kids House. Counsel asserts that this entity is almost identical in nature to the petition, and notes that they are currently advertising for a kindergarten teacher. However, unlike the previous posting

¹ According to DOL's *Occupational Employment Statistics (OES)* detailed statistics on self-enrichment teachers for 2008, there were approximately 6,960 persons employed as self-enrichment teachers in the field of individual and family services, and there were approximately 7,410 persons employed as self-enrichment teachers in civic and social organizations. *OES*, Occupational Employment and Wages, May 2010 ed., available at <http://www.bls.gov/oes/current/oes253021.htm> (last accessed February 16, 2012). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just one job posting with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the field of self-enrichment teaching. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisement was randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcement supported the finding that the job of self-enrichment teacher for a four-person non-profit research organization required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that this single posting, which appears to have been consciously selected, could credibly refute the statistics-based findings of the *OES* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

discussed above, the submission of the webpage for this entity merely states that "an employment opportunity" is available. This evidence contains no information that supports a finding that a degree requirement is common within the petitioner's industry in parallel position within similar organizations, since this company's webpage provides no information regarding the educational requirements for a kindergarten teacher or any other employees.

The petitioner, therefore, has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). That prong is satisfied if the petitioner is able to demonstrate that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

The proffered position, as was noted above, is chiefly a position teaching language and culture. Nothing in the record of proceeding establishes that any aspect of these classes is so complex or unique as to require a person with at least a bachelor's degree or the equivalent in any specific specialty. Thus, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also finds that there is insufficient evidence to demonstrate that the petitioner has an established history of recruiting and hiring for the proffered position only individuals with at least a bachelor's degree, or the equivalent, in a specific specialty. Counsel on appeal asserts that the petitioner previously employed a nonimmigrant worker in H-1B status in the proffered position, and submits copies of this person's Form I-129 and supporting documentation as further evidence of this claim. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In any event, evidence of one instance of an approved petition does not establish the historical recruiting and hiring basis requisite to satisfy this criterion.

Finally, the AAO has taken into account the petitioner's repeated assertions that the duties of the proffered position can only be performed by a degreed individual, and has reviewed the petitioner's job posting for the position as requiring a master's degree in the various areas discussed above. 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 claimed 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 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 proffered 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 § 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 recruiting and hiring practices.

Thus, as discussed above, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO will now consider the final alternative criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner is able to demonstrate that the nature of the specific 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 a specific specialty.

The AAO finds that, to the extent that they are described in the record of proceeding, the duties that the petitioner ascribed to the proffered position do not establish the relative specialization and complexity required to satisfy this particular criterion. Rather, the AAO finds that, while the duties as described indicate generic functions associated with teaching in general, they do not provide evidence that demonstrates that, in the context of this particular proffered position, the substantive nature or performance requirements of those functions are so specialized and complex as to require the application of a body of highly specialized knowledge that is usually associated with attainment of at least a bachelor's degree in a specific specialty. Further, the AAO here incorporates by reference and adopts its conclusion, and associated comments regarding it, that the evidence comports with that of a self-enrichment teacher, which is an occupational classification for which the *Handbook* does not indicate a usual association with attainment of at least a bachelor's degree in a specific specialty.

The AAO finds, first, that the requisite specialization and complexity is not self-evident in the extent to which the duties are described in the record of proceeding, and, second, that the petitioner has not

provided documentary evidence establishing the duties as sufficiently specialized and complex to satisfy this criterion.

In summary, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.