

**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
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

D2

Date: OCT 07 2011

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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:

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it will be remanded for further action and consideration.

The petitioner is a game engineering and designing company with four employees. It seeks to employ the beneficiary as a game developer 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 concluding that the petitioner failed to establish that the beneficiary is qualified to perform the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B, Notice of Appeal or Motion, with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

Before discussing the director's basis for the denial, the AAO will first examine whether the proffered position qualifies as a specialty occupation, as the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Beyond the decision of the director, the AAO finds that the petitioner's proffered position does not qualify as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [1] 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 [2] 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 (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.

The petitioner states that it is seeking the beneficiary's services as a game developer. The petitioner described the duties of the proffered position on the Form I-129 as "[d]evelop various on-line games using Adobe Flash Programming." Counsel for the petitioner, in a March 30, 2009 letter submitted in support of the petition, added:

[t]he beneficiary as a game developer will be responsible for the development of online games using various computer languages. He will also be responsible for many aspects of the development cycle, including production, coding, quality assurance and game launch.

Counsel also submitted three job postings for positions of: (1) game developer which required completion of a post secondary program in computer science for a major toy maker; (2) senior game developer which required a master of science degree in computer science or English for a game development company; and (3) game developer/programmer which required a bachelor's degree in computer science or related field for a game developer.

The director requested additional information to establish that the proffered position comprised the duties and responsibilities of a specialty occupation as well as evidence pertaining to the beneficiary's education and its equivalency to a United States baccalaureate or higher degree.

In response to the director's RFE, counsel provided the petitioner's description of responsibilities for the proffered position as:

Senior Game Developer will be responsible for the overall design and development of Internet Games, including, but not limited to the conceptualization, design and creative direction of the game project, programming and graphic design, testing and quality assurance. Job requires working with other members of a team, writing concise OOP code, and delivering the game projects on time and under budget.

The petitioner noted that the successful incumbent would need technical proficiency in computer languages and operating systems and a minimum educational level of a bachelor's degree. The petitioner indicated the beneficiary would spend 75 percent of his time on computer programming and 25 percent of his time on graphic design and quality assurance. The petitioner also noted that two of its employees had received bachelor's degrees, one in technocultural studies and the second in game software development.

The record also included a number of job postings. While all of the job postings required technical skill in various computer languages, only four of the fifteen job postings referenced a requirement of a bachelor's degree in an academic discipline. Nine of the job postings, although most indicating a bachelor's level degree in the heading, failed to further delineate the particular degree required. Two of the job postings indicated that a bachelor's degree in computer science or engineering or a similar discipline was preferred. Three of the job postings indicated that a bachelor of science degree in computer science or computer engineering, or a related discipline was required, and one job posting indicated that bachelor's of science level background in game theory, game design, mathematics and

software development practices was required. Thus, more than half of the job postings provided for applicants in game development positions, like the petitioner, did not require a bachelor's degree in a specific discipline as a prerequisite to the position.

Counsel also provided a number of articles describing occupations and career paths in the game industry, several of which noted that the game industry required individuals in a multitude of disciplines as diverse as geography, physics, and visual arts.

The director denied the petition finding the beneficiary's degree in physics was not equivalent to a degree in computer science, mathematics, or information systems, degrees the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*¹ recognized as appropriate for a software publisher or software engineer. The director appears to infer that a degree in physics is a general degree and not one that is sufficiently related to a position that requires a degree in a specific discipline.

On appeal, counsel for the petitioner asserts that a bachelor's degree in physics is sufficiently related to the proffered position of analyst/programmer (game developer). Counsel provides additional articles that discuss the myriad number of academic disciplines, including physics, useful to occupations in Internet game and software development.

Upon review of the descriptions of the proffered position, the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. It is not evident from the limited information provided regarding the duties of the proffered position to determine whether the proffered position is actually that of a programmer analyst or software engineer or under what other occupational classification the position might fall. Moreover, the petitioner does not indicate that it requires a bachelor's degree in a specific academic discipline as a minimum requirement for the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

To make its determination whether the proffered position, as described in the initial petition and the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum

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.

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)).

We observe that the petitioner provided an overview of the duties and responsibilities associated with the proffered position and indicated that the beneficiary would spend 75 percent of his time on computer programming. Thus, it appears the beneficiary's primary focus in the proffered position would be that of a computer programmer. The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

The *Handbook* discusses the Programmer/Software Engineer occupational category as follows:

Computer software engineers design and develop software. They apply the theories and principles of computer science and mathematical analysis to create, test, and evaluate the software applications and systems that make computers work. The tasks performed by these workers evolve quickly, reflecting changes in technology and new areas of specialization, as well as the changing practices of employers. (A separate section on computer hardware engineers appears in the engineers section of the *Handbook*.)

Software engineers design and develop many types of software, including computer games, business applications, operating systems, network control systems, and middleware. They must be experts in the theory of computing systems, the structure of software, and the nature and limitations of hardware to ensure that the underlying systems will work properly.

Computer software engineers begin by analyzing users' needs, and then design, test, and develop software to meet those needs. During this process they create flowcharts, diagrams, and other documentation, and may also create the detailed sets of instructions, called algorithms, that actually tell the computer what to do. They also may be responsible for converting these instructions into a computer language, a process called programming or coding, but this usually is the responsibility of *computer programmers*.

The *Handbook* describes computer programmers as follows:

[C]omputer 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. . . .

* * *

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.

* * *

[M]any 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. . . .

Id. Therefore, the *Handbook's* information on educational requirements in the programmer/software engineer occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials.

As evident above, the information in the *Handbook* does not indicate that programmer/software engineer positions normally require at least a bachelor's degree or its equivalent in a specific specialty. While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the evidence of record on the particular position

here proffered does not demonstrate a preference, much less a requirement, for the theoretical and practical application of such a level of highly specialized computer-related knowledge. As the evidence of record does not establish that the particular position here proffered 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). The first prong requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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. As stated previously, insufficient evidence was submitted regarding the duties of the proffered position to determine whether it is actually that of a programmer/software engineer.

Nevertheless, 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)).

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 or its equivalent in a specific specialty. The several articles submitted in support of the petition, also indicate that there are a variety of educational majors that are suitable for employment in the proffered position; thus, there is no demonstrated requirement that an applicant have at least a bachelor's degree or its equivalent in a specific specialty. The job postings provided also confirm that a bachelor's degree in a specific specialty is not a requirement for a position in the Internet gaming industry.

Additionally, the petitioner 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 evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for programmer/software engineer positions. Moreover, as mentioned previously, the record lacks sufficient information to distinguish the proffered position as unique from or more complex than a programmer/software engineer position that can be performed by persons without a specialty degree or its equivalent.

Although the petitioner noted that two of its employees had received bachelor's degrees, one in technocultural studies and the second in game software development, the petitioner did not produce the diplomas and transcripts of these two individuals. In addition, the petitioner did not provide job descriptions for the positions held by these two employees. Further the disparate degrees held by these two individuals further confirm that a wide spectrum of educational credentials is appropriate for employment in this field. The petitioner has not established a prior history of hiring only persons

with at least a bachelor's degree in a specific specialty for the proffered position; accordingly, 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 mentioned earlier, the petitioner provided a general description of the duties of the proffered position; thus the AAO is unable to determine that the duties are more specialized and complex than other positions that are not usually associated with a degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Upon review, the AAO is unable to evaluate whether the beneficiary is qualified to perform the services of a specialty occupation as the proffered position, as described, is not a specialty occupation. This matter must be remanded to the director to provide the petitioner the opportunity to establish the proffered position is a specialty occupation. On remand, the director should address the grounds for the intended denial of the petition as cited in the foregoing discussion.

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.

ORDER: The director's decision is withdrawn; however, because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.