



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUN 27 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for 
Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a medical office specializing in dermatology established in 1996. In order to employ the beneficiary in a position to which it assigns the "Chief Financial Officer," the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner had failed to demonstrate that the position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation. The AAO reviewed and basis its decision upon the totality of the evidence that has been submitted into this record of proceeding from the filing of the Form I-129 and its allied documents through the filing of the Form I-290B and its allied documents.

As will be discussed below, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

In reaching its determination on the specialty occupation, the AAO applies the following statutory and regulatory framework to the record of proceeding before it.

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly

been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor 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.

The AAO will begin with some of the information that the petitioner provided about itself and the proffered position in the Form I-129 and in the certified Lab or Condition Application (LCA) that it submitted to support the petition.

The entries at items 1, 2, and 3 at Part 5, "Basic information about the proposed employment an employer," specify, respectively, "Chief Financial Officer" as the Job Title; "manages financial affairs of company, reporting to CEO," as a Nontechnical Job Description; and "621111" as the NAICS (North American Industry Classification System) Code that pertains to the petitioner's business. The NAICS explanation for that code at the time of its entry on the Form I-129 reads as follows:

621111 Offices of Physicians (except Mental Health Specialists) This U.S. industry comprises establishments of health practitioners having the degree of M.D. (Doctor of Medicine) or D.O. (Doctor of Osteopathy) primarily engaged in the independent practice of general or specialized medicine (except psychiatry or psychoanalysis) or surgery. These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.

U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2007 NAICS Definition, "621111 Offices of Physicians Accounting, (except Mental Health Specialists)," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed June 23, 2013).

The AAO also notes that the entry at item 5 of part 5 of the Form I-129 indicated that the beneficiary's address where the beneficiary would work is the petitioner's office address in

In a March 31, 2010 letter of support, the petitioner's Chief Executive Officer describes the petitioner as follows:

Established in 1996, our company is a full service dermatology practice that provides the patient with the most up-to-date skin care treatments, procedures and cosmetics. The practice is built around the medical skills of the undersigned, [REDACTED]

[REDACTED] I diagnose skin conditions and prescribe courses of treatments for my patients, assisted by a team of licensed nurses and professionals. We currently employ seven full-time and three part-time workers. Copies of our financial statements and our company brochure are attached for your reference.¹

At the outset, the AAO will enter a finding that is dispositive of this appeal, namely, that the petitioner may not prevail on appeal because the record of proceeding establishes that, if the appeal were sustained and the petition were thus approved, the beneficiary would provide his services as an H-1B beneficiary not only to the petitioner, but also to other, independent business entities that are legally separate from the petitioner.

By lines connecting the proffered position and them, the aforementioned line-and-block organizational chart indicates that the person holding the proffered position would, in that capacity, serve not only the petitioner (depicted in the chart as [REDACTED] and also as "Corporation # 1") but also at least two additional businesses, operating as separate legal entities, which the chart identifies as (1) the "[REDACTED] Wellness Center" and (2) the "[REDACTED]". Other submissions, including the brief on appeal, confirm that the beneficiary would provide the position services not only to the petitioner, but also to the that wellness center in Lebanon and to that psychiatric clinic in Illinois. This feature of the petition in and of itself precludes approval of the petition and renders the appeal moot.

The regulation at 8 C.F.R. § 214.2(h)(1)(i) is dispositive, as it states:

General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer.

Consequently, the appeal will be dismissed, and the petition will be denied because the petition was filed for an impermissible purpose.

Aside from in addition to the above discussed material defect in the petition that precluded its approval as filed and so too precludes the petitioner from prevailing on appeal, this record of proceeding lacks evidence sufficiently detailed, specific, and concrete to establish the substantive nature of the work that the beneficiary would perform if this petition were approved. Consequently, there is an inadequate factual foundation for the AAO to find that the proffered position as actually performed would require the practical and theoretical application of at least a bachelor's degree

¹ Notably significant is the fact that the "financial statements" consist of simply copies of tax returns, which the AAOP finds, are not in themselves probative of substantive financial matters that would require the person in the proffered position to apply at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

level of a body of highly specialized knowledge, as is required to establish a position as a specialty occupation in accordance with the controlling definitions at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii).

In a four-page table (divided into five columns bearing the headings “Job Duty,” “Percentage of time spent on this duty,” “Level of Responsibility,” “Hours per Week,” and “Minimum education, training and experience required to do the job”) contained within her October 4, 2010 affidavit submitted as part of the petitioner’s RFE response, the petitioner’s chief executive officer (CEO) attested that the duties of the proposed position would include the following:

- Supervising all financial operations and policies of the company;
- Overseeing the proper preparation of accurate financial statements on a quarterly and annual basis;
- Ensuring compliance with current financial and accounting standards;
- Synchronizing and coordinating tax filings and tax liabilities among all of the owners’ companies, and between the personal and company obligations of the owners;
- Financial forecasting and predictions;
- Preparing timely reports and holding meetings in order to review financial business matters;
- Reviewing accounts payable, accounts receivable, financial reports, and assuring compliance with budgetary and dermatological benchmarks and industry standards;
- Preparing and executing sustainable budgets;
- Providing and identifying areas, parameters, and targets for improvements;
- Identifying quality assurance financial indicators for monitoring;
- Coordinating with accountants and legal advisors as a team in order to achieve better financial health;
- Preparing year-to-year comparison graphs and tables in order to better plan for the petitioner’s financial future;
- Preparing initial marketing and financial plans with regular updates, as dictated by market conditions and company policies;

- Increasing sales volume and revenue from cosmetic dermatology through marketing, promotion packages, and education of potential clients;
- Running and promoting the petitioner's new retail shop;
- Computerizing the petitioner's financial plan and related transactions; and
- Managing the petitioner's overseas activities and coordinating such activities and finances.

The AAO offers the above excerpts as illustrative of what the AAO finds to be the exclusively general and relatively abstract level at which the petitioner communicates information about the proffered position and its proposed duties. For instance, nowhere does the evidence of record provide substantively detailed information about any of the following functions that the petitioner ascribes to the proffered position: the "financial operations" that it says the beneficiary will supervise; the "financial statements" whose preparation the beneficiary will oversee; what applications of substantive knowledge that oversight would involve, and why; or the scope and depth of the financial planning in which the beneficiary would engage. Likewise, the record of proceeding is devoid of evidence establishing what the beneficiary would actually do in performing the generalized functions that the CEO's letter ascribes to the position within the actual context of the petitioner's business operations; the substantive nature and performance requirements of the particular business matters which would actually engage the beneficiary in the position; and a necessary correlation between the substantive work that the beneficiary would perform and the degree requirement that the petitioner asserts.

Also, the petitioner seems to be relying in material part upon a misconception that it meets its burden of proof by providing statements of generalized duties that comport with statements of generalized descriptions of the Financial Managers occupational classification in the O*NET and in the Department of Labor's *Occupational Outlook Handbook*, and with generalized job-descriptions found on the Internet.²

² The AAO will here comment specially upon the petitioner's reliance upon the submitted job vacancy announcements.

The record of proceeding does not sufficiently develop the duties, the substantive work, the matters to be worked upon, and the specific performance requirements of the proffered position to establish that the proffered position and the ones for which the advertisements were placed are substantially similar. Accordingly, the advertisements are not probative evidence.

Also, as noted above, the petitioner described itself on the Form I-129 as a medical office. It has not established that the nature of its business and its underlying financial management requirements are substantially similar to those of the advertising organizations. [REDACTED] is a financial institution; [REDACTED] describes it itself as a company offering "food safety [and] quality solutions"; the [REDACTED] is presumably a rehabilitation center; [REDACTED] describes itself as a company operating in the industrial facilities and infrastructure construction industry; [REDACTED] is an institution of higher education; [REDACTED] is a quarrying and stone fabrication business;

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 satisfies 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 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. Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this reason also, the appeal will be dismissed and the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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

the [REDACTED] is a manufacturing firm; [REDACTED] designs, patents, and imports conservation products from Asia; [REDACTED] states that it "designs and builds imaging systems"; [REDACTED] describes itself as a crisis response company; [REDACTED] is a multinational conglomerate; [REDACTED] describes itself as a provider of food services, facilities management, and uniform and career apparel; NuVasive is a medical device company; the [REDACTED] describes itself as an advanced technology company; [REDACTED] is recruiting a controller for a manufacturer of medical device delivery systems; [REDACTED] is recruiting a "Controller of U.S. Operations" for a medical device company; [REDACTED] describes itself as an "enterprise focusing on leading edge unmanned aircraft systems and efficient energy system solutions"; [REDACTED] is recruiting an assistant controller for "a Fortune 500 Medical Device Company"; [REDACTED] is a dental implant manufacturer; [REDACTED] is a nursing home management company; and the [REDACTED] is recruiting a corporate controller for a technology company. The first unnamed company advertising its vacancy through [REDACTED] directly is a multi-divisional manufacturing company, the second is a petroleum company, and the third is a medical device company.

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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.