

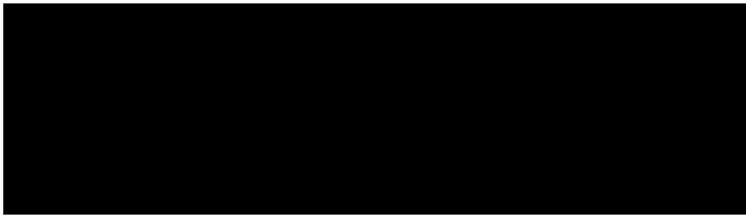
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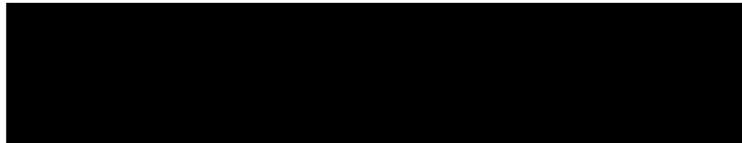
**U.S. Citizenship  
and Immigration  
Services**



*Dr*

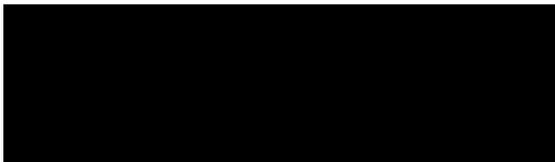
FILE: EAC 08 156 52973 Office: VERMONT SERVICE CENTER Date: **APR 01 2010**

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).

  
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 on the Form I-129 as a hair products and services company. The petitioner's name and the content of the provided advertising copy suggest that it specializes in hair braiding. To employ the beneficiary in a position designated as a computer systems analyst, 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 the petitioner failed to establish that the beneficiary is qualified for the proffered position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

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 observes that, while the director's decision addresses the beneficiary's credentials, it does not contain a specific finding that the proffered position is, in fact, a specialty occupation. As will be discussed below, the AAO finds that the petition must be denied not only because the director was correct in concluding that the petitioner had not established that the beneficiary is qualified to serve in a specialty occupation of the type claimed in the petition, but also because the evidence of record does not establish that the proffered position is a specialty occupation. The AAO will address the specialty occupation issue first.

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)(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 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 384, 387 (5<sup>th</sup> 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.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner’s descriptions of the position and its underlying duties correspond to occupational descriptions in the *Handbook*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work’s content.

In the instant case, the petitioner appears to be a hair braiding salon with one single location. The petitioner’s principal also asserted that the petitioner wishes to sell hair products on-line. In a submission to USCIS, the petitioner’s principal stated,

[The petitioner] requires the services of a Computer Services Analyst because its manner of procesing [sic] data, providing client services and tracking sales and receipts must be automated to grow responsibly. The [beneficiary] will be responsible for designing a computer inïormation systems [sic] to meet [the petitioner’s needs], modifying current systems to improve production or work flow, and expanding systems to serve new purposes.

The AAO recognizes the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) as an authoritative source on the duties and educational requirements of a wide variety of occupations. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/ocoo/>. As to the duties of computer systems analysts, the *Handbook* states, “When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree.” That statement does not support the assertion that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position. Rather, it indicates that some computer systems analyst positions do not even require a bachelor’s degree.

The petitioner did not demonstrate that a degree requirement is common to the industry for computer systems analyst positions at braiding salons, barbers shops, other hair-care salons, tanning salons, or

other similar organizations of the petitioner's size. The petitioner's principal's explanation fails to state in what way the needs of this single salon are so complex that existing off-the-shelf programs would be insufficient to meet its needs, of that the nature of the duties of the proffered position 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 the record contains no indication that the petitioner has ever previously hired anyone to fill the proffered position, it cannot show that it normally requires a degree or its equivalent for the proffered position.

The AAO finds, therefore, that the evidence fails to establish pursuant to the requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A) that the beneficiary would be employed in a specialty occupation position. The appeal will be dismissed and the visa petition denied on this basis.

The issue upon which the decision of denial was based is whether the beneficiary is qualified to perform in a specialty occupation. As was noted above, section 214(i)(1) of the Act provides that a specialty occupation means 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 degree referenced by section 214(i)(1)(B) of the Act, 8 U.S.C. § 1184(i)(1)(B), means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
  - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have [a] education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and [b] have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

For the purpose of the discussion of the beneficiary's qualifications, the AAO will assume, *arguendo*, that the proffered position is of such complexity that it is a specialty occupation, requiring a minimum of a bachelor's degree in computer science, information science, or management information systems. In that event, the petitioner would be obliged to show that the beneficiary is qualified to work in that particular specialty occupation.

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). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In this case, the visa petition was submitted on April 1, 2008. The petitioner must show that the beneficiary was qualified for the benefit sought as of that date.

In her résumé, the beneficiary stated that she received a bachelor of science degree in electrical engineering in December 2007. In response to a request for evidence, however, the petitioner submitted the beneficiary's transcripts from Suffolk University in Boston, Massachusetts. Those transcripts show that the beneficiary received a bachelor's degree in engineering on May 18, 2008. The petitioner may not therefore, rely on that bachelor's degree in showing that the beneficiary is qualified for a specialty occupation.

The petitioner must, therefore, consistent with section 214(i)(2) of the Act show that the beneficiary is either licensed by the state to work in the proffered position or that she has experience in the specialty equivalent to the completion of such degree, and recognition of her expertise in the specialty through progressively responsible positions relating to the specialty.

The proffered position is in Largo, Maryland. There is no indication that the state of Maryland requires licensure for computer systems analysts. Although the record contains evidence of various awards and recognition accorded to the beneficiary, it contains no evidence pertinent to the beneficiary's employment experience.

The petitioner has not demonstrated, pursuant to the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(C), that the beneficiary was qualified to hold a position in a specialty occupation as of the date the petition was filed. The visa petition will be denied on this additional basis.

The record suggests an additional issue not raised in the decision of denial. The proffered position purports to be for a computer systems analyst. The beneficiary's transcript states that she has a degree in engineering. The record does not contain evidence sufficient to show that a degree in engineering qualifies one for a computer systems analyst occupation. In other words, even if the proffered position were shown to be a specialty occupation, there is no indication that a degree in engineering would qualify the beneficiary to perform in this position, as the *Handbook* does not list this major as even being among those preferred. Thus, the AAO cannot find that the beneficiary is qualified to perform the duties of the claimed specialty occupation and the petition must be denied for this additional reason.

A 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), *affd.* 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 each of 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. The appeal will be dismissed and the petition denied.

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