



U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUN 01 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 \$585. 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 petitioner is an authorized dealer and on-line retailer of house wares, home décor, toys, and other accessories that seeks to employ the beneficiary as a computer programmer. Therefore, the petitioner endeavors to classify 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, finding that the proffered position did not qualify as a specialty occupation. On appeal, the petitioner submits a brief and additional evidence.

As will be discussed below, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed.

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 request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and its attachments.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which 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 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.

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.

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 (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 petitioner seeks to employ the beneficiary as a computer programmer, and indicated that she holds the U.S. equivalent of a master's degree in electrical and electronics engineering with a concentration in multi-media telecommunications. According to the petitioner's Form I-129 and H Classification Supplement and addendum attached thereto, the position of computer programmer requires a wide range of job duties and responsibilities. Specifically, the petitioner stated that the duties of the proffered position included:

- Development of programs for internet store using special languages such as MySQL, etc.
- [Development of] development tools and techniques in order to architect, develop, debug, and fix performance critical web based applications. More specifically, her responsibilities will include developing, maintaining and supporting large, high-availability, web-based applications and reporting tools. She will analyze existing platforms and their daily operations and will apply this analysis to develop and maintain feature add-ons to the existing platforms.
- Additionally, [the beneficiary] will develop and maintain new web applications based on the existing platforms and will assist in managing the development life cycle from conception to testing and deployment. Further, she will draw on her wealth of knowledge and experience with PHP programming, MySQL, Perl programming, software and web application design, Object Oriented Programming design, Shell Scripting, Javascript, XML, XML/XSLT, DHTML/CSS, and security issues surrounding deploying distributed, large-scale web applications to perform advanced web development.

On October 28, 2008, the director issued an RFE requesting additional information regarding the proffered position, including a more detailed description of the duties of the position and information regarding the petitioner's hiring practices. The director specifically asked the petitioner to submit evidence to establish that the proffered position met one or more of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) for a specialty occupation. In its letter of response to the RFE dated November 19, 2008, counsel for the petitioner addressed the director's queries.

Regarding additional information about the proffered position, the petitioner provided a brief overview of the nature of the proposed duties. Specifically, counsel stated:

Please note that the job duties of the proffered position of Computer Programmer in the petitioner's organization involve evaluating the petitioner's internet based systems and procedures as well as planning, developing, deploying and upgrading highly interactive database driven business systems and applications that are consistent with the petitioner's business practices and procedures. It is also essential that these large-scale, high-availability, web-based systems and applications are efficiently maintained and supported and that the security issues surrounding these distributed web applications are effectively resolved. The proffered position, therefore, is a specialty occupation involving specialized and highly complex duties and responsibilities and accordingly, requires the professional services of an individual with at least a

baccalaureate degree in computer science or electrical and electronics engineering or information technology fields.

In addition, counsel provides the follow list of tasks that the beneficiary would specifically be responsible for:

- Defining, comprehending and evaluating the petitioner's internet based business operational systems and procedures including payment options, pricing, product availability, on-line payment processing, shipping and tracking, product marketing, and customer support in order to develop appealing and user-friendly web applications and templates associated with content publishing in accordance with the existing and emerging business needs;
- analyzing detailed system components, including input and output requirements and information flow, in order to build and implement changes and enhancement functionalities;
- planning, developing and upgrading highly interactive database driven business systems and applications that are consistent with our business practices and procedures;
- performing project planning/reporting, conducting technical research, interfacing with external software component systems and programming applications focusing on ongoing maintenance and enhancements of existing web applications;
- performing regular maintenance services as required by business demands, troubleshooting production problems, and providing direction and technical support to sales and customer services staff;
- formulating and testing the logic and codes of web applications, and preparing technical documentation;
- providing application development support for web based applications utilizing her knowledge and experience and both user interface (UI) oriented aspects of web sites (XHMTL/CSS, Java Script, Ajax, SilverLight/Flash etc.) and server side oriented aspects of web pages; and
- addressing and resolving operational problems encountered by the company's sales staff and customers.

Counsel further claimed that the petitioner previously used the services of an outside information technology firm to design and maintain the company's website and to provide technical support. Counsel stated that the petitioner wished to employ the beneficiary as a full-time computer programmer since it would be cost-effective and provide better service to customers.

As evident in the descriptions of the beneficiary's future work above, the petitioner describes the proffered position exclusively by generalized statements of broad functions. These statements do not convey whatever applications of highly specialized knowledge in a specific specialty the functions might entail when performed in the context of the petitioner's business.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. With regard to Computer Programmers, 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 (A section on computer systems analysts appears elsewhere in the *Handbook*). 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.

Regarding the educational requirements for the occupation of Computer Programmers, 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 have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

The AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by USCIS when determining these criteria 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*, 71 2 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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.

Even if the generic statements that comprise the information about the proffered position and its duties were sufficient to align the position with the occupational category of Computer Programmer as discussed in the *Handbook*, this position has not been established as a specialty occupation. As already indicated in the discussion of the *Handbook*, employers of computer programmers do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty. Instead, the *Handbook* notes that while a bachelor's degree is often required, a two-year degree or certificate may be adequate in some cases.

Moreover, as the *Handbook* indicates that entry into the computer programmer occupation may occur with a degree with coursework in the listed subjects but without a *specific* course of study leading to a *specific* degree in the field, computer programmer positions do not categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation. This information from the *Handbook* does not by itself preclude a particular computer programmer position from qualifying as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). However, it is incumbent on the petitioner to establish that its particular position is one 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. This the petitioner has failed to do.

The AAO finds that the evidence of record does not indicate that the particular position before it is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO notes that, as reflected in its earlier discussions about the examples of the beneficiary's work-product and the petitioner's generalized descriptions of the duties of the proffered position, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The record's evidence is not sufficiently specific and concrete to distinguish the proffered position from positions in the computer programmer occupational category that do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty.

As the evidence of record does not establish that the particular position proffered here is one 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, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

Again, 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 at 1165.

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry. While the petitioner submits copies of job postings for such jobs as computer programmer, senior programmer, web developer, web programmer, and mainframe systems programmer/engineer from Internet websites such as www.careerbuilder.com and www.hotjobs.yahoo.com, as well as individual company websites, not all of the postings submitted require a degree in a specific specialty for entry into the respective position. Instead, some only require either a four-year degree, or express only a preference for a bachelor's degree in computer science, information technology, or a related field. In addition, the postings alone do not establish (1) that each of these positions is parallel to the position proffered here or (2) that the petitioner are for similar organizations.

The petitioner also failed to satisfy 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 evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for computer programmer positions, including degrees not in a specific specialty related to computer programming. 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 computer programmer positions that can be performed by persons without a specialty degree or its equivalent.

Moreover, the petitioner claims that it previously used the services of an outside information technology firm for computer programming services, and this petition represents the first time such a position has been offered in-house by the petitioner. As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 the earlier discussion of the limited information about the proffered duties, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with a degree in a specific specialty.

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 shall not be disturbed.

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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