

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

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



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

[REDACTED]

D2

FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date: DEC 03 2010

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:

[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.

Perry Rhew
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The acting 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.

On the Form I-129 visa petition, the petitioner stated that it is a software product development and services firm. To employ the beneficiary in a position designated as a computer programmer, the petitioner endeavors 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 acting director denied the petition, finding that the petitioner failed to establish that the petitioner would employ the beneficiary in a specialty occupation position. On appeal, counsel submitted a brief and contended that the petitioner satisfied all evidentiary requirements.

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 acting director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the 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. 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 position's 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.

The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook*¹ (the *Handbook*) as an authoritative source on the duties and educational requirements of a wide variety of occupations.

As to the duties of computer programmer positions, the *Handbook* states:

Computer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow [Parenthetical material omitted.] The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use "programmer environments," applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.

As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions.

As to the educational requirements of computer programmer positions, the *Handbook* states:

Many programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others

¹ 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.

have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

Thus, the *Handbook* does not support the assertion that computer programmer positions normally require a minimum of a bachelor's degree in a specific specialty or the equivalent, and does not support the proposition that a computer programmer position is necessarily a position in a specialty occupation.

As the fact that the proffered position's identification as a computer programmer position is not in itself sufficient to establish the educational credentials normally required for its performance, and thus to establish that it qualifies as a specialty occupation, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a computer programmer for the period specified in the petition, but also that he would do so at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer related specialty. As will now be discussed, the petitioner has failed on the latter count.

Further, 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*. 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.

With the petition, counsel provided a letter from the petitioner's director. The petitioner's director stated:

The specific duties to be undertaken by the beneficiary as a Computer Programmer include the following: Analysis of the problem statement, convert requirements from project specifications and statements of problems and procedures to create or modify computer programs. Analyze workflow chart and diagram, applying knowledge of computer capabilities, subject matter and symbolic logic.

The petitioner's director stated that the job specifications require a person with a bachelor's degree, but did not assert that the degree must be in any specific specialty.

In response to a request for evidence issued in this matter, counsel submitted another letter from the petitioner's director. In that letter the petitioner's director provided the following revised list of the duties of the proffered position:

1. Responsible for Software Live Cycle Development Methodologies (SDLC) for CRM systems and ERP systems, and third[-]party software, SQL, Technical Analysis, and Use Case Development.
2. Involved in upgrades to version changes and system enhancements.
3. Tools being used for development are Java, XML and Web technologies.

4. Assist the Development team to create and maintain programs for Daily Service Request.
5. Coordinate and install vendor software upgrades to the existing in-house projects.
6. Perform custom application change impact analysis.
7. Responsible for new development of custom applications as well as providing programming support to fulfill DSR (Daily Service Request).
8. Utilize business communication skills to interact with vendors, programmers, and management and use community.
9. Also assist in the design and development process of EDI initiatives and projects.
10. Collaborate with trading partners to establish connectivity for electronic file transmission of claims, encounters, authorizations, enrollment and eligibility transactions.
11. Perform testing and systematization of EDI processes.
12. Troubleshoot issues with data integrity and/or file transmission.

The petitioner's letter in response to the RFE also includes a table showing that the petitioner employs three people in positions designated as computer programmer positions and two people in positions designated as computer systems analyst positions. According to the table, one of the programmers has a bachelor's degree in engineering and the other a master's degree in computer science, while one of the computer systems analysts has a bachelor's degree in engineering and the other a master's degree in engineering.

That table does not support the proposition that the petitioner requires a minimum of a bachelor's degree **in a specific specialty** or the equivalent for its computer programmer positions. It may support the proposition that the petitioner's computer analyst positions require a minimum of a bachelor's degree in engineering or the equivalent. The AAO notes, however, that the beneficiary's degree is a Master of Computer Applications degree, and that an educational evaluation in the record states that it is equivalent to a master's degree in computer science awarded by an accredited United States college or university. The record contains no indication that the beneficiary's degree is equivalent to an engineering degree.

The AAO finds that the record of proceeding presents the duties of the proffered position in generalized and generic terms (such as "Responsibil[ity] for Software Live Cycle Development Methodologies (SDLC) for CRM systems and ERP systems," and "Responsibil[ity] for new development of custom applications as well as providing programming support to fulfill DSR (Daily Service Request)"), which, while indicative of a position that requires an undetermined level of technical IT and computer-related knowledge, do not, in themselves, indicate that performance of the proffered position would require the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty closely related to the duty requirements of the proffered position. The AAO further finds that that neither the duty descriptions nor any other evidence of record distinguishes the proffered position from computer programmer positions which do not require at least a bachelor's degree or the equivalent in a specific specialty closely related to their duties.

For the reasons discussed above, the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the petitioner's industry that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

As reflected in this decision's earlier comments, the relevant chapter of the *Handbook* does not indicate that a computer programmer position as described in this petition would require at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The petitioner has not submitted evidence distinguishing the proffered position as unique from or more complex than the range of computer programmer positions for which the *Handbook* indicates that there is no requirement for a bachelor's or higher degree or its equivalent in a specific specialty. Further, the generalized and generic terms by which the proffered position and its duties are described do not develop the relative elements of complexity or uniqueness in any work that may be assigned to the beneficiary if this petition were approved.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent for the position. To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. This the instant record of proceeding fails to do.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in this decision's earlier comments regarding the generalized and generic level of the evidence regarding the proffered position and its duties, the petitioner has failed to establish the relative specialization and complexity of any specific duties that the beneficiary would be involved in performing.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision to deny the petition shall not be disturbed.

The AAO finds that the acting service center director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the documents submitted on appeal have not remedied that failure. Accordingly, the acting director's decision to deny the petition shall not be disturbed.

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.