U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: WAC 08 145 52277 Office: CALIFORNIA SERVICE CENTER Date: APR 01 2010

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael T. Kelley
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 multi-technical aviation company with 270 employees and a gross annual income of over $15 million. It seeks to employ the beneficiary as an aeronautical engineering associate pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

As will be discussed below, the AAO finds that the director was correct to deny the petition for the petitioner's failure to establish the proffered position as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) The director's request for additional evidence (RFE) and the documentation submitted by the petitioner in response to that request; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and previously submitted evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue that the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires 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 also meet one of the following criteria:

> *(1)* A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. 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.

In this matter, the petitioner seeks the beneficiary's services as an aeronautical engineering associate. The petition was submitted on April 2, 2008. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's February 8, 2008 letter of support; and documentation the petitioner submitted in response to the RFE. The support letter indicates the proffered position would include:

- Maintaining, repairing, and modifying aircraft systems on heavy commercial aircraft;
- Devising and assembling new or modified aircraft systems components;
- Reviewing project instructions and production requirements;

- Analyzing customer specifications and application/performance needs to determine the feasibility of product designs; identifying technical problems in production; conducting tests of complete units and components under different operational environments; testing machinery and equipment;
- Analyzing test results in relation to specifications and test objectives;
- Developing quality control procedures and standards;
- Assisting in the management of purchasing, materials handling, inventory control, safety issues, and manufacturing personnel;
- Writing reports, developing designs and resolving design problems, planning manufacturing initiatives, assessing and planning personnel and materials requirements, and evaluating production and materials constraints; and
- Providing technical information regarding project and processing techniques, materials, properties, and process advantages and disadvantages which affect plant and project engineering planning.

The director issued an RFE on May 3, 2008, requesting a more detailed position description that evidences the proffered position is a specialty occupation, along with an organizational chart, a description of the petitioner's past employment practices in hiring for the proffered position, and more information regarding the petitioner's business.

In response to the RFE, counsel for the petitioner stated that on a weekly basis, aircraft maintenance would comprise 27.5% of the beneficiary's time, production issues would comprise 17.5% of the beneficiary's time, quality control also would be 17.5% of the beneficiary's time, purchasing and inventory control would be 15% of the beneficiary's time, serving as a technical expert would comprise 12.5% of the beneficiary's time, and manufacturing and design would comprise 10% of the beneficiary's time. Therefore, the majority of the beneficiary's proposed duties as described in the response to the RFE involve aircraft maintenance, production issues, and quality control.

Now, on appeal, counsel attempts to materially change, enhance, and expand the proffered duties as described prior to the director's decision, by asserting that the duties comprising the proffered position would include:

- Manufacturing and design analysis and control (including preparing technical requirements documents, developing engineering test requirements, and designing, developing, and testing aircraft and engine parts) – approximately 20% of time;
- Aeronautical engineering and performance (including the use of aerodynamic engineering codes and computational fluid dynamics to compute airframe performance, using aerodynamic modeling architecture to develop aeromodels for flight vehicles, participating in wind tunnel tests to capture critical aerodynamic models, developing and supporting flight simulation models; and applying scientific and technological principles to research, design, maintain, test, and develop performance of aircraft) – approximately 15% of time;
- Document and specification management (including creating and modifying engineering drawings, reports, test plans, and manuals as well as conceiving design, documents for the implementation of complex system architectures) – approximately 12.5% of time;
- Aeronautical engineering testing (including participating in flight test programs) – approximately 12.5% of time;
- Production issues (including identifying technical problems in production) – approximately 12.5% of time;
- Quality control – approximately 12.5% of time;
- Aircraft maintenance – approximately 10% of time; and

- Purchasing and inventory control – approximately 5% of time.

The AAO will not consider on appeal the material expansion of proposed duties beyond what was presented by counsel and the petitioner prior to the director's decision. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, the AAO bases its decision upon the information about the proposed duties that was before the director when she reached her decision to deny the petition. Further, the "Position [R]equirements" section of the RFE elicited and provided the petitioner opportunity to submit comprehensive information about the specific duties that the beneficiary would perform. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the duty information submitted for the first time on appeal to be considered, it should have submitted it in response to the RFE. The appeal will be adjudicated based on the record of proceeding before the director.

Additionally, 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, 591-592 (BIA 1988). If significant changes are made to the petition on appeal, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by counsel on appeal did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description, in conflict with the scope of duties presented in the petitioner's response to the RFE.[1]

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[1] For the first time on appeal, counsel included an opinion letter dated November 1, 2008, from Solomon Appel, a professor in the department of statistics and computer information sciences with Baruch College of the City University of New York and a professor in the department of business with the Metropolitan College of New York and Brooklyn College, who declares that the minimum educational requirement for the proffered position is a bachelor's degree in aeronautical engineering or a related field. However, this opinion letter is based on the job duties provided by counsel on appeal, and not the duties as described in the petition and the RFE response letter. Further, the letter is not based upon a review of the demands of any actual projects to which the beneficiary would be assigned. Therefore, this opinion letter is not probative of the proffered position as being a specialty occupation, and, accordingly, will be accorded no weight. Further, the AAO finds that neither the content of the professor's letter nor any other evidence of record substantiates the professor's self-endorsement as an expert on the educational requirements of the type of position proffered in this letter. For this reason also, the professor's letter merits no weight. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

These duties provided by counsel on appeal are not supported with any documentation evidencing that they actually comprise the proffered position. 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). 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)).

According to the petitioner, the proffered position requires a bachelor's degree in aeronautical engineering technology, engineering, or a related field. The petitioner submitted an education evaluation stating that the beneficiary has the equivalent of a bachelor's degree in aeronautical engineering technology from an accredited college or university.

At the outset, the AAO will comment on a number of salient aspects of the evidence of record that figure prominently in the AAO's decision.

The brochure submitted in response to the RFE states that the petitioner "provides skilled aircraft maintenance technicians to commercial heavy air transport clients on demand," and "provides the aviation industry with an immediate source of experienced and qualified technicians." It is noteworthy that the brochure does not mention aeronautical engineering associates, the type of position proffered in this petition.

The organizational chart submitted in response to the RFE does not include the proffered position, despite the RFE's request that the petitioner "identify the proffered position" in the line-and-block organizational chart requested by the RFE. The absence of the position in the petitioner's organizational chart indicates that the proffered position would not be part of the petitioner's in-house management structure.

The petitioner's brochure and its self-description in "The Petitioner" section of its support letter filed with the Form I-129 indicate that the petitioner functions as an employment contractor, by assigning personnel to projects generated by contracts for the petitioner's services at locations specified by its clients.

The AAO also notes that the record of proceedings neither identifies nor provides substantive details regarding any specific projects upon which the beneficiary would work during the period specified in the Form I-129.

As indicated by the aspects of the record addressed above, the petitioner failed to establish that this H-1B petition was filed on the basis of actual H-1B caliber work that was assured, as of the date of the petition's filing, for the beneficiary for the period specified in the petition. In this regard, the AAO notes that USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978)

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook.* Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform.

As recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where, as here, the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. There are no work orders, no statements of work, and no work itinerary with respect to the proposed employment of the beneficiary. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. (Reg. Comm. 1972). Also, as mentioned above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534; *Matter of Laureano*, 19 I&N Dec. 1 *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

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.