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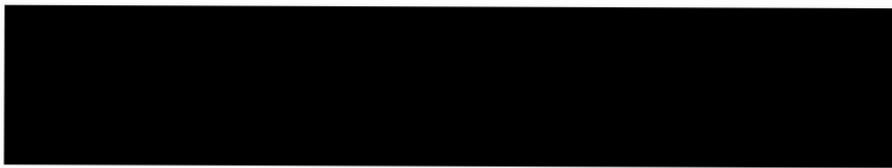
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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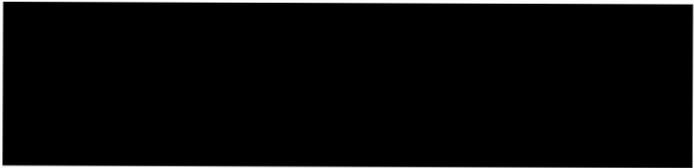
FILE: WAC 07 038 51073 Office: CALIFORNIA SERVICE CENTER Date:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting 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 is a corporation that, as a franchisee of HomeVestors, buys homes for resale to investors or for rehabilitation and maintenance as its own investment properties. In order to employ the beneficiary in a position to which Form I-129 ascribes the job title of Software Programmer, the petitioner endeavors to extend the classification of the beneficiary 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 on two independent grounds. The first basis is the director's determination that the petitioner failed to provide sufficient evidence to establish that the job that is the subject of the petition qualifies as a specialty occupation under at least one of the specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The second basis, which the director referenced as "the second issue," was "the petitioner's failure to provide evidence or [providing] evidence with inconsistencies in response to the USCIS' request."

In reaching his determination on the insufficiency-of-evidence basis of his decision, the director correctly noted that the documents filed prior to the request for additional evidence (RFE) indicated that the petitioner "seeks to temporarily employ the beneficiary as a software programmer." The director also acknowledged that the petitioner's response to the RFE provided a more detailed job description which the petitioner presented as those of a Software Engineer, Applications. The director also correctly noted that the petitioner enclosed a printout of the chapter of the Department of Labor's *Occupational Outlook Handbook (Handbook)* that discusses computer software engineers and "highlighted the portions of the job description that are also a part of the job duties of the beneficiary." The director stated that the petitioner's "sole reliance on the [*Handbook*] was misguided." As will be discussed below, the AAO finds that the director's determination that the evidence of record failed to establish the proffered position as a specialty occupation is correct. Accordingly, the AAO will not disturb the decision to deny the petition on the grounds of insufficient evidence of a specialty occupation. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's RFE dated June 22, 2007; (3) the response to the June 22, 2007 RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief on appeal.

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.

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.

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 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 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

At Part 5 of the Form I-129 (Petition for Nonimmigrant Worker) the petitioner stated the Job Title as “Software Programmer” and as a Nontechnical Job Description stated, “Program Development and Database Development and Maintenance tailored to the specific needs of the Company.” The service center’s six-page RFE dated June 22, 2007 included, *inter alia*, this request for more detailed information about the work proposed for the beneficiary:

Job Description: Provide a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity. Include specific job duties, the percentage of time to be spent on each duty, education level of responsibility, hours per week of work, and the minimum education, training, and experience necessary to do the job. Also, explain why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupational field.

* * *

Commenting that the *Handbook* indicates that the software computer occupation does not qualify as a specialty occupation under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the RFE requested that the petitioner provide additional evidence to establish that the proffered position qualifies as a specialty occupation under one or more of the remaining criteria.

The petitioner's September 4, 2007 memorandum responding to the RFE includes the following assertions. The petitioner's business has grown so substantially over the past few years that it is now necessary to employ the beneficiary in a position which, though bearing the title Software Developer, is actually a Computer Software Engineer job. According to the memorandum, the beneficiary "has to design and create specialized systems that enable our entire franchise to operate on [sic]," and "he will later be expanding the program to suit other franchisees with our system." The memorandum closes with the following bullet-descriptions presented as "outlines" of the beneficiary's duties:

- Designing, implementing, and maintenance of Property Leads Database. (SQL Server)
- Reporting on database (SQL Reports and Excel Reports)
- Head of Property Leads Mailer [S]ystem for [the petitioner] (creation of mailer files from SQL Database, importing information into SQL Server DB)
- Setup and maintenance of network system
- Setup and maintenance of servers
- Setup and maintenance of all desktops
- Design and Maintenance of Web Pages
- Design, code and maintain leads application (C# and SQL Server)

The petitioner's expanded description of duties presented in the RFE reply is a skeletal outline of broad functions stated in exclusively generalized and generic terms. There is no attempt to provide a meaningful description of the scope and complexity of data upon which the beneficiary would work or to explain, in compliance with the RFE, how specific aspects of the work would require a person with at least a bachelor's degree in a specific specialty closely related to that type of work. Qualification as a specialty occupation is not achieved by a position's title or how closely a petitioner's description of the position approximates the *Handbook's* description of an occupation. Neither the Act nor the implementing regulations support a formulistic approach that would allow specialty occupation status without substantive evidence of specific work into which a position's duty descriptions would translate when actually executed in the context of the petitioner's business. To determine whether a particular job qualifies as a specialty occupation, USCIS focuses on the record's evidence of specific work involved in actual performance of the job. *Cf Defensor v. Meissner*, 201 F.3d 384, 387-388 (5th Cir. 2000). If the evidence of record fails to develop the performance aspects of the proffered position in terms sufficiently concrete to manifest that they involve the application of at least a bachelor's degree level of knowledge in a specific specialty, the petition will fail to establish a specialty occupation. Such is the case here.

The AAO notes that the copy of the 2006-2007 *Handbook* Computer Software Engineers chapter submitted by counsel in reply to the RFE has three sections highlighted in yellow. The first is this “Significant Point” at the outset of the chapter:

Very good opportunities are expected for college graduates with at least a bachelor’s degree in computer engineering or computer science and with practical work experience.

The next highlighted section is:

Computer applications software engineers analyze users’ needs and design, construct, and maintain general computer applications software or specialized utility programs. These workers use different programming languages, depending on the purpose of the program. The programming languages most often used are C, C++, and Java, with Fortran and COBOL used less commonly. Some software engineers develop both packaged systems and systems software or create customized applications.

The highlighted area reads:

Most employers prefer to hire persons who have at least a bachelor’s degree and broad knowledge of, and experience with, a variety of computer systems and technologies.

Counsel contends that the petitioner has satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) because the descriptions of the proposed duties comport with portions of the *Handbook’s* comments about the work and educational requirements of the computer applications software engineer occupation. However, contrary to counsel’s interpretation, neither the cited sections of the 2006-2007 *Handbook* nor its “Computer Software Engineers” chapter as a whole indicates that possession of a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the computer applications software engineer occupation. Rather, the 2006-2007 *Handbook* indicates a preference (not a normal requirement) for a bachelor’s degree, but not necessarily in a computer-related specialty. The AAO finds that the information in the 2008-2009 *Handbook* is substantially the same.

While the *Handbook* does not support the proposition that computer applications software engineers constitute an occupational category for which a bachelor’s degree in a related specialty is a normal minimum entry requirement, it does indicate that the performance requirements of the specific work of a particular position in this category may be such as to normally require such a degree. The record of proceedings now before the AAO, however, contains neither substantive evidence of the specific work that the petitioner would likely perform on matters generated by the petitioner’s particular business operations, nor an explanation of why such work would elevate this particular

position above the range of computer applications software engineer positions not requiring at least a bachelor's degree or the equivalent in a specific specialty.

For the above reasons, the director was correct to determine that the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Although counsel asserts only this criterion as the basis for approving the petition, the AAO conducted an independent review of the record to determine if there was any basis in the record for approving the petition under any other criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The lack of evidence of record about the educational demands of the actual work that would engage the beneficiary precluded approval under any of the other criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

With regard to the second issue, the AAO also finds that the petitioner's failure to comply with the RFE's request for original college/university transcripts is a sufficient basis by itself to support the director's second ground for denial. The regulation at 8 C.F.R. § 103.2(b)(5) states that failure to submit an original document requested by USCIS "may result in denial or revocation of the underlying application or benefit."

Beyond the decision of the director, the AAO finds that the evidence of record does not establish the beneficiary as qualified to perform the services of the claimed specialty occupation in accordance with the regulatory requirements at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The education evaluation upon which the petitioner relies opines that the beneficiary's work experience is the equivalent of "[o]ne academic year (30 semester credits) of undergraduate study in Computer Science." However, the record does not establish that the evaluator issuing that opinion is "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accreted college or university which has a program for granting such credit based on an individual's training and/or work experience," as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Also, the record lacks documentary evidence of the beneficiary's recognition of expertise in the specialty, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) for a USCIS determination of U.S. degree equivalency in situations where a degree-equivalency claim is based in whole or in part on training or work experience. For this additional reason, the petition must be denied.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.