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U. S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090

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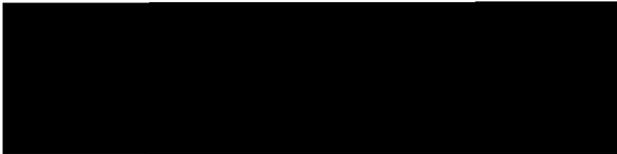


Date: DEC 06 2011 Office: VERMONT SERVICE CENTER FILE:

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew  
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, submitted October 14, 2008, the petitioner stated that it is a software development company with 14 employees. To employ the beneficiary in what it designates as a systems analyst position, the petitioner endeavors 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 appeal is filed to contest each of the independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner failed to establish: (1) that the petitioner will employ the beneficiary in a specialty occupation position, (2) that the Labor Condition Application (LCA) in this case is valid for the location where the beneficiary would be employed, and (3) that the beneficiary is qualified to work in the proffered position. The director also found that the petitioner had failed to provide the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B).

The AAO bases its decision upon its review of the entire record of proceeding, 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; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

The petitioner does not appear to have been represented when it filed the instant visa petition. Subsequently, an attorney filed a response to an RFE issued in this matter, and submitted a Form G-28 Notice of Entry of Appearance, properly executed by the petitioner's director of business development. The appeal in this matter was filed by a different attorney, who also submitted a properly executed G-28. That latter G-28 indicates that the petitioner is now represented by the second attorney. All representations will be considered, but the decision in this matter will be provided only to the petitioner and its current attorney of record.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

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.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely solely 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 U.S. Department of Labor's *Occupational Outlook Handbook (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 alien will likely perform for the entity or entities ultimately determining the work's content.

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 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.

The regulation at 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 a particular position 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) (hereinafter referred to as *Defensor*). 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 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

Both the visa petition and the LCA state that the beneficiary would work at the petitioner’s offices in Huntington, New York. The visa petition states that the petitioner would employ the beneficiary from September 22, 2008 to September 27, 2010.

In an RFE issued February 4, 2009 the service center asserted that the evidence shows that the beneficiary would work at multiple sites, and requested, *inter alia*, an LCA listing all of those sites. The petitioner’s director of business development responded with a letter dated March 4, 2009 and some other submissions, but did not address that request.

The service center issued another RFE on April 30, 2009. The service center requested, *inter alia*, an itinerary of the sites where the beneficiary would work, the dates she would work there, and the identity of the end-users of the beneficiary’s services at those sites. It also requested letters from each of the end-users of the beneficiary’s services stating the name of the project to which the beneficiary would be assigned, the beneficiary’s job title and duties, the end-users’ minimum educational requirement for that position, the name of the vendors who contracted with the end-users to provide the beneficiary’s services, the name and job title of the person who would supervise the beneficiary at each site, and whether the identified end-users are permitted to assign the beneficiary’s services to other employers. The service center requested that the petitioner identify the succession of companies through which the beneficiary’s services were assigned to those end users and provide contracts showing that succession of assignments.

The service center further requested that, if the beneficiary would be employed on an in-house project, the petitioner describe the project; state the length of time the beneficiary would work on the project; identify the other team members on the project by name, title, and duties; provide invoices showing sale of the work product; explain the qualifications necessary for the project and how the beneficiary meets those qualifications; and provide copies of contracts showing the project name, location, and starting and end dates.

Further still, the service center requested a detailed statement of the beneficiary's proposed duties and responsibilities to establish that the job requires a minimum of a bachelor's degree, and a statement of the educational requirements of the proffered position.

In response, previous counsel submitted, *inter alia*, (1) a letter, dated June 10, 2009, from the petitioner's director of business development; (2) diplomas issued to the beneficiary; (3) an evaluation of the beneficiary's academic credentials; (4) a document related to an agreement between the petitioner and Bergen County, New Jersey; (5) a document pertinent to an agreement between the petitioner and Essex County, New Jersey; and (6) previous counsel's own letter, dated June 10, 2009.

The petitioner's director of business development's June 10, 2009 letter states that the beneficiary would work with him and report to him, which the AAO construes to mean that he would assign her duties and supervise her performance. It further states that the petitioner does not provide consulting or staffing services, but "develops internet-based recreation management software at its own location, then installs it at client locations and maintains it." The AAO notes that the installation of that software, and its maintenance, might take place at the clients' sites.

That letter also states that the beneficiary would be employed only on in-house projects at the petitioner's Huntington, New York location from September 2008 to January 15, 2010. The AAO notes that, on the visa petition and the LCA, the petitioner stated that the requested period of employment is from September 22, 2008 to September 27, 2010. The petitioner's director of business did not indicate that the beneficiary would be employed on in-house projects throughout the period of requested employment, and did not indicate in what other locations she would be employed, and what duties she would perform while working on what other organizations' projects.

The letter further states, "[The petitioner] has a number of contracts that have been executed or are about to be executed," and names its clients and projected clients, who are state, county, and municipal governments. The AAO notes that the petitioner is unable to demonstrate that it has work for the beneficiary to perform by providing the names of clients with which it anticipates executing a contract in the future.

The letter also states,

The position requires at least a baccalaureate degree. The beneficiary must be experienced in ASP.Net, MS Access, C#, VB.Net, SQL Server (expertise on how to

write, debug, and maintain stored procedures is very important), as well as proficient with WinRunner, and Loadrunner.

The AAO notes that the petitioner's director of business development, who indicated that he would supervise the beneficiary's work, indicated that a bachelor's degree is required for the proffered position, but not that the degree must be in any specific specialty. Further, he provided no evidence to corroborate his assertion that the duties listed require a minimum of a bachelor's degree.

That letter notes, yet further, that in addition to her education the beneficiary has employment experience, and stated the duties of the proffered position as follows:

- Develop, design and modify software
- Design test plans, scenarios, scripts, or procedures
- Test system modifications to prepare for implementation
- Develop testing programs that address areas such as database impacts, software scenarios, regression testing, negative testing, error or bug retests, or usability
- Document software defects, using a bug tracking system, and report defects to software developers
- Identify, analyze, and document problems with program function, output, online screen, or content
- Monitor bug resolutions efforts and track successes
- Create or maintain databases of known test defects
- Plan test schedules or strategies in accordance with project scope or delivery dates
- Participate in product design reviews to provide input on functional requirements, product designs, schedules, or potential problems
- Review software documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks
- Interact with business analyst
- Customer interaction
- Train customers in using software

The AAO observes that the petitioner stated that all of the beneficiary's duties would be performed at the petitioner's own offices. Those duties related to programming and testing could likely be performed at the petitioner's offices. Even customer interaction might be performed telephonically. Training customers in using software, however, is unlikely to be accomplished at the petitioner's offices.

The document pertinent to an agreement with Bergen County includes an agreement to renew a contract with the petitioner to furnish, install and maintain an automated golf tee time reservation/scheduling system for the county. That document is dated February 4, 2009 and was ratified on April 15, 2009. It indicates that the contract between the petitioner and Bergen county was originally to run from January 21, 2008 to January 20, 2009, but was extended from January 21, 2009 to January 20, 2010. How many of the petitioner's 14 claimed employees would work on that project is unclear, as is whether the beneficiary would be among them.

The document pertinent to an agreement with Essex County, New Jersey is entitled "Memorandum of Agreement," and was ratified on December 15, 2008. It refers to an agreement pursuant to which the petitioner would provide an automated golf management information system to Essex County. The term of that agreement is from January 1, 2009 to December 31, 2010. How many of the petitioner's 14 claimed employees would work on that project is unclear, as is whether the beneficiary would be among them. The record contains invoices the petitioner issued to Essex County on January 30, 2009, February 28, 2009, March 30, 2009, April 24, 2009, and May 22, 2009. Those documents indicate that the petitioner provided some services to Essex County, but not that the petitioner would be providing the beneficiary, or that the beneficiary is qualified to perform any work under that contract.

Neither of those documents indicate what portion, if any, of the work pursuant to them would be performed at the petitioner's site. The AAO observes that the original contracts with Bergen County and Essex County, which the petitioner likely has in its possession, would likely have provided more detail pertinent to the work to be performed under them, including the locations where the work was to be performed.

Further, the visa petition was submitted on October 14, 2008. On that date, neither of those two agreements had been ratified. United States Citizenship and Immigration Services (USCIS) regulations 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). Because those agreements had not been ratified when the petitioner submitted the visa petition, they are not evidence that the petitioner then had specialty occupation employment in which the beneficiary could work, or that it had any work for the beneficiary to perform at all.

An exception exists to that blanket statement. The agreement with Bergen County, although it was ratified on April 15, 2009, states that the petitioner and Bergen County previously had a contract that ran from January 21, 2008 to January 20, 2009. Although the first contract would be better evidence in support of the existence of that agreement, the nature of the work contracted, and the contract's other terms, the AAO accepts that the document ratified on April 15, 2009 has some slight evidentiary weight for the proposition that the petitioner had a contractual agreement with Bergen County that ran from January 21, 2008 to January 20, 2009.

The diplomas issued to the beneficiary show that the beneficiary has a Bachelor of Arts degree awarded by the University of Delhi, India; and a bachelor's degree in education awarded by Annamalai University, also in India.

The educational evaluation submitted was provided by a professor at the Department of Management Science, Long Island University. It states that the beneficiary's degrees from institutions in India, taken together, are equivalent to a bachelor's degree in education earned in the United States. It does not indicate that the beneficiary's education is equivalent to a degree in any computer-related specialty.

In his June 10, 2009 letter, counsel asserted that 8 C.F.R. § 214.2(h)(4)(i)(C) allows the beneficiary to substitute three years of experience for each year of education she lacks in the appropriate field. Counsel performed various calculations pertinent to the beneficiary's education and experience and concluded that, taken together, they are equivalent to a bachelor's degree in computer science.

The AAO notes that 8 C.F.R. § 214.2(h)(4)(i)(C) does not pertain to any equivalence of employment experience and education. Rather, it pertains to the general requirements for petitions involving an alien of distinguished merit and ability in the field of fashion modeling.

The regulation that contains the educational equivalence to which counsel referred is 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). That regulation states, in pertinent part:

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

\* \* \* \*

It must be clearly demonstrated that the alien's training and/or work experience included theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (1) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (2) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (3) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (4) Licensure or registration to practice the specialty occupation in a foreign country; or
- (5) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

In the instant case, the petitioner provided no evidence pertinent to the educational qualifications of the beneficiary's peers, supervisors, or subordinates in her previous computer-related positions. The petitioner provided none of the enumerated indices nor any other evidence that the beneficiary is recognized as an expert in the specialty occupation. The petitioner is clearly unable to rely on the experience to education equivalent expressed at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The director denied the visa petition on June 26, 2009. As was noted above, the director found that the petitioner had failed (1) to demonstrate that it would employ the beneficiary in a specialty

occupation position, (2) to demonstrate that the Labor Condition Application (LCA) in this case is valid for the location or locations where the beneficiary would be employed, (3) to demonstrate that the beneficiary is qualified to work in the proffered position, and (4) to provide the required itinerary.

On appeal, present counsel submitted, *inter alia*, (1) printouts of E-mail exchanges between the beneficiary and others; (2) various documents pertinent to software development the petitioner performed for other entities and agreements to perform such work; (3) another evaluation pertinent to the beneficiary's qualifications for the proffered position; (4) a letter, dated August 14, 2009, from the beneficiary; (5) a letter, dated August 17, 2009, from the petitioner's director of business development; and (6) a brief.

The E-mail exchanges provided indicate that the beneficiary was involved in development of software systems and in contact with others pertinent to that development. All of those E-mails appear to pertain to the Miami-Dade County project.

With few exceptions, the documents provided pertinent to software development and agreements postdate the filing of the visa petition on October 14, 2008. As such, those later documents are not evidence that, when the petitioner filed the visa petition, it had any specialty occupation work for the beneficiary to perform, or, for that matter, any work at all.

One exception is a contract, dated March 6, 2007, between the petitioner and Miami-Dade County, Florida, in which the petitioner agreed to provide "the services set forth in the Scope of Services." The Scope of Services is included in an addendum to that contract, and indicates that the petitioner will develop software through which the public will access various Miami-Dade Parks and Recreation programs and facilities. The contract states that it is for a two-year term, with an option for Miami-Dade County to renew it for seven additional one-year periods. Although the signature page that should have been a part of that contract is not in the record, the AAO notes that the record contains invoices that purport to have been issued by the petitioner to the Parks & Recreation Department of Miami, Florida from June 18, 2007 to March 4, 2009, and the E-mail messages between the beneficiary and employees of Miami-Dade County, all of which suggests that some agreement was reached.

That contract states:

With respect to travel costs and travel[-]related expenses, the [petitioner] agrees to adhere to [Florida laws] as they pertain to out-of-pocket expenses including employee lodging, transportation, per diem, and all miscellaneous cost and fees.

That passage suggests that the petitioner anticipates that some of its workers would perform their duties at locations other than the petitioner's offices. That conclusion is bolstered by a section of the contract pertinent to the installation of software at Miami-Dade's locations, which states, "[The petitioner] agrees to install the Software at the applicable sites set forth in the Contract, as applicable."

The contract states:

In the event the [petitioner] wishes to substitute personnel for the key personnel identified in the [petitioner's] proposal, the [petitioner] must notify the County in writing and request written approval for the substitution . . . .

This passage suggests that the petitioner provided Miami-Dade a list of the petitioner's workers who would provide services pursuant to that contract. That list is not in the record. Whether the petitioner then intended to employ the beneficiary pursuant to that contract is unknown to the AAO. This weakens the inference that, when it signed that contract, the petitioner had work for the beneficiary to perform.

The record also contains an undated statement on the petitioner's letterhead signed by its president. That letter states that the beneficiary would work on the Miami-Dade project approximately half of her working hours and would devote the other half to other projects, including projects of Bergen County, Dakota County, Suffolk County, Essex County, and U.S.D.A. Land Between the Lakes. It further states that all software configuration, installation, documentation and maintenance are carried out at the petitioner's office in Huntington, New York.

The record also contains an undated, unsigned, unattributed statement on the petitioner's letterhead that, on whatever date that statement was produced, three of the petitioner's systems analysts were working on the Miami-Dade project, but does not name them. It provides the following list of "Primary Responsibilities" and a list of "Knowledge and Skill Requirements" that presumably pertain to those systems analyst positions:

1. Collect information to analyze and evaluate existing or proposed systems.
2. Research, plan, install, configure, troubleshoot, maintain and upgrade operating systems.
3. Research, plan, install, configure, troubleshoot, maintain and upgrade hardware and software interfaces with the operating system. Analyze and evaluate present or proposed business procedures or problems to define data processing needs.
4. Prepare detailed flow charts and diagrams outlining systems capabilities and processes.
5. Research and recommend hardware and software development, purchase, and use.
6. Troubleshoot and resolve hardware, software, and connectivity problems, including user access and component configuration.
7. Select among authorized procedures and seek assistance when guidelines are inadequate, significant deviations are proposed, or when unanticipated problems arise.
8. Record and maintain hardware and software inventories, site and/or server licensing, and user access and security.
9. Install, configure, and upgrade desktop hardware and peripherals to include network cards, printers, modems, mice and add-in boards.
10. Work as a team member with other technical staff, such as networking to ensure connectivity and compatibility between systems.

11. Write and maintain system documentation.
12. Conduct technical research on system upgrades to determine feasibility, cost, time required, and compatibility with current system.
13. Maintain confidentiality with regard to the information being processed, stored or accessed by the network.
14. Document system problems and resolutions for future reference.
15. Other duties as assigned.

The record contains a proposal the petitioner issued to Dakota County, Minnesota, and a contract between Dakota County and the petitioner pursuant to which the petitioner would provide a campground management system to the petitioner. For the projects specifications, the contract refers to a request for proposals that is not in the record. The record contains invoices issued by the petitioner to Dakota County between December 29, 2009 and April 27, 2009, but the nature of that work, where it was performed, and whether the beneficiary was qualified to perform any of it is not demonstrated in the record. The AAO further notes that the invoices provided were issued during a nine-month period within the two-year period of requested employment. The contract states that the project was expected to encompass four to six months after commencement, but did not state the date when the work would commence. It also states that the petitioner's duties under that contract would include installation and training, which suggests that at least some of the petitioner's workers on that project would provide services at Dakota County locations, rather than at the petitioner's Huntington, New York location. It states "The County will also implement the . . . software at two or three administrative/support locations designated by the County for the purpose of managing and administering the . . . system." This suggests even more strongly that some of the petitioner's workers would perform their duties at remote locations, notwithstanding the assertion of the petitioner's director of business development that the petitioner does not provide consulting or staffing services.

The record contains an amendment to a contract between the petitioner and Suffolk County, New York. That contract amendment indicates that the petitioner would add enhancements to Suffolk County's recreation tracking system from January 1, 2006 to December 31, 2010, with two two-year extension options. That amendment does not indicate the exact nature of the work to be performed, where it would be performed, whether the beneficiary was qualified to perform any of that work, or whether the petitioner anticipated employing the beneficiary on that project. The original contract, which likely contained some or all of that information, was not provided. That contract amendment was accompanied by invoices the petitioner issued to Suffolk County on January 22, 2008, July 10, 2008, and January 6, 2009. They suggest that the petitioner performed some work for Suffolk County, but do not clarify the issues discussed above.

The record contains a portion of a contract between the petitioner and Union County, New Jersey pursuant to which the petitioner would furnish a computerized golf reservation system. That provided portion of the contract refers to bid plans and specifications issued on November 8, 2007, which plans and specifications were not provided. It does not indicate the precise nature of the work to be performed, where it was to be performed, whether the beneficiary was qualified to perform any portion of that work, or whether the petitioner anticipated employing the beneficiary on that project. Further because the signature page was not provided, the contract itself contains no indication that it

was ever ratified. The record contains copies of invoices the petitioner issued to Union County on March 22, 2009, April 24, 2009, May 22, 2009, and June 25, 2009. Those invoices suggest that the petitioner performed some work for Suffolk County, but do not clarify the other issues discussed above.

The new evaluation, dated July 10, 2009, was prepared by a professor who is Lead Faculty of Management Information Systems and Business Administration, College of Undergraduate Business and Management, the University of Phoenix, Jersey City Campus; Adjunct Assistant Professor, Zicklin School of Business of Baruch College of the City University of New York (CUNY), Adjunct Assistant Professor of the Stern School of Business of New York University, and holds other academic positions as well. The evaluation was provided through a credential evaluation company.

The professor stated that the beneficiary's two foreign bachelor's degrees, considered together, are the equivalent to a U.S. bachelor's degree in education. He further stated that, considering the beneficiary's education and her employment experience together, she has the equivalent of at least a bachelor's degree in computer information systems from an accredited institution of higher education in the United States.

The professor concluded by stating:

“Because of the positions I hold at the University of Phoenix, Baruch College of the [CUNY] University of New York and the Stern School of Business of the New York University, I have authority to grant college-level credit for training, and/or courses taken at other U.S. or international universities.

No evidence was provided to support that assertion.

The beneficiary's August 14, 2009 letter and the petitioner's director of business development's August 17, 2009 letter both indicate that they are aware that the submissions in support of the visa petition contained errors. The beneficiary asserted that, if the visa petition is denied, she and her family will suffer great hardship. The AAO notes that the eligibility requirements of the instant visa category cannot be waived in consideration of hardship.

Counsel also provided additional copies of previously provided evidence.

In the brief filed on appeal, counsel asserted that the evidence provided shows that the beneficiary would work at the petitioner's office, and that an itinerary is not required in this case. Counsel further asserted that the petitioner was not obliged to file an LCA prior to filing the visa petition and that, in the alternative, compliance with the salient regulation should be waived. Counsel observed that, as the beneficiary and the petitioner's director of business development stated in their August 14, 2009 and August 17, 2009 letters, the petitioner elected to file the visa petitions without the assistance of counsel. Counsel asserted that the description of the beneficiary's duties was sufficient to show that she would work in a specialty occupation, citing an AAO non-precedent decision for the proposition that no further evidence is required.

Counsel's citation of a previous AAO decision pertinent to a position other than that proffered here is not persuasive. Counsel has not established that the facts of the cited decisions are substantially the same as the facts in the instant case.

Even if that case were on all fours with the instant case, counsel's citation to AAO non-precedent decisions would have no precedential value. While 8 C.F.R. § 103.3(c) provides that USCIS precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding, *see* 8 C.F.R. § 103.2(b)(16)(ii), and the record presently before the AAO does not establish the proffered position as a specialty occupation.

As to the specialty occupation issue, the AAO notes that the petitioner describes the proffered position as a systems analyst position. The duties described are generally related to computer systems analysis and programming.

The AAO recognizes 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>1</sup> The *Handbook* addresses systems analyst positions in the section entitled, "Computer Systems Analysts." As to the duties of those positions, the *Handbook* states:

To begin an assignment, systems analysts consult with an organization's managers and users to define the goals of the system and then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and a variety of accounting principles to ensure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts oversee the implementation of the required hardware and software components. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to "debug," or eliminate errors, from the system. Systems analysts who do more in-depth testing may be called *software quality assurance analysts*. In addition to running tests, these workers diagnose problems, recommend solutions, and determine whether program requirements have

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed February 14, 2011.

been met. After the system has been implemented, tested, and debugged, computer systems analysts may train its users and write instruction manuals.

Because the duties attributed to the proffered position are generally consistent with the duties of a computer systems analyst as described in the *Handbook*, the AAO finds that the proffered position is, in fact, a computer systems analyst position as described in the *Handbook*.

The AAO will now consider the various alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO will first consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied if the petitioner demonstrates that a bachelor's or higher degree, or the equivalent, in a specific specialty is normally the minimum entry requirement for the particular position at issue.

The *Handbook* describes the educational requirements of a computer systems analyst position as follows:

When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

A preference for applicants with bachelor's degrees is not a minimum requirement. Further, that passage does not suggest that employers seek a degree in any specific specialty. Neither the *Handbook*, nor any other evidence in the record, suggests that computer systems analyst positions categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty and therefore categorically qualify as specialty occupation positions. Further, the AAO finds that neither the duty descriptions – which are generalized descriptions of functions that do not self-evidently require at least a bachelor's degree, or the equivalent, in a specific specialty – nor any other evidence in the record establishes the requisite degree or degree-equivalency requirement.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO will next address the alternative criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations.

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 was noted above, the *Handbook* offers no support for the proposition that the petitioner's industry requires a minimum of a bachelor's degree or the equivalent in a specific specialty for its computer systems analyst positions. The record contains no evidence pertinent to a professional association of computer systems analysts that has made such a degree a minimum requirement for entry. The record contains no letters or affidavits from others in the industry. The record contains no other evidence pertinent to educational requirements placed on computer systems analysts by the petitioner's industry.

Having provided no evidence pertinent to the recruitment and hiring practices of other employers seeking computer systems analysts in the petitioner's industry, the petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO 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 demonstrates that, notwithstanding that other computer systems analyst positions in the petitioner's industry may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such a degree.

The description of the duties of the proffered position, however, is the only evidence pertinent to the relative complexity of the proffered position. Collecting information to analyze and evaluate existing or proposed systems; planning, installing, configuring, troubleshooting, maintaining and upgrading operating systems and hardware, etc., are all manifestly within the duties of a computer systems analyst as described in the *Handbook*, which indicates that not all such jobs require a bachelor's degree.

Nothing in the evidence provided distinguishes the instant computer systems analyst position from those computer systems analyst positions that do not require a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not, therefore, demonstrated that the

particular position proffered is so complex or unique that it can be performed only by an individual with such a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner provided no evidence pertinent to the educational credentials of its other systems analysts. In fact, other than various assertions, the record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore demonstrated that it normally requires a degree for the proffered position and that the position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that 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 was noted above, however, the duties attributed to the proffered position contain no indication of complexity or specialization beyond the ken of a computer systems analyst without a minimum of a bachelor's degree or the equivalent in a specific specialty. Absent considerable additional explanation, nothing about preparing flow charts, recommending specific hardware and software, or troubleshooting, for instance, establishes that such duties are so specialized and complex that they are associated with attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty.

The duties the petitioner's president attributed to the proffered position are not demonstrably more complex or specialized such that they would require knowledge that is associated with a bachelor's degree, notwithstanding that the duties of some other computer systems analyst positions do not. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)

Because the petitioner has not demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), the petition may not be approved. The appeal will be dismissed and the visa petition will be denied on this basis.

Another basis for the director's denial of the petition was the director's finding that the petitioner had not demonstrated that the LCA provided to support the visa petition corresponds with that petition. In order for an H-1B petition to be approvable, the location shown on the supporting LCA must correspond to the location where the beneficiary would work, as that location determines the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay.

The LCA submitted to support the instant visa petition indicates that the beneficiary would work in Huntington, New York. The petitioner's offices are, in fact, in Huntington. However, that the petitioner (1) installs, maintains, and offers training on the systems it installs for clients as far away as Minnesota; and (2) signed an agreement that included a clause pertinent to business travel by its

workers, suggests that some of the petitioner's employees would work at locations other than the petitioner's offices. Rather than stating that the beneficiary is not one of the workers who would work remotely, the petitioner's director of business development implied that none of the petitioner's employees work in a location remote from its offices. Absent additional explanation, that assertion is not credible.

The petitioner has not demonstrated that the LCA provided is valid for employment in all of the locations where the beneficiary would work, and has not, therefore, demonstrated that the LCA corresponds to the visa petition and may be used to support it. The petition was correctly denied on this additional basis.

Similarly, although the petitioner's director of business development implied that the beneficiary would work only at the petitioner's own office in Huntington, and implied that none of the petitioner's workers work elsewhere, evidence in the record tends to contradict that latter assertion, which casts doubt on the former assertion. Because the petitioner has not demonstrated that the beneficiary would work only in the petitioner's own offices, it was obliged, by 8 C.F.R. § 214.2(h)(2)(i)(B), to provide an itinerary of the locations where the beneficiary would work. The petitioner has not complied with that requirement. The appeal will be dismissed and the petition denied for this additional reason. The petitioner's failure to provide an itinerary raises another issue, however, in addition to failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B).

Rather than merely denying the visa petition because of the petitioner's failure to comply with the requirement of 8 C.F.R. § 214.2(h)(2)(i)(B) the service center requested, in the April 30, 2009 RFE, that the petitioner provide that itinerary, which the petitioner did not do.

Even if the petitioner were not compelled by 8 C.F.R. § 214.2(h)(2)(i)(B) to provide an itinerary as part of the initial evidence in this matter, the regulations provide the director with broad discretionary authority to request evidence in support of a petition. Specifically, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Moreover, in addition to 8 C.F.R. § 214.2(h)(9)(i), the regulation at 8 C.F.R. § 103.2(b)(8) provides the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue a request for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any request for evidence that the director may issue. See 8 C.F.R. § 214.2(h)(9). The purpose of a request for evidence is to elicit further

information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceeding as it existed at the time the request for evidence was issued, the request for itinerary evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition within the area for which the LCA was approved.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Here, in addition to being required initial evidence, as the detailed itinerary was material to a determination of whether the work to be performed by the beneficiary would be in a specialty occupation, the petitioner's failure to provide this specifically requested evidence precluded a material line of inquiry. As such, the petition must be denied for this additional reason.

Pertinent to another issue related to the LCA, the director also noted that the petitioner had failed to obtain the LCA with which it sought to support the instant visa petition until after it filed the visa petition. The visa petition was submitted on October 4, 2008. With it, the petitioner submitted an LCA previously submitted and used by another company that employed the beneficiary in H-1B status. For various reason, which counsel does not contest, that LCA may not be used to support the instant visa petition. Subsequently, the petitioner submitted an LCA that it had filed for the beneficiary, which was certified on May 18, 2009, after the visa petition was submitted. The petitioner now seeks to rely on that LCA to support the visa petition.

On appeal, counsel argued both that the petitioner was not obliged to file an LCA prior to submitting the visa petition and, in the alternative, that the petition should be approved because to do otherwise would cause hardship to the beneficiary and her family.

The AAO notes, again, that the requirements of the statutes and regulations pertinent to the instant visa category may not be disregarded based on hardship. The statutes and regulations contain no exceptions or exemptions based on hardship. Similarly, counsel has asserted that the petitioner's failure to comply with the pertinent statutes and regulations should be excused because the petitioner chose to file the visa petition without the assistance of counsel and did not understand the requirements of this visa category. The election to proceed without counsel is also ineffective to void the pertinent statutes and regulations. There is no exemption from the pertinent statutes or regulations based on the petitioner's choice to proceed without counsel.

The remaining issue pertinent to this basis for denial is whether the petitioner was required to provide a previously certified LCA when it submitted the visa petition.

United States Citizenship and Immigration Services (USCIS) regulations 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). The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission . . . .

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In cases where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(1) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed . . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

The record does not establish that, at the time of filing, the petitioner had obtained a certified LCA in the claimed occupational specialty and, therefore, as indicated by the director, does not indicate that the petitioner had complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).<sup>2</sup> The appeal will be dismissed and the visa petition denied for this additional reason.

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<sup>2</sup> While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

The remaining basis for the director's decision of denial concerns the beneficiary's qualifications for working in the proffered position.

An examination of the various descriptions of the duties of the proffered position demonstrates that those duties might be closely related to computer science, information technology or information systems, computer engineering, or, of course, computer systems analysis. The record shows that the beneficiary, however, has a bachelor's degree in education and a Bachelor of Arts degree, both from universities in India.

The AAO observes that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree or the equivalent in a specific specialty, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate that the beneficiary has a minimum of a bachelor's degree or the equivalent *in that specific specialty*.

The first evaluation of the beneficiary's credentials was concerned only with the beneficiary's education, and determined that the beneficiary's two degrees, considered together, are equivalent to a bachelor's degree in education from a U.S. institution. That is clearly insufficient to show that the beneficiary has a minimum of a bachelor's degree or the equivalent in any computer-related field.

The second evaluation, dated July 10, 2009, considered both the beneficiary's education and employment experience and determined that the two, taken together, are at least equivalent to a bachelor's degree in computer information systems. That evaluation, however, was not

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For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

[Italics added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, contrary to the assertions of counsel, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and for USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended H-1B petition with USCIS whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

accompanied by any evidence that the evaluator is authorized to grant academic credit at a U.S. college or university in computer information systems.

USCIS will not accept a faculty member's opinion as to the college-credit equivalent of a particular person's work experience or training, unless authoritative, independent evidence from the official's college or university, such as a letter from the appropriate dean or provost, establishes that the official is authorized to grant academic credit for that institution, in the pertinent specialty, on the basis of training or work experience. Because no such corroborating evidence was provided, the second evaluation is of no evidentiary weight, and no other evidence in the record suggests that the beneficiary has the equivalent of any computer-related degree.

Pursuant to the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation. Because the finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation position is dispositive, the AAO need not further address the issue of the beneficiary's qualifications.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

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