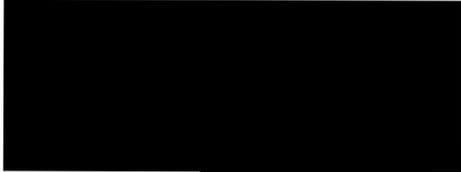


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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **OCT 02 2006**

WAC 03 055 52649

IN RE:

Petitioner:



Beneficiary:

PETITION:

Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The matter before the Administrative Appeals Office (AAO) is the appeal of the service center director's decision to revoke approval of the nonimmigrant visa petition that the petitioner had filed on behalf of the beneficiary. In a decision dated April 1, 2005, the AAO summarily dismissed the petitioner's appeal of the director's decision. The AAO now reopens the proceeding on its own motion, and it withdraws its previous decision, in order to consider the merits of the appeal. The appeal will be dismissed, and approval of the petition will be revoked.

The subject of the appeal is the director's revocation of the approval that the service center had granted to a petition to employ the beneficiary as an industrial engineer, 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), which pertains to temporary employment of nonimmigrant workers in positions that qualify as a specialty occupations as defined by section 101(a)(15)(H)(i)(b) of the Act and its implementing regulations.

The director of the service center approved the subject petition on December 20, 2002. On January 30, 2004, the director of the service center issued a Notice of Intent to Revoke (NOIR), to which counsel filed a timely reply. On March 4, 2004, the director issued the decision to revoke approval of the petition.

Counsel filed a timely Form I-290B (Notice of Appeal) which included counsel's election, by checkmark at section 2 of the form, to file a brief and/or additional evidence with the AAO within 30 days. Subsequently, the AAO summarily dismissed the petitioner's appeal, noting that the AAO had received no documents pursuant to counsel's election to supplement the record. Upon notice of the AAO's summary dismissal of the appeal, counsel submitted convincing evidence that he had timely filed documentary evidence in accordance with his election on the Form I-290B, but that the documents had been mistakenly returned to counsel by the AAO's administrative staff. Counsel also resubmitted the documents, and the AAO has included them in the record of proceeding. The AAO mailed a letter of notification to the petitioner that it was reopening the proceeding, on its own motion, to consider the matters that the petitioner had submitted on appeal. The notification letter also afforded the petitioner the opportunity to submit an additional brief within 30 days. As the 30-day period has expired without receipt of an additional brief, the AAO deems the record of proceeding complete and ready for reconsideration of the appeal on the basis of the record of proceeding as expanded to include the brief and allied documents that were submitted on appeal.

As discussed below, the AAO finds, first, that the director complied with the procedural requirements established by Citizenship and Immigration services (CIS) for revocation of approval of a non-immigrant worker petition, and, second, that the director's decision to revoke approval of the petition was correct. Therefore, the appeal will be dismissed, and approval of the petition will be revoked. The AAO bases these determinations upon its consideration of the entire record of proceeding, including: (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and supporting documentation; (2) the documentation regarding the approval of the petition; (3) the NOIR; (4) the materials submitted in response to the NOIR; (5) the director's notification of his decision to revoke approval of the petition; and (5) the Form I-290B, counsel's brief on appeal, and the documents submitted with the brief.

The regulation that governs revocation of H-1B petitions is published at 8 C.F.R. § 214.2(h)(11). The particular section that pertains here, *Revocation on notice*, at 8 C.F.R. § 214.2(h)(11)(iii), provides that the director may revoke approval of a petition on certain specified grounds, provided that the petitioner has been given notice of the grounds of the intended revocation and 30 days to respond. The AAO finds that the director complied with the notice requirement of subsection (A) of this regulation, which identifies the

particular grounds for revocation. This subsection states that the director shall send the petitioner a NOIR if the director finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition;
or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

Subsection (B) of 8 C.F.R. § 214.2(h)(11)(iii), *Notice and decision*, states that the director's NOIR shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal.

The AAO finds that the content of the NOIR gave adequate notice that the director intended to revoke the petition under sections (2) and (5) of 8 C.F.R. § 214.2(h)(11)(iii)(A) above, that is, on the grounds that the petitioner had provided incorrect and untrue information that was material to the approval of the petition, and that approval of the petition violated paragraph h of 8 C.F.R. § 214.2 because the petitioner had not established that the proffered position satisfies any specialty occupation criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The NOIR also properly notified the petitioner of its right to submit evidence and arguments within 30 days.

The AAO will next evaluate the merits of the director's decision to revoke the approval that had been issued for this particular petition. This assessment will include the application of the following statutory and regulatory standards to the entire body of evidence in the record of proceeding, including the materials submitted in response to the NOIR and on 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.

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.

Consonant 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. (Italics added.)

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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.

CIS has consistently interpreted 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 and closely related to the proffered position. Applying this standard, CIS 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 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title or generalized descriptions of duties. CIS must examine the ultimate on-the-job employment of the alien to determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). CIS concentrates primarily upon the record's evidence about specific duties that the beneficiary would perform, the nature of the petitioning entity's business operations, the specific aspects of those operations that would occupy the beneficiary, and the specialized knowledge that the beneficiary would have to apply. CIS must determine whether the evidence establishes that performance of the specific duties that comprise the position actually requires the theoretical and practical application of a

body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. What the record reveals about the nature of the specific duties and the knowledge required to perform them is decisive. A position's title is not persuasive, nor are an employer's hiring standards that exceed the educational level shown to be required by the specific duties.

The AAO finds that the evidence of record supports the director's decision to revoke the approval that had been granted to the petition. As evident in the discussion below, in reviewing the record of proceeding the AAO discerned that some of the matters that the director specified in the NOIR and the revocation decision were irrelevant or did not pertain to the record of this particular proceeding. Having discounted these matters, however, the AAO finds that the record supports revocation of the approval of the petition on the ground that the evidence of record does not establish that the beneficiary would perform the specialty occupation for which the petition was filed and approved. As this ground was encompassed by the NOIR and not overcome by any of the submissions in response to the NOIR or on appeal, the appeal will be dismissed, and the approval of the petition will be revoked.

In the instant proceeding, the approved H-1B petition was filed by [REDACTED] a construction and remodeling company, in order to employ the beneficiary, [REDACTED], as an industrial engineer. The record reflects the following facts. Prior to the filing of the instant petition, the director had approved an H-1B petition that the instant petitioner had filed to employ a different beneficiary as an industrial engineer. Prior to issuing the NOIR in the instant case, the director had issued a NOIR with regard to the petition that had been approved for that other beneficiary to serve as an industrial engineer. At the time of the filing of the instant petition, the beneficiary of the earlier approved petition was employed by the petitioner in a position with the same title – industrial engineer – that the petitioner assigned to the position that is the subject of the instant proceeding.

In the petitioner's November 8, 2002 letter of support filed with the instant proceeding's Form I-129, the petitioner described itself as "an innovative general contracting firm" that "was established in 1987 with the primary objective of reconstruction and remodeling of both residential and commercial houses and buildings such as apartments, condominiums, office buildings, restaurants, shopping centers, warehouses and retail stores, etc." This letter stated that the petitioner employed five people and that its net profit for 2001 "had reached over \$95,000." The letter asserted the petitioner's expectation "to double our growth within the next three years" through its "innovative and collaborative approach in today's fast-track project." According to the letter, the petitioner needed an industrial engineer "to bridge between management goals and operational performances," and the position required a person with a bachelor's degree in industrial engineering and the ability to use "the related knowledge and skills in engineering and mathematics to achieve [the petitioner's] objectives." The petitioner further stated that the position required a person with "strong management skills in dealing with our clients," and he noted that the majority of the petitioner's clients are Chinese immigrants who came from China, Taiwan, or Hong Kong "to seek commercial and investment opportunities" and who have lived in the United States for over 20 years.

This support letter stated that the beneficiary's duties would include the following:

- (1) Determine cost[-]effective ways to use machines, materials, and financial resources to produce products and provide services for [the petitioner's] Chinese speaking clients and customers

- (2) Consult with other management staff to determine and create methods and procedures of business operation to increase productivity
- (3) Study various project requirements to resolve organizational, production, and related business operational issues
- (4) Apply engineering and mathematical methods to manufacturing and information system design
- (5) Develop management control systems, design production planning and control systems to coordinate activities and control production quality and cost[,] including designing or improving systems for the physical distribution of goods and services, and communicate with executive staff to develop wage and salary administration systems and job evaluation programs
- (6) Travel to China to study and examine new equipment and products that our company intends to purchase as well as to develop business opportunities for our company

It appears that the director decided to reevaluate the evidence in support of the approved petition because CIS received a report from the U.S. consulate at Chengdu, China to the effect that, in the words of the NOIR: "The beneficiary was interviewed at the consulate at Chengdu, China, and was unable to explain his duties with the petitioner." The director's revocation decision states that CIS "is in possession of a report issued by the U[.]S[.] consulate at Chengdu, China relating to that interview." However, the record contains no copy or summary of the interview.

The core of the NOIR that the director issued to the petitioner consists of: (1) a listing of the specialty-occupation qualifying criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A); (2) a summation of the industrial engineer duties presented by the petitioner; and (3) a listing of evidence in the record that the director found inconsistent with an industrial engineer position.

Verbatim below is the paragraph that the NOIR presented as the petitioner's description of the duties proposed for the beneficiary:

Determine the most effective way to use machines, material information, and financial resources to make product to provide service to our projects. Coordinate with management and design staff to create methods and procedures for business operation in order to increase productivity. Organize projects and their requirements and resolve organizational production and related business operational issues. Using engineering and mathematical tools to set up manufacturing and information systems. Develop management control systems, design production planning and control systems to coordinate activities and control product quality and cost including designing or improving systems for the physical distribution of material and services, and assist the executive staff to develop compensation and salary administrative systems and performance evaluation programs.¹

¹ The reply to the NOIR did not dispute the accuracy of this summary of the beneficiary's duties as presented in the petition.

The following paragraphs of the NOIR identified the grounds for the director's intention to revoke the approval of the petition:

These proposed duties must be weighed against the known facts about the business. The petitioner submitted their [sic] 2001 tax return. The tax return show[s] that no wages were paid so there is no executive staff or design staff. A search of public records shows that the petitioner is licensed as a general building contractor. Therefore, the projects that they refer to would be remodeling projects. The physical distribution of materials and services would involve moving construction materials to the work site. The only machines that the petitioner would use are basic construction tools.

The proposed duties do not make sense in light of the petitioner's business. The petitioner has no need for an industrial engineer. It appears that the beneficiary would be performing general construction duties. It is also noted that the petitioner petitioned for two industrial engineers, both of which are relatives of the petitioner. The beneficiary was interviewed at the consulate [at] Chengdu, China and was unable to explain his duties with the petitioner. It appears that the positions were created merely to circumvent immigration laws and bring relatives to the United States.

The petitioner's reply to the NOIR has three components: (1) a February 27, 2004 letter from counsel; (2) a copy of the NOIR in the instant case; and (3) a copy of the documents that constituted the response that the petitioner had submitted in response to the earlier NOIR that the director had issued concerning the H-1B petition that had been approved for the person holding the petitioner's industrial engineer position when the instant petition was filed. Counsel's letter submitted the petitioner's response to the NOIR on the earlier petition as the reply to the NOIR in the instant proceeding. Counsel states that the petition that is at issue in the instant proceeding here was filed in order to secure a replacement for the previous beneficiary who "is contemplating a change of employer." In requesting consideration of the NOIR documents from the other proceeding, counsel asserted that "both cases involve the same employer for a similar position." Counsel also stated:

The reason for the employer to submit the second H-1B petition for the similar position is because the beneficiary in the first petition is contemplating a change of employer. The petitioner's business requires a continuation of the service of the position petitioned for and any interruption will be detrimental to its business. Therefore, the petitioner, in a pre-cautious manner and also due to the continuous growth of its business, submitted the second H-1B petition, which was reviewed by your Center more than a year ago . . .

Accordingly, the AAO incorporates the NOIR response on the previous petition into the NOIR response on the instant petition.

As discussed below, the AAO finds that some of the grounds specified in the NOIR and in the revocation decision are invalid, because either irrelevant or not supported by the record. However, the evidence of record does support revocation on a valid ground identified both in the director's decision and earlier in the NOIR, namely, that the evidence of record does not establish that the beneficiary would actually perform the work of an industrial engineer. This ground is most distinctly stated in these sentences in both the director's revocation decision and the NOIR:

The proposed duties do not make sense in light of the petitioner's business. The petitioner has no need for an industrial engineer. It appears that the beneficiary would be performing general construction duties. It is also noted that the petitioner petitioned for two industrial engineers . . .

The AAO will now separately address the petitioner's response to each NOIR assertion about the lack of factual support for the proffered position as a specialty occupation. In order of appearance in the NOIR, these assertions are to the effect that: (1) contrary to the information provided in the petition, the petitioner's 2001 tax return indicates that the petitioner has no executive staff or design staff with whom the beneficiary would coordinate; (2) as the petitioner is a licensed building contractor, the only projects in which it would employ the beneficiary would be remodeling projects; (3) the beneficiary's involvement with the distribution of materials and services would be limited to moving construction materials to construction worksites; (3) the only machines with which the beneficiary would be involved are basic construction tools; (4) the duties that the petition describes for the beneficiary are inconsistent with the petitioner's business; (5) the petitioner had already an approved H-1B petition for the position that is the subject of the instant petition; (6) the beneficiary was unable to explain the proposed duties to the counselor officer who interviewed him at the U.S. consulate in Ghendu, China; and (7) the proffered position is a subterfuge for circumventing immigration laws in order to bring a relative to the United States.

The NOIR statement to the effect that the petition falsely stated that the beneficiary's duties would include coordination with executive staff and design staff is not supported by the record of this proceeding. The first mention of "executive staff and design staff" is by the director in the NOIR. Therefore, any adverse determinations based upon assertions purportedly made by the petitioner about work with executive and design staff are invalid, and may not be used to support a decision to revoke approval of the petition.²

The NOIR response documents, particularly the information about the petitioner's agreement to construct homes for Ariel Development Group XXI, effectively rebut the NOIR statements to the effect that the beneficiary would only be working on remodeling projects. The reply evidence is sufficient to establish that the petitioner engages in residential and light commercial new construction, as well as remodeling or renovation projects. Therefore, the director's determination that that the beneficiary would only work on remodeling projects has been overcome and may not be used to support revocation.

The AAO notes that the petitioner's NOIR reply in this proceeding did not address the director's assertion that, in an interview at the consulate at Chengdu, China, "the beneficiary was unable to explain his duties with the petitioner."³ However, this fact is of no consequence to the validity of the petition: neither the specialty occupation status of a proffered position nor a beneficiary's qualification to serve in such a position is dependent on the ability of a beneficiary to describe the position's duties. Therefore, even if established, the

² The AAO notes that the NOIR's summary of the proposed duties differs in some details from the descriptions in instant record of proceedings, and that the director may have confused the duty descriptions of this petition with those used in the earlier petition that had been filed for the instant beneficiary's relative. It is also noted that the first paragraph of the instant decision refers to that relative, [REDACTED]. However, the duties stated in the instant NOIR do generally comport with those found the record of the instant proceeding and provided the petitioner with fair and adequate notice of the grounds for the contemplated revocation.

³ The NOIR reply which the petitioner submitted from the proceeding on the earlier petition filed for the industrial engineer position is not relevant. That reply addressed this issue only with regard to the beneficiary in that separate proceeding.

beneficiary's inability to describe the duties of a position in which he is not yet serving would not be probative and would not serve as a proper basis for revocation.⁴

In the NOIR the director correctly noted that the petitioner "petitioned for two industrial engineers, both of whom are relatives of the petitioner." However, the director also commented that "it appears" that the petitioner "created" both of these positions "merely to circumvent immigration laws and bring relatives to the United States." The AAO concurs with counsel that the beneficiary's relationship to the petitioner is not material to the merits of the petition. Therefore, the AAO accords no evidentiary value to the family relationships evident in this proceeding. Further, the AAO finds that there is insufficient evidence in the record to establish the validity of the director's conclusion about the petitioner's motivations with regard to the instant petition, namely, the petitioner submitted it to circumvent immigration laws.

However, the director's reference to the fact that the petitioner had already petitioned for an industrial engineer is a legitimate comment about the apparent lack of a need to fill the position. The AAO finds that the evidence submitted in the NOIR reply does not substantiate the counsel's assertion that the present petition was filed because of business growth and a contemplated change of job by the incumbent in the industrial engineer 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's response did not overcome the NOIR assertion to the effect that, contrary to information presented in the petition, the petitioner's business does not require – and the beneficiary therefore would not perform – the services of an industrial engineer for manufacturing, the movement of materials, or any other purpose. The pertinent NOIR assertion is contained in the following NOIR statements read in the context of the summary of the petitioner's duty descriptions that preceded them in the NOIR:

[A] search of public records shows that the petitioner is licensed as a general building contractor. Therefore the projects that they refer to would involve moving construction materials to the work site. The only machines that the petitioner would use are basic construction tools. . . .

The proposed duties do not make sense in light of the petitioner's business. The petitioner has no need for an industrial engineer. It appears that the beneficiary would be performing general construction duties. . . . It is also noted that the petitioner petitioned for two industrial engineers . . .

⁴ Counsel, in his brief on appeal, and the director, in his revocation decision, each appear to mistakenly identify the information in the earlier NOIR response about the consulate interview as applying to the beneficiary in the instant petition.

The contention in the NOIR response that the beneficiary would be working as an industrial engineer is unsubstantiated by the evidence of record.

By adopting the NOIR response that had been filed with regard to the earlier approved industrial engineer petition, the petitioner asserted that the beneficiary in the instant proceeding "has been hired as an industrial engineer" and that "[p]art of his job duties is to determine the most effective way to use machines, material information, and financial resources for our construction and remodeling projects; to design production planning and control systems for project quality and cost involved." By adoption of the previous NOIR and its exhibits, the petitioner also asserted that the increase in its net sales and gross income and the examples in the record of its present industrial engineer's work products demonstrate that the petitioner has fruitfully employed and requires the skills of an industrial engineer. However, the documents submitted as examples of the type of work that would engage the beneficiary do not demonstrate a need for at least a bachelor's degree, or its equivalent, in industrial engineering or a related specialty.

Submitted as evidence of the work that the beneficiary would perform are the following documents that the previous NOIR reply identified as the work product of its present industrial engineer: (1) "Decision Support System (DSS)" documents consisting of three pages of what appear to be computer input-selection screens, a table entitled "DSS - earth Moving Equipment Selection Alternatives," and a one-page "DSS-Earth Moving Equipment Selection Report"; (2) sixteen pages of a document entitled "Productivity Analysis Project Report" that includes a table of contents and one or more pages of tables, diagrams, or graphs concerning topics such as "Data Analysis," "One Minute Crew Rating," "Field Rating," "Crew Balance Sheet," "Analysis Results," "Productivity Analysis Result," and "Learning Curve"; and (3) a 23-page document entitled "Cost Estimate for the Han Residence Project," which includes tables, spreadsheets, and diagrams concerning topics such as "Schedule of Price/Construction Cost Estimating"; "Construction Cost Summary"; "Recapitulation of Person-Hours/Construction Cost Estimating"; "Labor Cost"; "Excavation"; "Concrete"; "Masonry"; "Structural"; "Thermal Protection"; "Window and Door"; "Roofing"; "Drywall and Wetwall"; "Finishing"; "Mechanical, Electrical, and Plumbing"; "General Cost"; and "Overhead and Profit."

It is not evident that any of the documentary examples of the incumbent industrial engineer's work involved the application of at least a bachelor's degree level of knowledge in industrial engineering or any other specialty, as required to be probative of a specialty occupation. The documents in the record do not manifest that they are the product of calculations, analysis, or theoretical and practical applications at a bachelor's degree level of any specific specialty. Also, based upon the configuration of the forms that the NOIR reply included as examples of the type of work product expected from the beneficiary, it is a fair inference that computers would be involved; but the record does not indicate the extent to which off-the-shelf computer software programs, rather than original calculations by the beneficiary would be employed. Further, not only is it not self-evident that the production of any of the work products submitted in the NOIR response required at least a bachelor's degree in any specialty, but also the record contains no independent evidence that the calculations behind those work products involved the application of a level of highly specialized knowledge that would require at least a bachelor's degree level of knowledge in industrial engineering or any other specialty.

The AAO further notes that the record describes the proposed duties in exclusively generic terms that convey only generalized functions, such as "Determin[ing] the most effective ways to use machines . . . to make product"; "Organiz[ing] projects and their requirements"; "resolv[ing] organizational, production, and related business operation issues"; and "design[ing] production planning." The duty descriptions do not convey

substantive work that the beneficiary would actually perform, and, consequently, they do not show that actual work performance requires the application of the bachelor's degree level of highly specialized knowledge in industrial engineering as asserted by the petitioner. The AAO also notes that the record is devoid of independent evidence that establishes that the actual performance of the duties so broadly and abstractly described require the theoretical and practical application of at least a baccalaureate degree's level of highly specialized knowledge in a particular specialty, as required by statute and for satisfaction of any of the specialty occupation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO also notes that the petitioner's claim that the work product documents were developed by the incumbent industrial engineer is inconsistent with other information in the record. The cover page of the "Cost Estimate for the Hans Residence Project" identifies the incumbent industrial engineer beneficiary as producing that document as "Project Manager," whereas the NOIR response and the organizational chart included with it identifies the petitioner's project manager position as distinct from the industrial engineer position and as manned by a different person than the one in the industrial engineer slot. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO finds that the evidence submitted in response to the NOIR did not effectively rebut the assertions in the NOIR that the proposed duties "do not make sense in light of the petitioner's business," that the petitioner "has no need for an industrial engineer," that "[i]t appears that the beneficiary would be performing general construction duties."

After consideration of the petitioner's response to the NOIR, the director issued his decision to revoke approval of the petition. The director determined, in part, that that the director's assertions had not been overcome, and also that the evidence of record after the NOIR response indicates that the proffered position is that of a non-specialty-occupation construction manager. In part, quoting from the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director stated, that "the beneficiary's stated duties may be considered similar to that of a construction manager," and that the *Handbook* indicates that "although a baccalaureate level of training is increasingly preferred[,] it is not a normal, industry-wide minimum requirement for entry into the occupation." The director concluded the decision as follows:

The petitioner has not submitted sufficient evidence in rebuttal to the USCIS's [NOIR] and has not overcome the grounds for revocation. Therefore, as of this date, the petition is revoked.

Since the director's decision found that petitioner's response to the NOIR overcame none of its assertions, the issue now is whether the appeal has overcome those specific assertions that, earlier in this decision, the AAO recognized as relevant to the instant record, appropriate to evaluation of the merits of a petition, and not overcome by the response to the NOIR. These assertions - all of which were stated among the director's grounds in the decision to revoke approval of the petition - are that the proposed duties "do not make sense in light of the petitioner's business," that the petitioner "has no need for an industrial engineer," and that "[i]t appears that the beneficiary would be performing general construction duties." On appeal neither counsel nor the petitioner presented additional documentary evidence to overcome these assertions.

Counsel contends that the evidence of record establishes that “the duties of this position are so complex, unique, and specialized that it can be performed only by a professional with college training [in] engineering or construction.” However, as reflected in the earlier discussion about the generic and generalized nature of the duty descriptions, the petitioner has not provided sufficient information to show such complexity, uniqueness, or specialization. The AAO again notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof, and the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena; Matter of Laureano; Matter of Ramirez-Sanchez.*

Although not a decisive factor in its decision, the AAO has taken note of the apparent inconsistency between the petitioner’s business as evidenced in the record and the duty descriptions submitted in support of the petition that attested the proffered position would include manufacturing and the production of products. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho.*

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. Accordingly, the appeal will be dismissed, and the approval of the petition will be revoked.

ORDER: The previous decision of the AAO, dated April 1, 2005, is withdrawn. The appeal is dismissed. The approval of the petition is revoked.