

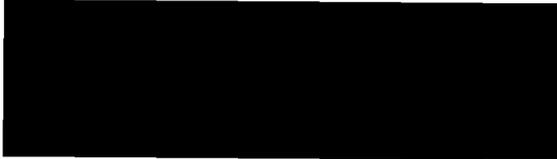
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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



D2

Date: **JAN 04 2012** Office: CALIFORNIA SERVICE CENTER

FILE: 

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:

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.

Thank you,

Michael T. Kelly
/s/ 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.

On the Form I-129 visa petition, the petitioner stated that it is an entertainment company. To employ the beneficiary in a position it designates as a film and video editor position, 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 was qualified for the proffered position on the date the visa petition was filed. On appeal, counsel submitted a copy of the beneficiary's recent college transcript and asserted that it demonstrates that the visa petition is approvable.

The AAO bases its decision upon its review of the entire record of proceeding, 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 letter and attached exhibit in support of the appeal.

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.

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.

A bachelor's degree does not, *per se*, qualify a beneficiary for employment in a specialty occupation. Rather, the position must require a degree in a specific specialty. *See Matter of Michael Hertz, Assoc.*, 19I&N Dec. 558,560 (Comm. 1988). Further, the beneficiary must have a degree in that specific specialty. *See Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968).

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 also 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.

The instant visa petition was filed on April 1, 2009. The period of requested employment is from September 1, 2009 to August 30, 2012. With the visa petition, counsel submitted a letter, dated April 1, 2009, from the petitioner's president. That petitioner's president stated that the proffered position requires a bachelor's degree, but did not specify any specific specialty that degree must be in. The petitioner's president also stated that the beneficiary would receive a bachelor's degree in film and cinema from the University of California in September of 2009.

Because the evidence did not demonstrate that the beneficiary was qualified to hold the proffered position, the service center, on April 21, 2009, issued an RFE in this matter. The service center requested, *inter alia*, evidence that the beneficiary was qualified to work in the proffered position.

In response, counsel submitted a letter, dated May 29, 2009. In it, he stated:

PERTAINING TO BENEFICIARY'S QUALIFICATIONS

1. Criteria for the beneficiary to Qualify

- 1) Beneficiary is studying at the University of California majored in film/cinema. She will be awarded [a] bachelor[']s degree on Sep., 2009. From the courses and transcript, it shows that the beneficiary qualify [sic] to performance services in the specify occupation as film and video editors.
- 2) A letter from the University of California. Please see EXHIBIT V

A transcript then provided showed that the beneficiary had been attending the University of California at Santa Barbara since the Fall of 2007. An accompanying letter, dated May 18, 2009, from [REDACTED] on the letterhead of that institution indicates that [REDACTED] is an immigration analyst there, and states that the beneficiary was then pursuing a degree in Film and Media Studies and was expected to receive her degree in spring 2009.¹

The director denied the visa petition on July 2, 2009 finding that the petitioner had not demonstrated that, as of the date the petitioner filed the petition, the beneficiary was qualified to work in the proffered position.

On appeal, counsel stated, "A brief will be filed later," but provided no further argument and no additional evidence. Subsequently, counsel submitted a short statement. Counsel stated that the beneficiary had received her degree on September 12, 2009 and urged that the visa petition should, therefore, be approved.

With that statement, counsel submitted an updated version of the beneficiary's transcript from the University of California. It states that the beneficiary was awarded a bachelor's degree in Film and Media Sciences on September 12, 2009, a date which is not only after the visa petition's filing date, but also after the commencement of the period of requested employment.

That the beneficiary may have become qualified to perform in the proffered position sometime after the visa petition was filed is inapposite. United States Citizenship and Immigration Services (USCIS) regulations 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).

The AAO finds that the director was correct in her finding that the petitioner failed to demonstrate that, on the date it filed the visa petition, the beneficiary was qualified to work in a specialty occupation. The appeal will be dismissed and the visa petition denied on this basis.

The record suggests an additional issue that was not addressed in the decision of denial.

¹ Although that statement appears to conflict with counsel's assertion that the beneficiary was expected to receive her degree during September of 2009, the AAO notes that the distinction is of no practical importance in this case.

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.”

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.

Although the petitioner’s president stated, in his April 1, 2009 letter, that the proffered position requires a bachelor’s degree, he did not even allege that it requires a degree in any specific specialty or, if it does, what that specialty might be. As such, he failed to demonstrate, or even effectively allege, that the proffered position qualifies as a position in a specialty occupation. The appeal will be dismissed and the visa petition denied on this additional basis.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review 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. The appeal will be dismissed and the petition denied.

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