U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 02 2011

IN RE: Petitioner: [redacted]
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:

[redacted]

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 record shows that the petitioner was represented by counsel when it filed the visa petition. Subsequently, however, the petitioner executed a Form G-28 Notice of Entry of Appearance recognizing a different attorney as its counsel of record. All representations will be considered, but the decision in this matter will be issued only to the petitioner and its current counsel of record.

On the Form I-129 visa petition, the petitioner stated that it is an IT (information technology) consulting firm. To employ the beneficiary in what it designates as a software engineer position, the petitioner endeavors 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, assuming that the proffered position qualifies as a specialty occupation position, the petitioner failed to demonstrate that the beneficiary is qualified to work in that specialty occupation position. On appeal, counsel reviewed the beneficiary's educational credentials and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief.

The AAO bases its decision upon its review of the entire record of proceedings, 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 counsel's brief and attached exhibits in support of the appeal.

The AAO will address the basis for the decision of denial below. Before it can address that basis, however, the AAO must first address an issue suggested by the record, but which was not addressed on appeal. The AAO will first address whether the proffered position qualifies as a position in a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, the position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A)

should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position 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 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.

With the visa petition, previous counsel provided a letter, dated April 3, 2009, from the petitioner's vice president. As to the duties of the proffered position, the vice president stated:

> In this position the Beneficiary will analyze client requirements, design software systems, develop and code software systems using .NET technology. She will test software systems and implement in client productions systems. She will also analyze and design databases within an application area, working individually or coordinating database development as part of a team.

As to the educational requirements of the proffered position, the petitioner's vice president stated:

> It is the position of the [petitioner] that an individual would need, at a minimum, a Bachelor's Degree or equivalent to perform the job duties as described. The petitioner attests that is has not hired any individuals in the above-described position who did not have, at a minimum, a Bachelor's degree or equivalent.

The petitioner's vice president did not indicate that the proffered position requires a degree *in any specific specialty*.

The petitioner also provided evidence demonstrating that the beneficiary has a bachelor's degree in business and commerce and a master's degree in business administration, both from universities in India. An evaluation of the beneficiary's education from [redacted] indicates that the beneficiary's education is equal to a bachelor's degree and a master's of business administration earned in the United States. Although the evaluation states that the beneficiary has

the equivalent of a U.S. bachelor's degree, it does not state that she has the equivalent of a bachelor's degree in any specific specialty.[1]

Because the evidence submitted was insufficient to demonstrate that the visa petition is approvable, the service center, on June 16, 2009, issued an RFE in this matter. The service center requested, *inter alia*, evidence that the proffered position qualifies as a specialty occupation requiring a minimum of a bachelor's degree or the equivalent in a specific specialty and evidence that the beneficiary is qualified to work in that particular specialty occupation by virtue of having a minimum of a bachelor's degree or the equivalent in that specific specialty.

In response, counsel submitted a letter, dated July 25, 2009, in which he cited the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) as evidence that a master's degree in business administration is appropriate for the proffered software engineer position and that the position qualifies as a specialty occupation position. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[2] It will be addressed further below.

The director denied the visa petition on August 12, 2009.

The petitioner's vice president stated, in his April 3, 2009 letter, that the proffered position requires a bachelor's degree. However, he never indicated that it requires a bachelor's degree in any specific specialty. The petitioner has failed even to allege, therefore, that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty. The AAO will, however, address the issue further.

As was noted above, the petitioner is obliged to demonstrate that the proffered position qualifies as a proffered position pursuant to one of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). This decision will now address those criteria.

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[1] The AAO notes that to prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, 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. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, 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).

[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, accessed January 26, 2011.

The *Handbook* addresses software engineer positions in the section entitled Computer Software Engineers and Computer Programmers. It describes the educational requirements of software engineer positions as follows:

> For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

That most employers prefer to hire software engineers with bachelor's degrees does not indicate that a bachelor's degree is the minimum requirement for the position. The *Handbook* does not support the proposition that software engineer positions categorically qualify as specialty occupation positions, nor does any other evidence in the record. 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).

The petitioner provided no evidence pertinent to the recruitment and hiring practices of other similar IT consulting firms seeking to hire workers for parallel positions. The petitioner 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 clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for software engineer positions, including degrees not in a closely-related specialty. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than software engineer positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

The evidence of record does not establish that the proffered position is so complex or unique that it can be performed only by an individual with a degree and does not, therefore, demonstrate that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner's vice president stated that the petitioner has never hired anyone to work in the proffered position who had less than a bachelor's degree. He did not, however, state that the petitioner insists that its software engineers must have a minimum of a bachelor's degree or the equivalent *in a specific specialty*. Merely requiring a bachelor's degree, without further specificity, is insufficient to demonstrate that the proffered position qualifies as a position in a specialty

occupation pursuant to the statutory and regulatory definition of specialty occupation, much less the supplemental criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

As was noted above, the duties of the proffered position as described in the petitioner's vice president's April 3, 2009 letter, are consistent with the duties of a software engineering position. Nothing submitted shows that the duties of the proffered position are more specialized and complex than the duties described for ordinary software engineer positions. The *Handbook* indications that some software engineer positions do not require a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not demonstrated that 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 in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Because the petitioner has not shown, even by its own claimed entry requirements, that the proffered position qualifies as a position in a specialty occupation pursuant to the statutory and regulatory definition of specialty occupation or to any of the additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) the visa petition may not be approved. The appeal will be dismissed and the visa petition will be denied on this basis.

As was noted above, the director denied the visa petition based on his finding that the petitioner had not demonstrated that the beneficiary is qualified for the proffered position. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation. Therefore, the AAO need not address the beneficiary's qualifications further. The AAO observes, however, that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree or the equivalent in a specific specialty, computer science, software engineering, or mathematics, for instance, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate that the beneficiary has a minimum of a bachelor's degree or the equivalent in that specific specialty.

Here, the petitioner only demonstrated that the beneficiary's education is equivalent to a U.S. bachelor's degree and master's degree in business administration. As such, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of an occupation requiring a degree in a specific specialty. A degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *See Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1968). This the petitioner has failed to do. Therefore, the AAO concludes that the director did not err in denying the petitioner on this basis and hereby affirms the denial of the petition for this additional 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. The appeal will be dismissed and the petition denied.

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