

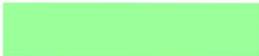


U.S. Citizenship
and Immigration
Services

(b)(6)



Date: OCT 09 2013 Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

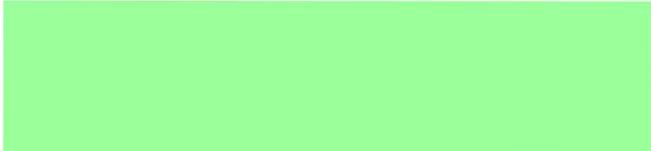
Petitioner:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. 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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, ("the director") denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded for entry of a new decision.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as in the "Education" business. The petitioner indicates it was established in 1997, employs 256 individuals, and is a non-profit organization. In order to continue the employment of the beneficiary in what it designates as a computer science teaching position, the petitioner seeks to classify him 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 petitioner also provided a Labor Condition Application (LCA) certified on June 28, 2011, for a Level I (entry-level), secondary school teacher SOC (ONET/OES) code 25-2031.

The director denied the petition, determining that the petitioner had not established that the beneficiary possessed the appropriate licensure as required by the proffered position, or had demonstrated an exemption or exception to the requirement.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's two Requests for Further Evidence (RFE); (3) the petitioner's responses to both RFEs; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and counsel's brief in support of the appeal.

On appeal, counsel for the petitioner asserts that the petitioner has provided sufficient evidence to establish by a preponderance of the evidence that teachers of noncore subjects are not required to be licensed at a charter school in California. Counsel references previously submitted printouts provided by the California Department of Education in support of this assertion.

The California Education Code at section 47605(l) states:

Teachers in charter schools shall hold a Commission on Teacher Credentialing certificate, permit, or other document equivalent to that which a teacher in other public schools would be required to hold. These documents shall be maintained on file at the charter school and are subject to periodic inspection by the chartering authority. It is the intent of the Legislature that charter schools be given flexibility with regard to noncore, noncollege preparatory courses.

As noted above, counsel asserts that the printouts submitted establish by a preponderance of the evidence that California charter schools are not required to license teachers who teach noncore, noncollege preparatory courses. Upon review of the California education code we find that the flexibility accorded charter schools with regard to noncore, noncollege preparatory courses sufficient to establish that the charter school need not require a Commission on Teacher Credentialing certificate to teach such courses.¹

¹ The flexibility language occurs in the same section on credentialing charter school teachers, so may be

Upon review of the entire record of proceeding, the AAO finds that the petitioner has established that the proffered position does not require a license or teaching certification under California law. The director's decision will be withdrawn on this issue. However, during our review of the entire record of proceeding, we found additional grounds that preclude approval of the petition. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). As the petitioner has not had an opportunity to address these issues, the matter will be remanded so that the petitioner may have the opportunity to do so. Accordingly, the petition will be remanded for the entry of a new decision.

The first issue to be addressed is whether the proffered position is a specialty occupation. In that regard, we find that the petitioner's identification of its computer science course as a noncore, noncollege preparatory course is a confirmation that the proffered position is not a specialty occupation. This determination precludes approval of the petition based on the current record and accordingly the matter is remanded for the director to enter a new decision on this issue.

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 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 which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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

read as an addendum to the requirement of a Commission on Teacher Credentialing certificate.

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, 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.

The petitioner in this matter has failed to establish that the proffered position, a secondary charter school teacher of computer science (a noncore and noncollege preparatory course and therefore unlicensed position) is a specialty occupation. The petitioner has not established that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge in a *specific discipline* to perform the particular work associated with the position.

The petitioner initially listed the duties of the proffered position as follows:

Teach computer science and computer science concepts to middle and high school charter school students, teaching computer skills and networking courses for grades 6th to 12th, including basic skills, typing and computerized design, network administration such as LAN and WAN, and basic programming including C++ programming – 40 percent of the time;

Study and utilize the most appropriate learning strategies; Engage the class in stimulating discussions; Prepare curriculum maps of the delivered subjects; Prepare lesson plans and grade homework for multiple courses at a time; Integrate curricular activities into classes including Internet based lessons, cooperative learning and exploration activities – 30 percent of the time;

Compile notes and deliver engaging, coherent lectures; Establish and maintain relationships with students, parents, staff in order to coordinate and communicate education services – 20 percent of the time; and,

Tutor students individually and/or in group settings; Improve school's Computer Science curriculum; Coach students for local, regional and national contests – 10 percent of the time.

Counsel asserts "[t]eaching a course of Computer Science to secondary school students must always require theoretical and practical application of the principles of Computer Science". Counsel also contends that the proffered position is "so complex, involving various complex issues in the discipline of Computer Science that a person who does not hold a degree in Computer Science cannot have such knowledge." In an undated document, titled "Statement on Standards for a Specialty Occupation", the petitioner compares the proffered position to the Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on teachers. The petitioner observes that the *Handbook* reports the traditional route to becoming a public school teacher is to complete a bachelor's degree from a teacher education program and then obtain a license and that the proffered position falls within this category. In the same document the petitioner references job listings for computer science teachers and claims that the job listings indicate that a minimum bachelor's degree is required for the position. The petitioner also asserts

that it requires at least a bachelor's degree in computer science, a related field or equivalent for the proffered position.

The petitioner has differentiated this position from that of a middle school and secondary school teaching position as described in the *Handbook*. The position in this matter is to teach a noncore and noncollege preparatory course; such a position appears to relate more to the occupation of a career or technical education teacher of middle and secondary students (SOC (ONET/OES) code 25-2023 and 25-2032) or a self-enrichment teacher (SOC (ONET/OES) code 25-3021). These occupations accept a variety of ways to enter into the occupations, ways which do not require a bachelor's degree in a specific discipline. The petitioner has not provided evidence of what duties elevate the proffered position to one that is a specialty occupation.

Counsel asserts that a computer science teacher at a secondary level always requires the theoretical and practical application of the principles of computer science and that the proffered position is so complex that a person who does not have a degree in computer science cannot have such knowledge. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's overly broad statements and assertions do not establish that a secondary school teacher of computer science is a specialty occupation. The petitioner's statement that job listings for secondary school computer science teachers require a bachelor's degree is noted; however, the current record does not include these job listings. Moreover, job listings that find a general bachelor's degree acceptable to perform the duties of the occupation only confirm that such a position is not a specialty occupation. Upon review of the current record, the petitioner has not provided probative, credible evidence that a middle and secondary school teacher of computer science is a specialty occupation. The petitioner has not provided credible evidence that the proffered position requires more than a basic understanding of computers and a technical background resulting from certifications. The record is devoid of evidence establishing that the proffered position with the duties as described requires the theoretical and practical application of a body of highly specialized knowledge in a *specific discipline* to perform the particular work associated with the position.

We note that the petitioner claims that it requires at least a bachelor's degree in computer science, related field or equivalent for the proffered position. However, a petitioner's belief or assertion that a proffered position requires a specific degree, 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 in a specific specialty 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 that particular field. *See Defensor v. Meissner*, 201 F. 3d at 384. The petitioner has not described what specific coursework relating directly and closely to the position in question makes the proffered position a specialty occupation.

We observe, as well, that both counsel and the petitioner assert that the proffered position

qualifies as a specialty occupation on the basis that its duties are so specialized and complex. However, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.² Therefore, it is not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has failed to establish that the proffered position is a specialty occupation as defined at section 214(i)(1) of the Act. Similarly, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(ii) or (iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. For this reason, the petition may not be approved and the matter must be remanded for the director to request additional evidence on this issue.

The second issue that precludes approval of the petition concerns the petitioner's failure to establish that the beneficiary is qualified to perform the duties of a specialty occupation relating to the field of computer science. The current record does not demonstrate this essential element. We observe that the beneficiary's transcript, provided in this matter, shows that the beneficiary took a computer and information systems course eight times, failed the course each time, and received no credit for the course. His transcript does not reflect that he took other computer science courses. As such, the record is deficient in establishing the beneficiary's qualifications as they relate to the proffered position.

The record in this matter did not establish that the proffered position is a specialty occupation. In addition, the record did not adequately establish the beneficiary's qualifications relating to the proffered position. For these reasons, the petition cannot be approved. This matter must be remanded to the director for issuance of a request for further evidence to provide the petitioner opportunity to address these issues and any other issues identified by the director in more detail. On remand, the director should address all grounds for the intended denial of the petition as cited in the foregoing discussion.

Accordingly, this matter will be remanded for the purpose of a new decision. The director must afford the petitioner reasonable time to provide evidence that is pertinent to the above issues, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

² See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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NON-PRECEDENT DECISION

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ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.