



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF S-S- LLC

DATE: MAY 22, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a computer consulting firm, seeks to temporarily employ the Beneficiary as a "programmer analyst" under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the evidence of record does not establish that: (1) the proffered position qualifies as a specialty occupation; and (2) the Petitioner will engage the Beneficiary in an employer-employee relationship.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in the decision. Upon *de novo* review, we will dismiss the appeal.

**I. SPECIALTY OCCUPATION**

We will first determine whether the record of proceedings establishes that the proffered position qualifies as a specialty occupation.

**A. Legal Framework**

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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

#### B. Proffered Position

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “programmer analyst.” In addition, the Petitioner stated that the Beneficiary will work at [REDACTED] in [REDACTED] Texas,<sup>1</sup> as well as at its offices in [REDACTED] California.

In response to the Director’s request for evidence (RFE), the Petitioner stated that the initial project in [REDACTED] Texas has been cancelled<sup>2</sup> and that the Beneficiary will be assigned to work in-house on the [REDACTED] project for its client [REDACTED]. The Petitioner also provided a job description for the proffered position, as follows:

<sup>1</sup> Public records indicate that [REDACTED] is located at this address.

<sup>2</sup> On appeal, the Petitioner states that the Beneficiary “was selected prior to the filing of this petition to work on the [REDACTED] project” and submits a letter entitled “Project Selection Letter” dated in March 2016 that also states that the Beneficiary was selected to work on the [REDACTED] project. The Petitioner did not provide an explanation for this discrepancy.

<sup>3</sup> When responding to an RFE, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l

1. Requirement Analysis: 20%

- Participate in requirements meeting
- Provide testability feedback by reviewing and analyzing project and maintenance requirements documents
- Communicate requirements and assign development tasks to offsite resources
- Supervise and ensure off site resources execute assigned tasks

2. Software Programming: 50%

- Planning, developing and designing of Automation Framework
- Designing software application development process to meet with Agile Development
- Work with Testing Team, marketing staff and developers to create a consistent and compelling Web Interface of Framework and Test Data creation tools
- Programming and implementing web applications using Java, JSP, Servlets, JDBC, Java, Hive, Shell script, CVS & SVN, HIVE Query tool, SQOOP, Maven, Ant, Struts, Spring, Oracle Database
- Develop GUI interface for Automation Framework using Angular JS and JavaScript
- Administer and maintain production systems running on multiple development and production environments
- Deploy and monitor applications on Tomcat, Jboss and Weblogic
- Lead the team by allocation of task and provide technical help to team members
- Coordinating with onshore and onsite coordinators in resolving issues
- Analyze Programming Errors or security failures, potential for failure, and opportunities
- Recommend strategies, tactics and actions to minimize risk and optimize return on investment
- Maintain the highest level of confidentiality and security of corporation information

3. Test Execution: 20%

- Select appropriate test cases for execution on every given build
- Report to the SDLC on test execution status

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Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to our requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

- Resolve or seek assistance on any road blocks encountered during test case execution
- Supervise, track and report test case execution of offsite resources
- Keep manager informed and up-to-date on status, events and other critical information
- Encourage and maintain open and two way communication with all SDLC members

4. Client Responsibilities: 10%

- Provide detailed deliverables to resources
- Provide required software and hardware access to perform duties
- Provide training on applications that will be tested

According to the Petitioner, the proffered position requires a bachelor's degree in engineering, science, computer science, business administration, or its equivalent.

C. Analysis

For the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.<sup>4</sup> Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>5</sup>

As a preliminary matter, the Petitioner's claim that a bachelor's degree in business administration is sufficient for the proffered position is inadequate to establish that it qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a general degree, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree in business administration may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp.*, 484 F.3d at 147.<sup>6</sup>

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<sup>4</sup> Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

<sup>5</sup> The Petitioner submitted documentation in support of the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

<sup>6</sup> A general degree requirement does not necessarily preclude a proffered position from qualifying as a specialty

Further, the Petitioner stated that a degree in one of several disparate fields (specifically: engineering, science, computer science, or business administration) is sufficient for the position. Notably, in general, provided the specialties are closely related, e.g., finance and accounting, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same.

Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of degrees in disparate fields, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties.<sup>7</sup> Section 214(i)(1)(B) of the Act (emphasis added). The Petitioner has not made this showing. On the basis of the proffered position's educational requirement, we cannot conclude that the proffered position qualifies as a specialty occupation.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, we now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

#### 1. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. To inform this inquiry, we recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>8</sup>

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occupation. For example, an entry requirement of a bachelor's or higher degree in business administration with a concentration in a specific field, or a bachelor's or higher degree in business administration combined with relevant education, training, or experience may, in certain instances, qualify the proffered position as a specialty occupation. In either case, it must be demonstrated that the entry requirement is equivalent to a bachelor's or higher degree in a specific specialty that is directly related to the proffered position.

<sup>7</sup> While the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

<sup>8</sup> All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and we regularly review the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the

On the labor condition application (LCA)<sup>9</sup> submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Computer Programmers” corresponding to the Standard Occupational Classification code 15-1131.<sup>10</sup>

The *Handbook*’s subchapter entitled “How to Become a Computer Programmer” states, in pertinent part: “Most computer programmers have a bachelor’s degree in computer science or a related subject; however, some employers hire workers with an associate’s degree.” Bureau of Labor Statistics, U.S. Dep’t of Labor, *Occupational Outlook Handbook*, Computer Programmers (2016-17 ed.). Thus, the *Handbook* does not support the Petitioner’s assertion that a bachelor’s degree is required for entry into this occupation. The *Handbook* reports that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor’s degree in a specific specialty.

In the instant matter, the Petitioner has not provided documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

## 2. Second Criterion

The second criterion presents two alternative prongs: “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[.]” 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner’s specific position.

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burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

<sup>9</sup> The Petitioner is required to submit a certified LCA to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the “area of employment” or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

<sup>10</sup> The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The “Prevailing Wage Determination Policy Guidance” issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://flcdatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf). A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. *Id.*

a. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by us include: whether the *Handbook* reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

In support of this criterion, the Petitioner submitted copies of job announcements placed by other employers. However, upon review of the documents, we find that the Petitioner’s reliance on the job announcements is misplaced. First, we note that some of the job postings do not appear to involve organizations similar to the Petitioner. For example, the Petitioner is a 32-person, information technology consulting and software development company, whereas one of the postings is for a food and drug retailer with over 2,300 stores. Furthermore, one of the postings appears to be for a staffing agency for which no information is provided regarding the hiring employer. In addition, some of the advertisements provide little or no information regarding the hiring employers. The Petitioner did not supplement the record of proceedings to establish that these advertising organizations are similar to it.

When determining whether the Petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the Petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Moreover, many of the advertisements do not appear to be for parallel positions. For example, some of the positions appear to be for more senior positions than the proffered position.<sup>11</sup> More importantly, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

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<sup>11</sup> For instance, the posting for [REDACTED] requires a degree and five years of experience. In addition, the advertisement for [REDACTED] requires a degree and five years of experience in programming and analysis.

Without more, the Petitioner has not provided sufficient evidence to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations.<sup>12</sup> Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

b. Second Prong

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner described the proffered position and its business operations, as well as the end-client's business operations. On appeal, the Petitioner asserts that "because of the complex and highly technical nature of the job duties" the proffered position requires a bachelor's degree. However, the Petitioner designated the proffered position as an entry-level position within the occupational category (by selecting a Level I wage).<sup>13</sup> This designation, when read in combination with the Petitioner's job descriptions, further suggests that the particular position is not so complex or unique that the duties can only be performed an individual with bachelor's degree or higher in a specific specialty, or its equivalent. While related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

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<sup>12</sup> It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

<sup>13</sup> The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, unique, and specialized compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.



The Petitioner claims that the Beneficiary is well-qualified for the position, and references the Beneficiary's qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

### 3. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

The record must establish that a petitioner's stated degree requirement is not a matter of preference for high-caliber candidates but is necessitated instead by performance requirements of the position. *See Defensor v. Meissner*, 201 F.3d at 387-88. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, an organization could bring any individual with a bachelor's degree to the United States to perform any occupation as long as the petitioning entity created a token degree requirement. *Id.* Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner's past recruitment and hiring practices, as well as information regarding employees who previously held the position.

In response to the RFE, the Petitioner states that it "ONLY employ[s] people in the role of Programmer Analyst with the minimum of a Bachelor's degree or its equivalent in very specific and directly related fields." The Petitioner submitted documentary evidence (including a list of the employees with their salary information; academic credentials; and pay statements); however, the record does not include evidence establishing that the persons to whom the evidence relates held substantially the same position with the same or similar substantive responsibilities, duties, and performance requirements as the position proffered in this petition. Notably, one of the employees is compensated \$90,000 per year, which is significantly higher than the salary offered to the Beneficiary. Thus, this strongly suggests that this individual is employed in a different or more senior position than the proffered position. The Petitioner did not provide an explanation for the variance in the wages.

In addition, the Petitioner provided two of its internet job postings for programmer analyst positions. However, the postings do not indicate that a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but a bachelor's degree in a specific specialty that is directly related to the duties of the position. *See* section 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

On appeal, the Petitioner submits a printout of its job postings from its website, which includes two programmer analyst positions. One posting states that a "Bachelor's degree in Computer Science, Engineering, Information Systems or Biotechnology [is] needed" for the position. However, the second posting does not state that a bachelor's degree is required. Specifically, it states that "2 years of experience in Programmer Analyst or any related IT occupation [is] needed" for the position. The Petitioner did not provide an explanation for the variance in the requirements.

Without more, the Petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, it has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

#### D. Fourth Criterion

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

In the instant case, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. The Petitioner does not establish how the generally described duties of its programmer analyst elevate the proffered position to a specialty occupation. We again refer to our comments regarding the implications of the Petitioner's designation of the proffered position at a Level I wage level.

Upon review of the totality of the record, the Petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

The Director also found that the Petitioner did not establish that it will have a valid employer-employee relationship with the Beneficiary. The Petitioner provided additional evidence on appeal to establish that it will have an employer-employee relationship. However, as the Petitioner has not established that the proffered position is a specialty occupation we will not address the employer-employee issue further.

### III. CONCLUSION

For the reasons outlined above, the Petitioner has not established eligibility for the benefit sought.

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-S- LLC*, ID# 402160 (AAO May 22, 2017)