

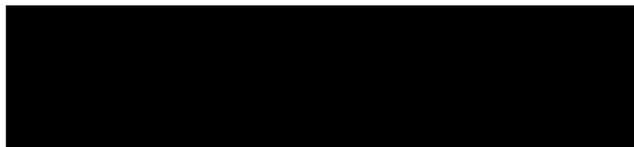
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U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Date: **MAY 03 2012**

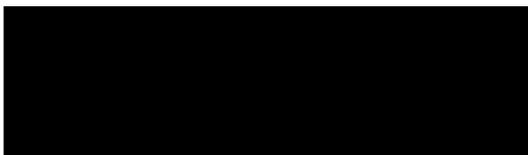
Office: CALIFORNIA SERVICE CENTER

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,

*for Michael T. Reedy*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. 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 a homeowner's association management firm that seeks to continue to employ the beneficiary in a position it designates as an association administrator position. The petitioner, therefore, endeavors to continue 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 on the basis that approval of the visa petition would place the beneficiary in H or L nonimmigrant status for the maximum six years and because she found that the beneficiary did not qualify for an extension of his visa status. The director concluded that the beneficiary is not eligible for extension of H-1B nonimmigrant status under applicable law, because a final decision was made on the alien's Form I-485 Application for Adjustment of Status.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The AAO notes, before reaching the basis of the director's decision to deny the visa petition, that the beneficiary's previous H-1B status expired on June 27, 2009, and the instant visa petition was submitted, subsequently, on July 7, 2009. The regulation at 8 C.F.R. § 214.2(h)(14) states, in pertinent part, "A request for a petition extension may be filed only if the validity of the original petition has not expired."

Counsel noted that he originally attempted to file the visa petition on June 26, 2009, prior to the expiration of the beneficiary's H-1B visa status, but that it was rejected as incomplete. Counsel asserted that this was due to no fault on the part of the petitioner or the beneficiary, and that, pursuant to 8 C.F.R. § 214.1(c)(4), USCIS has discretion to approve a petition under these circumstances.

An "extension of stay" is not synonymous with an extension of H-1B status, which occurs through a "petition extension." Although those seeking H-1B status are currently permitted to file one form to request a petition extension and extension of stay they are separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). In addition, 8 C.F.R. § 214.2(h)(15)(i) specifically states that, "[e]ven though the requests to extend the petition and the aliens stay are combined on the petition, the director shall make a separate determination on each."

The language of 8 C.F.R. § 214.2(h)(14) makes explicit that it deals only with H-1B petition extensions, whereas the language of 8 C.F.R. § 214.1(c)(4) makes equally clear that it relates solely to extension of stay requests.

Not only does 8 C.F.R. § 214.2(h)(14), which applies in the instant case, make no distinction between the errors of counsel and the errors of the petitioner or the beneficiary, it provides for no exceptions whatsoever to the requirement that a request for petition extension may be filed only if the validity of the original petition has not expired.

As the request for petition extension in this matter was filed after the validity of the beneficiary's previously approved H-1B visa petition had expired, the instant visa petition should have been rejected. This is sufficient reason, in itself, to dismiss the appeal and to deny the visa petition. Nevertheless, the AAO will address whether the beneficiary would have been entitled to an extension of his authorized admission if the visa petition had been timely submitted.

The record shows that the beneficiary was present in the United States in H-1B status from September 3, 2003 to June 27, 2006 and from Jun 28, 2006 to June 27, 2009. During this time, the petitioner filed a Form ETA 750 Application for Alien Employment Certification on behalf of the beneficiary. The petitioner also filed a Form I-140 on the beneficiary's behalf on October 12, 2005, and that petition was approved on April 19, 2006.

The beneficiary then filed an I-485 Application to Adjust Status on June 30, 2008. That application was denied on May 4, 2009.

Section 214(g)(4) of the Act, 8 U.S.C. §1184(g)(4) provides that, in general: “[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years.” However, the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (21<sup>st</sup> Century DOJ Appropriations Act), removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030A(a) of DOJ21, § 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act* (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since *the filing of any of the following*:

(1) *Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).*

(2) *A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.*

Section 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

*(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;*

*(2) to deny the petition described in subsection (a)(2); or*

*(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.*

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

On appeal, counsel argued that the beneficiary is still eligible for extensions of his H-1B status because the I-140 remains approved. However, § 106(b)(3) of AC21 makes clear that such an extension was no longer available to the beneficiary after the denial of the beneficiary's application for adjustment of status. The beneficiary was eligible for one-year extensions of his H-1B status until such time as his application for adjustment of status was denied on June 30, 2008. The director correctly found that the beneficiary is no longer eligible for such extensions. The appeal will be dismissed and the visa petition will be denied on this additional basis.

The record suggests additional issues that were not addressed in the decision of denial. The AAO will next address the issue of whether the proffered position qualifies as a position in a specialty occupation.

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 employ 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.

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 a particular position 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 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.

In a letter dated June 25, 2009, and provided with the visa petition, the petitioner's president stated:

The duties of [the proffered position] are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a Bachelor's degree in Business Administration, Accounting, or a closely[-]related field.

Initially, the AAO observes that the petitioner provided no evidence or argument for the proposition that business administration and accounting are so closely related that they should be regarded as a single, specific specialty. Without pertinent evidence or argument, the alternative requirement of either of a bachelor's degree in either of two different subjects would not be a requirement of a minimum of a bachelor's degree or the equivalent *in a specific specialty*.

Further, the AAO observes that, even if the proffered position required an undifferentiated bachelor's degree in business administration, without any alternatives, that would be insufficient to qualify it as a specialty occupation position. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

The petitioner's president has stated that an otherwise undifferentiated bachelor's degree in business administration is a sufficient educational qualification for the proffered position. This is tantamount to conceding that it does not require a minimum of a bachelor's degree or the equivalent in a specific specialty and does not, therefore, qualify as a position in a specialty occupation. The visa petition will be denied on this additional basis.

Another issue suggested by the record is whether, if the proffered position were demonstrated to require a minimum of a bachelor's degree or the equivalent in a specific specialty and to qualify as a position in a specialty occupation, the beneficiary would be qualified for the job.

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.

A college transcript in the record shows that the beneficiary attended two years of classes at [REDACTED] majoring in property management. On his résumé, the beneficiary characterized this as graduation from a three-year course in property management.

The record contains an Evaluation Report, dated May 30, 2003, prepared by a credential evaluator at an evaluation service. As to the beneficiary's college transcript, that evaluation states:

This document is equivalent to two years of university level credit in business and property management from an accredited community college in the United States.

That evaluation further states that the beneficiary's education, taken together with his employment experience, equates to a bachelor's degree with a specialization in property management awarded by a U.S. institution.

The record does not indicate that the beneficiary earned a bachelor's degree of any type in the United States. The beneficiary is not qualified for the proffered position pursuant to the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). The evaluation provided indicates that the beneficiary's foreign education is equivalent to two years of college credit in the United States. The beneficiary's foreign education has not, therefore, been demonstrated to be equivalent, in itself, to a U.S. bachelor's degree. Thus the beneficiary does not satisfy the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). Although the beneficiary's résumé indicates that he has a real estate license, the record contains no evidence that licensure is required for association administrator positions, and that such licensure would be for a specialty occupation position. Thus, even if association administrator positions were demonstrably specialty occupation positions, the beneficiary would not have been shown to satisfy the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(C)(3).

Because the beneficiary has not been shown to qualify for the proffered position pursuant to any of the other subsections of 8 C.F.R. § 214.2(h)(4)(iii)(C), in order to show that the beneficiary is qualified for the proffered position, the petitioner is obliged to demonstrate that the beneficiary satisfies the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;<sup>1</sup>
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The record contains no evidence pertinent to recognized college-level equivalency examinations. The beneficiary does not, therefore, satisfy the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(D)(2). The record does not contain an evaluation equating the beneficiary's education alone to a U.S. bachelor's degree. The beneficiary does not, therefore, satisfy the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). The record contains no evidence pertinent to certification or registration from a recognized professional association of association administrators. Thus, the beneficiary has not demonstrated that he qualifies for the proffered position by the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(D)(4). USCIS has not determined that the beneficiary has acquired the equivalent of a required bachelor's degree through a combination of education, training, and/or experience. The beneficiary has not, therefore, been shown to qualify for the proffered position pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The petitioner is obliged, therefore, to demonstrate that the beneficiary qualifies for the proffered position pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

The résumé of the evaluator who prepared the May 30, 2003 evaluation of the beneficiary's credentials indicates that she has a bachelor's degree in Canadian-American Studies and worked as a credential evaluator for [REDACTED] during 1997 and 1998. The record contains no evidence that she has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. As such, the evaluation provided cannot satisfy the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

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<sup>1</sup> The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

The petitioner has not satisfied any of the alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C), and has not, therefore, demonstrated that if the proffered position required a minimum of a bachelor's degree or the equivalent in a specific specialty, the beneficiary would be qualified for the proffered position. 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 (9<sup>th</sup> 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 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