U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 05 216 50818 Office: CALIFORNIA SERVICE CENTER Date: JUL 02 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

Michael T. Kelley
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a solar electric contracting company that seeks to employ the beneficiary as a programmer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on two grounds: (1) that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) that the petitioner had failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. On appeal, counsel contends that the director erred in denying the petition.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; and (3) the Form I-290B and supporting documentation. The record also contains the records of proceeding of the two previous petitions filed by the petitioner for this beneficiary: WAC 02 253 52405, filed August 7, 2002 (hereinafter "Petition A"); and WAC 04 053 50192 (hereinafter "Petition B"), filed December 16, 2003. The AAO reviewed the record in its entirety before issuing its decision.

The instant petition is the third H-1B petition that the petitioner has filed for this beneficiary and, due to the lengthy record before it, and the fact that the deficiencies and inconsistencies of the prior petitions are also present in this petition, the AAO finds useful a review of the procedural history of the prior petitions.

I. Petition A: WAC 02 253 52405

The petitioner filed Petition A on August 7, 2002.[1] The position proposed by the petitioner in that petition for the beneficiary was a "computer aided design specialist." The petitioner reported that it had four employees and "variable" gross and net annual incomes. The petition was approved on October 19, 2002 (with validity from October 17, 2002 through September 21, 2005), and the beneficiary appeared at the United States consulate in Sofia, Bulgaria on October 28, 2002 for a visa interview.

However, during the course of the interview concerns arose regarding the beneficiary's qualifications to perform the duties proposed for her. In his January 22, 2003 notice of intent to revoke (NOIR) approval of the petition, the director relayed the concerns of the consular officer to the petitioner as follows:

> [The beneficiary] currently works as a "technical secretary" at a construction firm. Although [the beneficiary] has a degree in Information Technology, her grade point average at her university was below average and her study did not focus on advanced computer programming topics. During the course of the interview, an embassy computer specialist asked [the beneficiary] questions related to computer design and programming. It emerged

[1] The AAO notes that, on the Forms I-129 for Petitions A and C, the petitioner stated that it was established in 1994 (this field was not completed in Petition B). However, on the tax returns for 2001, 2002, 2003, and 2004, the petitioner told the Internal Revenue Service that it had been in business since 1991.

> that [the beneficiary] has little computer knowledge and is primarily responsible only for data entry at her current job.
>
> The consular officer does not believe that [the beneficiary] possesses the work or educational background necessary to qualify for the position. Instead, the consular officer believes that the petition has been submitted for the sole purpose of facilitating her entrance into the U.S. Further, the consular officer suspects that the proffered job duties may not exist, because the petition comes from a company whose manager and partner recently expressed interest in obtaining a visa for a nanny.

The director stated his intention to revoke approval of the petition, and provided the petitioner 30 days during which to submit countervailing evidence.

The petitioner's response to the director's NOIR was dated February 19, 2003. Regarding the existence of a specialty occupation position for the beneficiary to fill, the petitioner's general managing partner responded that it had been engaged in the applied research and product development of energy converters since 1994, and that it was in the advanced phase of prototype development and testing of a thermal solar electric generator. The petitioner stated that it had four employees on June 30, 2002, but by December 31, 2002 had expanded to nine employees—of whom three held Ph.D. degrees, one held an M.S. degree, and one held a B.S. degree.

Regarding the beneficiary's qualifications to perform the duties proposed for her, the petitioner's general managing partner stated that the beneficiary earned a degree in computer systems engineering, through the completion of a five-year curriculum at Technical University, located in Sofia, Bulgaria. He also stated that the beneficiary had completed postgraduate studies, successfully defended a thesis, and been conferred the degree "Magister of Computer Systems and Information Technologies." The petitioner's general managing partner also expressed his own satisfaction that the beneficiary was qualified to perform the duties of the proposed position, and that she held the equivalent of a master's degree in computer science engineering. Finally, the petitioner included a printout of an e-mail from an individual referenced by the petitioner's general managing partner as a professor in the computer science department at the University of Chicago, which stated that the beneficiary's degree was not equivalent to a bachelor's degree in computer science, but rather to a master's degree in electrical engineering or computer science engineering.

The director revoked approval of the petition on May 20, 2003, finding that the petitioner had failed to establish the proposed position as a specialty occupation under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or overcome any of the consular officer's concerns regarding the beneficiary's qualifications to perform the duties of the proposed position. The director expressly discounted the petitioner's general managing partner's opinion regarding the beneficiary's educational qualifications.

The petitioner filed the Form I-290B, with supporting evidence, on June 19, 2003. In addition to a June 18, 2003 letter written by its general managing partner, the petitioner also submitted a June 5, 2003 evaluation of the beneficiary's educational credentials.

In its February 3, 2004 decision, the AAO dismissed the petitioner's appeal, affirming the director's revocation of the petition's approval. Although the details of the AAO's decision need not be repeated, the AAO does note that it expressly rejected the new evaluation submitted on appeal as deficient.

The AAO made its determination that, independent of the assertions made by the consular official, the proposed position did not qualify for classification as a specialty occupation and that the beneficiary did not qualify to perform the duties of a specialty occupation:

> The fact most important to the appeal is that, even if all the consular information in the notice were discounted, the evidence in the record is not sufficient to establish that the petition was properly approved.

Accordingly, the director's revocation of Petition A's approval was affirmed.

II. Petition B: WAC 04 053 50192

The petitioner filed Petition B on December 16, 2003, while Petition A was still pending at the AAO.[2] The position proposed by the petitioner in the petition for the beneficiary was again a "computer aided design specialist." The petitioner reported that it had nine employees and "variable" gross and net annual incomes.

The director issued a request for additional evidence on December 24, 2003 and requested, among other items, the following: original copies of the beneficiary's school transcripts; a foreign educational credentials evaluation, which was to provide a detailed description of the material evaluated and not just provide conclusions; copies of the petitioner's Forms DE-6 for the previous four quarters; a copy of the petitioner's payroll summary; copies of the petitioner's current valid city, county, state, and federal business licenses; color photographs of the inside and outside of the petitioner's business premises; a complete copy of the petitioner's lease agreement; and a copy of the petitioner's telephone directory listing. The petitioner provided none of these items, and offered no explanation for its failure to do so.

The director denied Petition B on June 14, 2004. The director noted that although the petitioner submitted copies of its income tax returns from 2001 and 2002, those returns demonstrated that it did not pay any wages or compensation to any of its employees or officers. The director noted that, pursuant to a review of public records of the address of intended employment, it appeared as though the petitioner's business premises are actually a single-family residence owned by the petitioner's general managing partner.

Citing to *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), the director stated that 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. Regarding the petitioner's failure to submit the requested items referenced in the previous paragraph, the director cited to 8 C.F.R. § 103.2(b)(14), which states that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

The director then found that the petitioner had failed to establish the proposed position as a specialty occupation. The director found the petitioner's description of the proposed position to be generalized in nature, lacking in detail, and providing no context as to the beneficiary's role in the petitioner's organization. As such, the director concluded that the position was not a specialty occupation.

Finally, the director found the beneficiary unqualified to perform the duties of a specialty occupation (discounting a submitted evaluation). The director found that there was insufficient evidence to conclude that

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[2] The AAO notes that, on the Form I-129 submitted with Petition B, the petitioner did not disclose that the beneficiary had been previously denied H-1B classification, as is required.

the beneficiary's education in Bulgaria was equivalent to a bachelor's degree, or its equivalent, from an accredited institution of higher education in the United States.

The director also discounted the foreign language translations contained in the record, noting that the petitioner's general managing partner had performed them.[3] The director stated that, given the inconsistencies contained in the record, CIS questioned the authenticity of those translations. The director also noted that the translations performed by the petitioner's general managing partner lacked the requisite attestations to certify that he was competent to provide such a translation.

III. Petition C: WAC 05 216 50818

Petition C, the instant petition, was received at the service center on July 29, 2005. The petitioner now proposes to employ the beneficiary as a programmer. The petitioner reports that it has four partners and no employees. In the field at page 3 of the Form I-129 requesting the petitioner's financial information, the field requesting the petitioner's gross annual income is marked "Fully funded start-up," and the field requesting the petitioner's net annual income is marked "N/A."

According to the petitioner's July 6, 2005 letter of support, it is presently working on a prototype of a thermal solar generator. The petitioner stated that a need for a programmer has arisen within the company, and that it has offered the position to the beneficiary. According to this letter of support, the duties of the proposed position will include designing, developing, and writing computer programs that will allow the petitioner to input existing hard-copy engineering designs into the computer in order to display the prototype(s) and the associated parameters in three-dimensional space; resolving symbolic formulations and encoding the resultant equations for processing, applying her knowledge of engineering and the computer's limitations; designing computer simulation programs that will provide the engineers and other interested personnel with the ability to determine the effect on the design and the design's output as a result of changing existing parameters, which will then be designed to test the feasibility of the design; reviewing the results of her computer runs with the appropriate individuals to determine the necessity for modifications, their effect, and the need to perform reruns; developing subroutines; and expanding the program so as to simplify statements, programming, or the coding of future problems.

Regarding the beneficiary's qualifications to perform the proposed duties, the petitioner submitted new translations of the beneficiary's foreign language documents (which were not performed by the petitioner's general managing partner) and a new evaluation, dated January 7, 2005, from Education International.

The director denied the petition on October 13, 2005 finding, as noted previously (1) that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) that the petitioner had failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. On appeal, counsel contends that the director erred in denying the petition.

The director did not issue a request for evidence prior to denying the petition. In his denial, he stated the following:

> Although, the actual job title has changed from a "Computer Aided Design Specialist" in Petitions A and B, to a "Programmer" in the current petition, the job duties are nearly

[3] The AAO notes that the petitioner's general managing partner also performed the translations of foreign language documents for Petition A.

> identical, to the point that it is clear that the job being offered in the same position as that offered previously. Therefore, USCIS has not requested further evidence in this petition as the petitioner has been given three previous opportunities in Petitions A and B to prove the position qualifies as a specialty occupation.

On appeal, counsel draws attention to the fact that the director did not issue a request for evidence. However, it is not clear what remedy, even if the AAO were to find that the director should have issued such a request, would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to once again supplement the record with new evidence.

Section 214(i)(1) of the Immigration and Nationality Act (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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> [A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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.

Citizenship and Immigration Services (CIS) 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 proposed position.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations. In reviewing the 2006-2007 edition of the *Handbook*, the AAO finds that the duties and responsibilities of the proposed position are encompassed within the *Handbook's* entry for computer programmers.

At page 105, the *Handbook* finds that there are many training paths available for computer programmers, and that some programmers may qualify for certain jobs with an associate's degree or its equivalent. It specifically notes that "[t]he associate degree is a widely used entry-level credential for prospective computer programmers." It does not that a bachelor's degree, or its foreign equivalent, is normally the minimum entry-level requirement for computer programmer positions.

The AAO will accord no weight to the information counsel submits from the *Dictionary of Occupational Titles* (*DOT*). The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The *DOT's* assessment (the SVP rating) is meant only to indicate the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and does not specify the particular type of degree, if any, that a position would require. Again, CIS 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 proposed position.

For all of these reasons, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. However, no evidence has been submitted to establish this criterion. Thus, the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) has not been established.

The second prong of this regulation requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The *Handbook* reveals that the duties of the proposed position are similar to those of a computer programmer as outlined in the *Handbook*, which does not require a baccalaureate degree or its equivalent as a minimum entry requirement. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner.

The record does not develop information about the proposed position and its duties with sufficient specificity and detail to demonstrate uniqueness, complexity, or specialization that would distinguish them from computer programming positions and attendant duties that neither require nor are associated with at least a baccalaureate degree in a specific specialty. Therefore, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, no evidence has been submitted to establish that the petitioner has required past applicants to possess a bachelor's degree, or its equivalent.

While the petitioner states that a degree is required, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether 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. To interpret the regulations in any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

The fourth criterion requires the petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. However, such a demonstration has not been made. Again, the AAO refers to the *Handbook* excerpts quoted previously in this decision, which state that a bachelor's degree in a specific specialty is not the normal minimum entry requirement for positions such as the one proposed here. The duties of the proposed position do not appear any more specialized and complex than those set forth in the *Handbook*. The AAO finds nothing in the record to indicate that the beneficiary, in her role as a computer programmer at the petitioner's place of business, would face duties or challenges any more specialized and complex than those outlined in the *Handbook*.

As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

The director also found the beneficiary unqualified to perform the duties of a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

> (*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 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 have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*), as described above, which requires a demonstration that the beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. The beneficiary obtained her education abroad, so she does not qualify under this criterion.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*), as described above, requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. In finding the beneficiary unqualified under this criterion, the director discounted the January 7, 2005 evaluation submitted by Education International (EI), which found the beneficiary's educational credentials equivalent to a master's degree in computer systems, with a specialization in information technologies, awarded by an accredited institution in the United States.

In finding this evaluation deficient, the director noted that this evaluation was performed based upon the evaluator's review of copies of the original documents, stating the following:

> As with the other evaluations presented with Petitions A and B, this current evaluation was performed based on copies and English translations of the beneficiary's transcripts. Accordingly, the evaluator did not have access to the originals of those documents and therefore did not have the required documentation to analyze equivalency.

In finding the EI evaluation deficient because the evaluator did not have access to the beneficiary's original documents, the director noted that, in a previous request for additional evidence, he had requested copies of the beneficiary's original school transcripts. The petitioner, however, elected not to submit the original documents at that time, and offered no explanation as to its failure to do so.[4] The AAO notes here that the director's June 14, 2004 denial of Petition B specifically referenced the petitioner's failure to submit the beneficiary's original school transcripts.

On appeal, counsel states the following:

> The USCIS alludes to the fact that in a previous petition, the petitioner was asked to provide the beneficiary's original school documents but failed to do so. As a result, this was one of the bases for the denial of the previous petition [Petition B]. However, submitting original documents is not and has not been a requirement for an initial filing, nor were the beneficiary's original school documents requested in this case. Since these documents were not requested, the USCIS cannot rely on a previous failure to provide documents as a reason to deny the present petition.

However, the AAO notes that these documents were not submitted on appeal. While counsel is correct that the director did not request the original transcripts, the fact that his denial was based in part on the lack of these original documents in the file put counsel and the petitioner on notice that, without them, the file is incomplete. No explanation has been given why, since counsel and the petition were put on notice that CIS desired the original school transcripts, they were still not submitted on appeal. Again, it is unclear what remedy, even if the AAO were to find that the director should have issued such a request, would be appropriate beyond the appeal process itself. The petitioner has had its chance to supplement the record on appeal and has declined to submit the original school transcripts. It would therefore serve no useful purpose to remand the case simply to once again afford the petitioner the opportunity to supplement the record with original school transcripts.

Counsel has submitted a December 5, 2005 letter from the EI evaluator who performed the evaluation. The evaluator states the following:

> Please note that my service has been recognized by the INS and now by USCIS since 1978 . . . that almost all of my evaluations are based on photocopies, and that they have never before been contested because of being based on photocopies.[5] Please also note that the statement about photocopies on the evaluation indicates "no reason to doubt authenticity." This means that I have taken pains to assure as far as possible that the credentials conform to what would be expected of the originals.

However, this letter does not address the issue at hand. The issue is not whether EI normally requires original school transcripts, whether EI doubts the authenticity of the copies that were submitted, or whether EI's

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[4] The AAO here incorporates its earlier discussion of the director's December 24, 2003 request for additional evidence in connection with Petition B, and notes further that 8 C.F.R. § 103.2(b)(5) specifically states that when a copy of a document is submitted, CIS may request that the original document be submitted for review.

[5] The evaluator also submitted a copy of a letter, dated May 8, 1978, from the legacy Immigration and Naturalization Service, stating that EI had been placed on a list of organizations recognized as qualified to evaluate foreign educational credentials.

evaluations have been accepted by CIS in the past. The petitioner has been put on notice that the director was desirous of the beneficiary's original school transcripts, and the petitioner has failed to provide them. The fact that EI does not normally require original school transcripts in evaluating foreign educational requirements is irrelevant. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The director clearly doubted the authenticity of the copies of the beneficiary's school transcripts that were submitted, and the petitioner has made no attempt to overcome the director's doubt. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

For all of these reasons, the beneficiary is unqualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*).

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so she does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's combination of education and work experience. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by 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;
>
> *(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 beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*), as the EI evaluation was not based upon the beneficiary's work experience.

No evidence has been submitted to establish, nor has the petitioner contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*), which requires that the beneficiary submit 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).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*), the beneficiary is unqualified under this criterion because the EI evaluation is deficient.

No evidence has been submitted to establish, nor has the petitioner contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*4*), which requires that the beneficiary submit 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.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

> *(i)* Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation[6];
>
> *(ii)* Membership in a recognized foreign or United States association or society in the specialty occupation;
>
> *(iii)* Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
>
> *(iv)* Licensure or registration to practice the specialty occupation in a foreign country; or

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[6] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

While the record contains information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the occupation, that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in a related field, and that she achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (*i*), (*ii*), (*iii*), (*iv*), or (*v*) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(*1*)(*2*)(*3*)(*4*), or (*5*), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*).

Accordingly, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

On the Form I-290B, counsel lists five assertions in support of his contention that the director's denial of this petition was arbitrarily capricious and an abuse of discretion. Counsel first states that the director did not consider this petition (Petition C) independently but rather allowed the denials of Petitions A and Beneficiary to "taint" his judgment. The AAO, however, rejects this assertion. There is no evidence in the record to support any contention that the director behaved in any improper behavior. Serious questions were raised during the adjudication of Petitions A and B, and the director was correct to review those records of proceeding during his adjudication of Petition C.

Counsel next contends that the director's decision was not based on the evidence presented by the petitioner, and that the director erroneously dismissed the petitioner's detailed list of duties. However, as discussed *infra*, the AAO finds that the duties of the proposed position set forth in Petition C do not qualify for classification as a specialty occupation.

In his third contention, counsel asserts that the director "relies on a regulation related to combined education, training[,] and experience where, in this case, this is not an issue[.]" In his appellate brief, counsel states that the director's citation to 8 C.F.R. § 214.2(h)(4)(iii)(D) was irrelevant. However, counsel has misunderstood the director's citation to this regulation. A careful reading of the denial reveals that the director, having found the beneficiary unqualified to perform the duties of a specialty occupation under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C), properly proceeded to analyze the beneficiary's qualifications under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(D). It would have been improper for the director to not engage in such an analysis.

In his fourth contention, counsel asserts that the director "relies on a regulation related to fashion models and not to specialty occupations." In his appellate brief, counsel states the following:

> Similarly, the lengthy citation to 8CFR214.2(h)(4)(ii) and the definition of "recognized authority" is totally irrelevant since it relates **only** to Fashion Models and has no application to professional positions. Why was this even in the decision? [emphasis in original]

Counsel's analysis is incorrect. The regulation at 8 C.F.R. § 214.2(h)(4) addresses three types of H-1B petitions: (1) petitions for aliens to perform services in a specialty occupation (such as the instant petition); (2) petitions for aliens to perform services relating to a Department of Defense cooperative research and development product or coproduction project; and (3) petitions for aliens to perform services of distinguished merit and ability in the field of fashion modeling. The regulation at 8 C.F.R. § 214.2(h)(4)(ii), at consideration here, merely provides the regulatory definition of four terms: (1) prominence; (2) recognized authority; (3) specialty occupation; and (4) United States employer. While counsel is correct that the term "prominence" does not relate to the instant petition, the terms "recognized authority," "specialty occupation," and "United States employer" are relevant to the instant petition.

In the fifth contention set forth on the Form I-290B, counsel stated the director had failed to "give credibility to a long established and recognized credentials evaluation expert." The deficiencies in the EI evaluation were set forth previously, and the AAO incorporates that discussion here. Moreover, the AAO notes that the mere fact that a company's evaluations have been accepted previously does not lead to a conclusion that its evaluations must be accepted without question, particularly when CIS has reason to question a particular beneficiary's credentials. The AAO notes again that counsel and the petitioner have been repeatedly placed on notice that CIS wishes to see the beneficiary's original school transcripts.

Accordingly, the petitioner has failed to demonstrate that the proposed position qualifies for classification as a specialty occupation and that the beneficiary qualifies to perform the duties of a specialty occupation. The petitioner was, therefore, properly denied.

Beyond the decision of the director, the AAO finds additional reasons why the petition may not be approved. The term "employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii):

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (*1*) Engages a person to work within the United States;
>
> (*2*) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
>
> (*3*) Has an Internal Revenue Service Tax identification number.

The record does not indicate that the petitioner would engage the beneficiary in an employer-employee relationship. First, the AAO notes that the petitioner's business appears to be conducted from the petitioner's general managing partner's residence. While not in and of itself problematic, it adds weight to other information in the file, including the deficiencies and inconsistencies discussed previously, which lead the AAO to question whether the petitioner would actually engage the beneficiary in an employer-employee relationship. Moreover, the AAO notes that in 2001, 2002, 2003, and 2004, the petitioner reported losses of income on its income tax returns and paid no wages to any employees.

It also appears that the petitioner has attempted to misrepresent itself to CIS regarding the scope of its business operations. The Form I-129 for Petition A stated that the petitioner had four employees. In its February 19, 2003 response to the director's NOIR response, the petitioner stated that it had expanded from

four to nine employees. The Form I-129 for Petition B stated that the petitioner had nine employees. The Form I-129 for Petition C stated that the petitioner has four partners, but no employees. In its December 31, 2003 response to the director's request for additional evidence pertaining to Petition B, the petitioner submitted a letter to CIS indicating that it had nine partners.

On appeal, counsel states that the petitioner has four partners, and that the petitioner had considered the four partners as "employees" in Petitions A and B because it had counted those partners as employees. Counsel also states that partners are, arguably, employees since they are compensated in shares of stock.

The record, as currently constituted, contains copies of the petitioner's Forms 1065, U.S. Return of Partnership Income, for tax years 2001, 2002, 2003, and 2004 (copies of the attachments are not included). Item I of the Form 1065 states the following:

> Number of Schedules K-1. Attach one for each person who was a partner *at any time* during the tax year [emphasis added].

On each return (i.e., 2001, 2002, 2003, and 2004), the petitioner stated that it was submitting two Schedules K-1, which indicates that the petitioner had only two partners in each of those years. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Accordingly, the AAO finds that the petitioner has failed to establish that it meets the statutory definition of a "United States employer." For this additional reason, the petition may not be approved.

The petitioner has failed to establish that the proposed position qualifies as a specialty occupation or that the beneficiary qualifies to perform the duties of a specialty occupation. Beyond the decision of the director, the AAO finds that the petitioner has also failed to establish that it meets the statutory definition of a "United States employer." 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.

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