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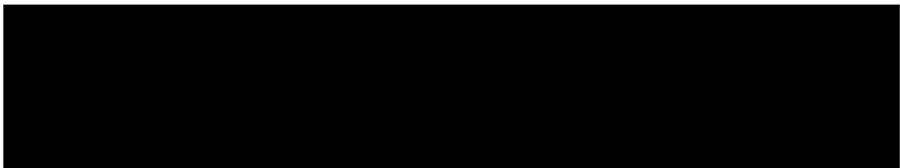
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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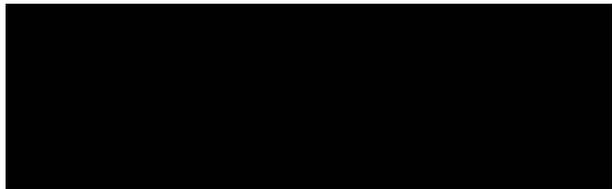
FILE: WAC 07 146 50602 Office: CALIFORNIA SERVICE CENTER Date: APR 03 2009

IN RE: Petitioner:  
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:



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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** On August 22, 2007, the Director of the California Service Center denied the nonimmigrant visa petition, and on November 20, 2007 she dismissed a Motion to Reconsider filed by the petitioner's counsel. On December 21, 2007, counsel for the petitioner filed an appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The director's decision on the Motion will be affirmed. The petition will be denied.

The petitioner is the corporate owner of a specialty care organization with 18 facilities in Orange County, California. To employ the beneficiary in a position that it has designated as a technical writer, the petitioner endeavors to attain classification of 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).

Stating that U.S. Citizenship and Immigration Services (USCIS) "does not dispute that a bona fide position of technical writer requires a beneficiary to have a baccalaureate degree," the director denied the petition on the basis of her finding that the petitioner did not establish that the beneficiary would actually perform the duties of a technical writer.

On motion, counsel contended that the director's decision is "an arbitrary and capricious abuse of discretion, and otherwise not in accordance with the law," fails to follow what counsel describes as precedent decisions' mandate to afford deference to the petitioner, fails to properly consider the evidence, and demonstrates a "misunderstanding of the evidence and the professional field in question." Counsel asserted that, contrary to the director's decision, the duties proposed for the beneficiary are "consistent with those of a Technical Writer for an Intermediate Care Facility." Counsel argued, in part, that the director based her decision on what counsel describes as an erroneous conclusion "that the position offered is not bona fide or credible because its duties overlap with those of other professions as described in [the Department of Labor's *Occupational Outlook Handbook (Handbook)*], and that this conclusion indicates that the director "completely ignored the stated duties of the position that are clearly consistent with those performed by a Technical Writer."

Citing to *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), the director dismissed the Motion on finding "inconsistencies and contradictions in the evidence that lend doubt as to the actual duties the beneficiary would be expected to perform." At 19 I&N Dec. 591-92, *Matter of Ho* states the evidentiary principle 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 and notes that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and that attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

On appeal, counsel submits essentially the same brief as he submitted on motion. Also, the appeal's Form I-290B asserts the same reasons for relief as were asserted on the motion's Form I-290B, with the exception that on appeal counsel adds, verbatim:

The director did not forward the matter to the [AAO] as requested. It is an abuse to deny reconsideration and then not forward for review in such matters.

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; (5) the Motion; (6) the director's decision dismissing the Motion; and (7) the Form I-290B, counsel's brief, and the allied documents submitted on appeal.

As a preliminary matter, the AAO disregards counsel's assertion that, absent an immediate response by the AAO, certain factual statements in his brief "are herein stipulated as undisputed." There is no statutory or regulatory authority for counsel or the petitioner to propose stipulations or to require a response to proposed stipulations during an administrative appeal before the AAO. The AAO rejects counsel's attempt to do so.

Next, there is no basis to counsel's claim that the director was obliged to forward to the AAO the matters on motion when the director determined that the motion should not be granted. The AAO notes that counsel placed language in the Motion's Form I-1290B and brief requesting that the matters submitted on motion be forwarded to the AAO if the director was not inclined to grant the Motion. However, the request does not conform to the procedures provided in the Form I-290B and the pertinent regulation precludes the requested action. The Form I-290B in effect at the time that counsel filed the petition required him to elect between an appeal and a motion, by checking only one of the boxes A to F at Part 2 of the Form I-290B; and counsel checked box F, which designates this election: "I am filing a combined motion to reopen and reconsider a decision. My brief and/or additional evidence is attached." This election precluded consideration of the submissions as an appeal. Further, the controlling regulation on motions, at 8 C.F.R. § 103.5, contains no provision for the director to forward an adversely decided motion to the AAO. Rather, the regulation at 8 C.F.R. § 103.5(a)(4) indicates that dismissal is the only appropriate action when the director finds that a motion does not merit the relief sought. It states:

*Processing motions in proceedings before the Service.* A motion that does not meet applicable requirements shall be dismissed. Where a motion to reopen is granted, the proceeding shall be reopened. The notice and any favorable decision may be combined.

Accordingly, there is no merit to counsel's claim that the director abused her discretion by failing to forward to the AAO the matters submitted on motion.

Upon review of the totality of the record, the AAO finds that the evidence of record fails to establish a specialty occupation. As a corollary matter, the AAO also finds that the director was correct to dismiss the motion for failure to meet the applicable requirements for motions to reconsider set forth in 8 C.F.R. § 103.5(a)(3). This regulation states, in pertinent part, that "[a] motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish

that the decision was based on an incorrect application of law or [USCIS] policy." In this matter, the evidence of record fails to establish that the director's decision to dismiss the Motion was an incorrect application of law, precedent decisions, or USCIS policy. Rather, the director's dismissal of the Motion was in accord with the mandate at 8 C.F.R. § 103.5(a)(4) to dismiss a motion that does not meet applicable requirements.<sup>1</sup>

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

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:

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<sup>1</sup> Counsel's briefs clearly identify the Motion as a motion to reconsider. However, to the extent the Motion could be construed to also be a motion to reopen because of counsel's checking of box F on the Form I-290B for a combination motion to reopen and reconsider, it is noted that the Motion also does not meet the applicable requirements in 8 C.F.R. § 103.5(a)(2). This regulation states in pertinent part that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." In this matter, the petitioner offers no new evidence. This is an insufficient basis under the regulations to grant a motion to reopen.

- (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 (5<sup>th</sup> 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.

Listed below are the “bullet” descriptions of the proposed duties provided by the petitioner, followed, in parenthesis, by the AAO’s comments on each description.

- Assistance in the development of detailed resident plans;  
(The petitioner neither provides the specific nature of the assistance nor identifies the staff personnel to whom the assistance will be provided.)
- Pre-admission evaluations of prospective residents to the Petitioner's facility, including meetings with the resident, his or her family and/or existing care provider, and health care providers;  
(The petitioner does not specify the elements of these evaluations, their necessity, or their role in facilities for which the record indicates at least the part-time presence of healthcare professionals and California State regulatory requirements for evaluations by such professionals.)
- Development of detailed resident care plans to provide the highest level of care for the Petitioner's residents;  
(The components of the plans are not presented, and whatever areas of highly specialized knowledge may be involved in their development are not identified.)
- Review and evaluation of existing resident care plans to ascertain the appropriateness of existing plans in accordance with current and on-going resident observation;  
(The petitioner provides neither the content of the reviews and evaluations nor the extent, if any, to which they would involve analysis and judgments independent of professional determinations made by physicians, nurses, therapists, and other licensed staff professionally responsible for the residents' health and welfare.)
- Preparation of detailed reports, regarding the Petitioner's residents, their receipt of services, and their receipt of services from outside health care providers that are prepared for review by the Petitioner's administration;  
(The types of information and details to be included in the "detailed reports" are not provided, nor is any information about what the reports' preparation may require in terms of a specific type and educational level of highly specialized knowledge in a specific specialty.)
- Review, organization, and maintenance of medical and residential records;  
(The specific nature of these tasks is not discussed.)
- Preparation of detailed reports for use by medical care providers;  
(The petitioner fails to provide concrete information about the content of the reports and the processes involved in their preparation.)
- Preparation of reports to be submitted to the governmental agencies to which the Petitioner must report to maintain [its] licensure;  
(No information is presented about the reports and their requirements.)
- Inspection of the Petitioner's facilities to determine compliance with government regulations;  
(No information is provided about the scope of the inspections and the nature and level of knowledge required to conduct them.)

- Review, evaluation and inspection of the Petitioner's existing policies, procedures and programs to ascertain compliance with all governmental laws, regulations and policies, with preparation of reports to the Petitioner's management detailing her inspections and all necessary modifications to retain the Petitioner's existing compliance with state and federal regulations; (No evidence addresses the components of the reviews, evaluations, and inspections or the knowledge required to produce them.)
- Assistance with the preparation of all documents supportive of any permit and regulatory applications to be submitted to all city, county, state, and federal agencies; (The substantive requirements for the preparation of these documents are not provided.)
- Preparation of recommendations to the Petitioner's management detailing all necessary modifications to facilities, including cost analysis, personnel requirements necessary to accomplish the modifications, the length of time necessary to accomplish the recommended modifications and the means of implementing them at the same time the Petitioner provides care to its residents at a minimal inconvenience and disturbance to them; (The substantive nature of the analysis required to prepare the recommendations is not provided.)
- Assistance with medical personnel decisions regarding employment and assignment; (The petitioner does not elucidate the substantive nature of this assistance.)
- Review of and assistance with exercise and physical therapy plans of residents; and (The petitioner again fails to provide substantive information about the beneficiary's work, and the extent to which a non-licensed person, like the beneficiary, may engage in the development of a physical therapy plan for a patient is questionable.)
- Coordination of all health care providers necessary to provide the optimal level of care and supervision for the Petitioner's residents. (The petitioner does not establish what such coordination entails.)

The AAO finds that, as reflected in the above list of duties and the AAO's comments upon them, the generic and generalized descriptions of the proposed duties are too abstract to convey whatever educational level of specialized knowledge in a specific specialty may be required in their performance. This lack of concrete detail about the performance requirements of the proposed duties precludes the petition from satisfying any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty-occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

Counsel claims that technical writing is the core of the proposed position, asserts that the position should therefore be evaluated as a technical writer position, and concludes that as such the proffered position qualifies as a specialty occupation. Even assuming arguendo that the proffered position is in fact a technical writer position, there is insufficient evidence to establish that a bachelor's or higher degree in a specific specialty is required for entry into this position.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it covers. As will be evident in the following discussion of its information on technical writers, the *Handbook* indicates that a bachelor's or higher degree in a specific specialty is not the normal minimum entry requirement for the technical writer occupation.

Footnote 1 of the brief on appeal quotes from the *Handbook's* section on the general nature of a technical writer's work as showing that the general nature of the beneficiary's work and that of the *Handbook's* technical writer are substantially the same. The AAO notes the following section of counsel's quote as significant to this proceeding, as it reflects that a bachelor's degree in a specific specialty is not a prerequisite for employment in the technical writer occupational category: "Technical writing requires a degree in, or some knowledge about, a specialized field . . . or one of the sciences, for example." The AAO notes that counsel misquotes the *Handbook* by leaving out the qualifying adverb "increasingly" which appears before the word "technical." Correctly quoted, the *Handbook's* text reads: "Increasingly, technical writing requires a degree in, or some knowledge about, a specialized field – for example, engineering, business, or one of the sciences."<sup>2</sup>

The 2008-2009 edition of the *Handbook* addresses technical writers in its chapter "Writers and Editors," where it treats technical writers as one of two main categories of the writer occupation, with the other category being writers and authors.<sup>3</sup> The *Handbook* describes technical writers as follows:

*Technical writers* put technical information into easily understandable language. They prepare product documentation, such as operating and maintenance manuals, catalogs, assembly instructions, and project proposals. Technical writers primarily are found in the information technology industry, writing operating instructions for online Help and documentation for computer programs. Many technical writers work with engineers on technical subject matters to prepare written interpretations of engineering and design specifications and other information for a general readership. Technical writers also may serve as part of a team conducting usability studies to help improve the design of a product that still is in the prototype stage. They plan and edit

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<sup>2</sup> See also the *Handbook's* 2004-2005 edition at page 276, and its 2006-2007 edition at page 277, which contain the same wording.

<sup>3</sup> Hereinafter all *Handbook* references are to the 2008-2009 edition.

technical materials and oversee the preparation of illustrations, photographs, diagrams, and charts.

The first of the three “Significant Points” at the beginning of the *Handbook’s* “Writers and Editors” chapter states:

- Most jobs in this occupation require a college degree preferably in communications, journalism, or English, but a degree in a technical subject may be useful for technical writing positions.

The section “Training, Other Qualifications, and Advancement” includes the following narrative relevant to the educational requirements for the technical writing occupation:

A college degree generally is required for a position as a writer or editor.<sup>[4]</sup> Good facility with computers and communications equipment is necessary in order to stay in touch with sources, editors, and other writers while working on assignments, whether from home, an office, or while traveling.

*Education and training.* Some employers look for a broad liberal arts background, while others prefer to hire people with degrees in communications, journalism, or English. For those who specialize in a particular area, such as fashion, business, or law, additional background in the chosen field is expected. Increasingly, technical writing requires a degree in, or some knowledge about, a specialized field—for example, engineering, business, or one of the sciences. Knowledge of a second language is helpful for some positions. A background in web design, computer graphics, or other technology field is increasingly practical, because of the growing use of graphics and representational design in developing technical documentation. In many cases, people with good writing skills may transfer from jobs as technicians, scientists, or engineers into jobs as writers or editors. Others begin as research assistants or as trainees in a technical information department, develop technical communication skills, and then assume writing duties.

As indicated in the discussion above, the *Handbook* indicates that employment in the technical writer occupation does not normally require at least a bachelor’s degree in a specific specialty. As reflected in this decision’s earlier discussion of evidentiary deficiency of the broadly generic and generalized descriptions of the proposed duties, the petitioner fails to demonstrate that the beneficiary’s technical writing would require the application of at least a bachelor’s degree level of highly specialized knowledge in a field related to the subject matter upon which he would write.

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<sup>4</sup> The AAO notes that the *Handbook* does not indicate a requirement that the college degree be in a specific specialty.

The AAO has also considered the extent to which the record establishes duties in addition to technical writing to see if, in combination with the limited extent to which the nature of the technical writing is conveyed, they elevate the proffered position to a specialty occupation. However, incorporating here its earlier discussion about the deficiency of evidence on the proposed duties, the AAO finds that these additional duties also lack substantive evidence about what their performance would likely entail in terms of the theoretical and practical application of a body of highly specialized knowledge and the level of education required for such application.

For the reasons discussed above, the director was correct in not finding that the petitioner had satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS 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 already discussed, the petitioner has not established that its claimed proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for technical writer positions, including degrees not in a specific specialty related to the technical subjects that will be the focus of the writing. As evident in the earlier discussion about the generalized descriptions of the proffered position's duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than technical writer positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in the earlier discussion of the limited information about the proffered duties, they have not been described with sufficient specificity to show that they are more specialized and complex than technical writer positions that are not usually associated with a degree in a specific specialty.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The AAO will dismiss the appeal as the evidence of record establishes that the director's decision to deny the petition for failure to establish a specialty occupation position was correct. Likewise, because the decision was not an incorrect application of law, policy, or precedent decision as would be required to merit the granting a motion to reconsider under 8 C.F.R. § 103.5(a)(3), the director's decision to dismiss the Motion to Reconsider was correct.

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 director's decision of November 20, 2007 dismissing the Motion to Reconsider is affirmed. The petition is denied.