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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

DATE: FEB 26 2015 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a six-employee "Child Care Facility" established in [REDACTED].¹ In order to employ the beneficiary in what it designates as a part-time "Health Consultant, Child Development and Safety" position, the petitioner seeks 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserts that the director's basis for denial is erroneous and contends that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.²

We base our decision upon our 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 petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's submissions on appeal.

II. THE LAW

The issue before us is whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

¹ We note that the petitioner designated its business operations on the Labor Condition Application (LCA) under the North American Industry Classification System (NAICS) code 62441. This NAICS code is designated for "Child Day Care Services."

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, NAICS Code 62441, at [http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=62441&search=2012 NAICS Search](http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=62441&search=2012%20NAICS) (last visited Feb. 25, 2015). According to the U.S. Census Bureau, the NAICS is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. *Id.*

² We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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 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 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.

III. EVIDENCE

The LCA submitted to support the visa petition states that the proffered position is a "Health Consultant, Child Development & Safety" position, and that it corresponds to Standard Occupational Classification (SOC) code and title 21-1091, Health Educators, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, the petitioner submitted evidence that the beneficiary received a master's degree in biotechnology from the [REDACTED] in Poland, an associate's degree in business administration from [REDACTED] and a bachelor's

[REDACTED]

degree in nursing from [REDACTED] also in Georgia. An evaluation in the record states that the beneficiary's degree Polish degree is equivalent to a U.S. master's degree in biotechnology.

The petitioner also submitted (1) a letter, dated August 29, 2013, from [REDACTED] signing as the petitioner's president; and (2) a letter, dated September 4, 2013, from [REDACTED] of the Immigration Legal Office in [REDACTED] New York.

In her August 29, 2013 letter, [REDACTED] stated:

In [the proffered] position, [the beneficiary] will be responsible for the following professional tasks:

- Provide consultation, guidance, technical assistance, training and support on child care issues and early education of all children including those with special health or developmental needs;
- Assist in responding to issues of childhood communicable disease, child development, safety and inquiry prevention, nutrition, and family health;
- Administer and coordinate referrals and provide up-to-date immunizations for children;
- Provide guidance and support and care coordination for children and families to access mental health consultation and educational services for the family and children;
- Advise and coordinate child care providers in developing general policy statements and an annual plan for the child care program such as: management of infectious diseases, fevers, and use of medications;
- Help obtain, understand and use information about health status of individual children;
- Educate children , their family members, and child care providers about child development, mental and physical health, safety, nutrition, and oral health issues;
- Link staff, families, and children with community health resources;
- Identify and implement improvement plans;
- Increase interactions that promote child's brain development;

- Decrease the incidence of injuries; check for proper playground equipment, supervision during active play and recruitment of competent staff;
- Decrease the spread of infection;
- Facilitate child preventative care; Evaluate the information on the child health, identify children who are due for immunization, child examinations, and other routine care;
- Provide professional medical knowledge when training staff such as: how to interpret the information on the child health records as they receive them;
- Identify necessary changes that can be made to the physical environment to accommodate children with special needs;
- Develop an individualized treatment plan and specific guidelines for injuries or conditions of any child with special needs;
- Provide guidance on children's cultural diversity and meeting their needs; [and]
- Refer children whose behavior, school progress, or mental or physical impairment [sic] indicate need for assistance[.]

As to the educational requirement of the proffered position, [REDACTED] stated:

Due to the complex nature of the [proffered] position we require a Bachelor's Degree in Public Health or Nursing. These requirements are consistent with our staff requirements for this and similar positions with our company in the United States and worldwide.

[REDACTED] September 4, 2013 letter states that entry into the proffered position requires a bachelor's degree.

We observe that [REDACTED] signed the Form I-129 visa petition as preparer. However, the record contains no indication that [REDACTED] participated in filing the instant appeal. For this reason, [REDACTED] will not be recognized as the petitioner's representative or counsel of record.

On January 22, 2014, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The

service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, the petitioner submitted: (1) a vacancy announcement posted by the petitioner; (2) vacancy announcements posted by other companies; (3) a portion of the chapter of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* pertinent to health educators; (4) a list of people in the petitioner's employ and their educational credentials; (5) an organizational chart showing the hierarchy of the petitioner's operations; (6) a copy of the petitioner's Employee Handbook; and (7) a letter, dated April 14, 2014, from [REDACTED]

The petitioner's vacancy announcement which appears to have been posted in a Spanish language publication is for bilingual teachers and states no educational requirement. It is of no apparent relevance in determining the educational requirements of the proffered position.

Among the positions listed on the petitioner's employee list and organizational chart are executive director, child care director, lead teacher, assistant teacher, and the beneficiary's position. The petitioner's organizational chart shows that the beneficiary's position is "Health Care Consultant, Child Development & Safety." The petitioner's employee list shows that it is an "Administrative/Nurse" position.

The petitioner's Employee Handbook contains a description of its Executive Director position, its child care director position, its lead teacher positions, and its assistant teacher positions. It does not list the proffered position.

In her April 14, 2014 letter, [REDACTED] stated that the petitioner provides group child care for children from six weeks to five years old. She further stated:

[The beneficiary] holds Bachelor of Science [sic] degree from [REDACTED] from [REDACTED] Georgia. Moreover she holds a Registered Professional Nurse License, no: [REDACTED] As well as a Neonatal Resuscitation Certificate, Adult IV Therapy Certificate, and APNEC – Low Risk Labor & Birth Certificate and CRP and AED American Heart Association Certificate, as well as Radiologic Technology Certificate. [The beneficiary] is a member of an American Nurses Association.

The director denied the petition on May 6, 2014, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner submitted (1) an additional vacancy announcements, and (2) a letter, dated May 13, 2014, from [REDACTED]

In her May 13, 2014 letter, [REDACTED] stated that, in the proffered position, the beneficiary would "advise of various topics such as child care, child oral health, nutrition, physical activity, immunizations, medical issues, child development and wellness promotion." She further stated:

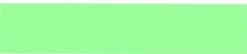
[The proffered position] probably falls under the broader category of child, family, school social workers. We believe there are also related careers like: Behavioral Counselor's, Educational, Guidance, School Counselors, Mental Health Counselors, Rehabilitation Counselor's, or Healthcare Social Workers, Public Health Education Promoters, Mental Health Social Workers, Health Educators, Social and Human Service Assistants, Community Health Workers, Community and Social Service Specialist that could resemble ours.

IV. ANALYSIS

We find that despite the director's request for additional evidence demonstrating that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the record is devoid of substantial documentary evidence as to the specific duties of the proffered position. Given the lack of detail and corroborating evidence, we cannot determine that the proffered position substantially reflects the duties of a "Health Consultant, Child Development & Safety." The petitioner did not submit sufficient documentary evidence demonstrating that it would employ a "Health Consultant, Child Development & Safety" for 20 hours a week. When the petitioner filed the visa petition, it reported that it was then a six-employee "child care facility" and would employ the beneficiary as a "Health Consultant, Child Development & Safety," corresponding to SOC code and title 21-1091, Health Educators, from O*NET, for 20 hours per week. There are factors suggesting that the petitioner would not employ the beneficiary as a "Health Consultant, Child Development & Safety." The petitioner's employee list indicates that the beneficiary's position is Administrative/Nurse. The petitioner cares for children between the ages of six weeks and five years, and it has not shown with sufficient documentary evidence that it, a daycare, has a need for a "Health Consultant, Child Development & Safety." Further, [REDACTED] places significant importance on the beneficiary's bachelor's degree in nursing, a registered professional nurse license, and a neonatal resuscitation certificate. These seemingly conflicting pieces of information and assertions, as well as the lack of evidence corroborating the petitioner's claim that the beneficiary will work as a "Health Consultant, Child Development & Safety," preclude a determination of what the beneficiary will actually do.

The record is devoid of substantial documentary evidence as to the specific duties of the proffered position. Given the lack of detail and corroborating evidence, we cannot determine that the proffered position substantially reflects the duties of a "Health Consultant, Child Development & Safety" corresponding to SOC code and title 21-1091, Health Educators, from O*NET, for 20 hours per week. Moreover, the petitioner also has not adequately explained why it requires the beneficiary to perform the duties of a "Health Consultant, Child Development & Safety."

Thus, the record, as constituted, precludes a determination that the duties of the proffered position are



those of a "Health Consultant, Child Development & Safety." There is insufficient basis upon which it can be determined that the petitioner has demonstrated a need for a "Health Consultant, Child Development & Safety" and that the beneficiary will be performing the claimed duties of a health educator. 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)). Furthermore, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." There must be sufficient, corroborating evidence in the record that demonstrates not only actual, non-speculative employment for the beneficiary, but also enough details and specificity to establish that the work the beneficiary will perform for the petitioner will more likely than not be in a specialty occupation. While the petitioner provides a description of the proffered position's claimed duties, there is insufficient evidence in the record that the petitioner, a child care provider with six employees, requires a "Health Consultant, Child Development & Safety." USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1) and 103.2(b)(12).

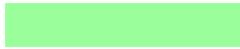
The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

V. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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NON-PRECEDENT DECISION

ORDER: The appeal is dismissed. The petition is denied.