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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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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Date: JUL 06 2011

Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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,

Perry Rhew
Chief, Administrative Appeals Office

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

In this matter, the petitioner seeks the beneficiary’s services as a nursery production and sales manager. The petitioner initially did not provide a detailed job description but stated in response to the RFE that the beneficiary would:

- Plan a propagation schedule of tomato sowing (5% of the beneficiary’s time);
- Implement the sowing, transplanting, and organizing of organic tomato plant growing (20% of the beneficiary’s time);

- Identify and order the supplies necessary for tomato production (5% of the beneficiary's time);
- Edible plant identification and seed ordering (5% of the beneficiary's time);
- Supply purchasing and inventory management (5% of the beneficiary's time);
- Other edible plant greenhouse propagation production (vegetables, fruits, herbs, and edible flowers) (20% of the beneficiary's time);
- Tomato plant sales management for on- and off-site sales to the public (25% of the beneficiary's time);
- Other edible plant sales management (25% of the beneficiary's time); and
- Bookkeeping/accounting (10% of the beneficiary's time).

It should be noted that these duties add up to 120% of the beneficiary's time, rather than 100%. Consequently, it is not clear how the beneficiary's daily responsibilities are actually broken down.

The petitioner also stated in response to the RFE that it requires its nursery production and sales manager to have at least a bachelor's degree or the equivalent in horticulture or agriculture plus experience.

The petitioner submitted copies of the beneficiary's foreign credentials. In response to the RFE, the petitioner also submitted a credential evaluation stating that the beneficiary has the equivalent of a U.S. bachelor of science degree in horticultural management through a combination of his education and experience.

The proffered salary for the position is \$50,000 per year. The Labor Condition Application (LCA) submitted is not signed by the petitioner. Further, the petitioner submitted a copy of its owner's 2007 U.S. individual income tax return. This document indicates that the petitioning farm only earned \$16,809 for that year. The other income earned by the petitioner's owner came from taxable interest, real estate, and alimony. Altogether, the petitioner's owner earned \$62,881 in that year. Therefore, the petitioner has not presented evidence that it will be able to abide by the terms and conditions of employment and pay the beneficiary the proffered wage of \$50,000.

In response to the RFE, the petitioner submitted an organizational chart. In a letter submitted with the chart, the petitioner's owner states as follows:

I eventually thought I should hire some help, and got a FEIN in the year 2005. I hired two part-time employees, one for the nursery and one for the crops. While searching for Worker's Compensation insurance, I realized that the cost would be too prohibitive for a business not making any money, and I had to terminate them after only several months of employment.

Regarding the farm's workers listed on the chart, the petitioner states, "[n]one of these people are paid; they are willing students and helpers on the farm."

The petitioner further states as follows regarding why she now wishes to hire the beneficiary: "[The beneficiary] first came to my farm in October of 2008 for a visit on a tourist visa. He

voluntarily pitched in around the farm, for no remuneration whatsoever, and I quickly began to see that his value to my farm structure could enable me to become a vastly better-functioning organization. . . .”

Regarding the hiring practices of other similar employers, the petitioner states: “[The petitioner] understands that there are not very many organizations that have no employees that require a degree of their first employee. Granted, that would be difficult, if not impossible, to find evidence along those lines. . . .”

The petitioner further provides documentation from the State of California that employers hiring horticulturalists prefer to hire those with a bachelor’s degree in horticulture or a closely related agricultural science, from the University of [REDACTED] that the majority of horticultural positions require either a two-year or four-year degree, and from the University of [REDACTED] that employers often require a bachelor’s degree for an entry level position as a greenhouse manager, plant breeder, and nursery center sales worker. It should be noted that the documentation submitted from [REDACTED] Center indicates that, contrary to the petitioner’s claims, a bachelor’s degree in horticulture is desired or preferred, but not required. Moreover, regarding the submitted job listings from other employers, the petitioner states, “I recognize that these employers are all “bigger” than the petitioner” Therefore, the documentation submitted by the petitioner does not demonstrate that other similar employers require at least a bachelor’s degree or the equivalent in a specific specialty for parallel positions.

The director denied the petition on July 17, 2009.

On appeal, the petitioner provides a professional evaluation from [REDACTED] at [REDACTED] opines as follows:

Based on my review of the aforesaid job duties, I believe that the position is a professional-level horticultural management position, and that the duties correspond with those typically associated with such professional-level positions. Furthermore, I find that the position of “Nursery Production and Sales Manager” is a specialty occupation requiring at least a bachelor’s-level background in Horticulture, Horticultural Management, or a related field, and the application of specialized knowledge in these fields. As an initial matter of note, the position requires in-depth knowledge of several areas of core competency such as greenhouse management, nursery management, horticultural sales management and propagation management, and expertise in an exceptionally large number of exotic tomato cultivars. The position also involves supervisory duties - - as evinced by an organizational chart showing that the Nursery Production and Sales Manager is responsible for supervising and training a Nursery Production Apprentice, a Nursery Sales Volunteer and two interns. The Nursery Production and Sales Manager must also be proficient in disease and pest management and analysis, the assessment of various production schedules and methods (for challenging and exotic plants), and all aspects of greenhouse and nursery

management, including sowing, transplanting, scheduling, lighting and climate control, fertilizer systems, and related areas. Finally, the position requires skills in horticultural sales (for exotic plants) as well as accounting, inventory management, purchasing and related activities.

It is my opinion that nursery production and sales management professionals who will be responsible for the job duties specified above are required to demonstrate bachelor's-level training in Horticulture, Horticultural Management, or a related area, in order to competently execute the required job duties. Generalized knowledge of horticulture alone is not sufficient in enabling the Nursery Production and Sales Manager to successfully meet the functional position requirements. Bachelor's-level training in Horticulture, Horticultural Management, or a related field enables the Nursery Production and Sales Manager to handle the sophisticated and specialized greenhouse, nursery, personnel and business-related management activities required to effectively ensure the optimal functioning of the highly specialized greenhouse and nursery operations of the employer. Indeed, given the core horticultural management aspects of the position, and the requirement of managing highly specialized and exceptionally demanding horticultural production and propagation operations, as well as supervising junior staff, it would be impractical to employ a Nursery Production and Sales Manager for the subject position that lacks a suitable bachelor's-level background in Horticulture, Horticultural Management, or a related field. . . .

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO finds that the proffered duties most closely resemble those found in the *Handbook's* (2010-11 online edition) section describing farmers, ranchers, and agricultural managers, which states as follows:

American farmers, ranchers, and agricultural managers direct the activities of one of the world's largest and most productive agricultural sectors. They produce enough food and fiber to meet the needs of the United States and for export. *Farmers and ranchers* own and operate mainly family-owned farms. They also

may lease land from a landowner and operate it as a working farm. *Agricultural managers* manage the day-to-day activities of one or more farms, ranches, nurseries, timber tracts, greenhouses, or other agricultural establishments for farmers, absentee landowners, or corporations. While their duties and responsibilities vary widely, all farmers, ranchers, and agricultural managers focus on the business aspects of running a farm. On small farms, they may oversee the entire operation; on larger farms, they may oversee a single activity, such as marketing.

* * *

While most farm output is sold to food-processing companies, some farmers—particularly operators of smaller farms—may choose to sell their goods directly to consumers through farmers' markets. Some use cooperatives to reduce their financial risk and to gain a larger share of the prices consumers pay. For example, in community-supported agriculture, cooperatives sell shares of a harvest to consumers prior to the planting season. This frees the farmer from having to bear all the financial risks and ensures a market for the produce of the coming season. Farmers, ranchers, and agricultural managers also negotiate with banks and other credit lenders to get the best financing deals for their equipment, livestock, and seed.

Like other businesses, farming operations have become more complex in recent years, so many farmers use computers to keep financial and inventory records. They also use computer databases and spreadsheets to manage breeding, dairy, and other farm operations.

The type of farm managers operate determines their specific tasks. On crop farms—farms growing grain, cotton, other fibers, fruit, and vegetables—farmers are responsible for preparing, tilling, planting, fertilizing, cultivating, spraying, and harvesting. After the harvest, they make sure that the crops are properly packaged, stored, and marketed. Livestock, dairy, and poultry farmers and ranchers feed and care for animals and keep barns, pens, coops, and other farm buildings clean and in good condition. They also plan and oversee breeding and marketing activities. Both farmers and ranchers operate machinery and maintain equipment and facilities, and both track technological improvements in animal breeding and seeds, and choose new or existing products.

The size of the farm or ranch often determines which of these tasks farmers and ranchers handle themselves. Operators of small farms usually perform all tasks, physical and administrative. They keep records for management and tax purposes, service machinery, maintain buildings, and grow vegetables and raise animals. Operators of large farms, by contrast, have employees who help with the physical work. Although employment on most farms is limited to the farmer and one or two family workers or hired employees, some large farms have 100 or more full-time and seasonal workers. Some of these employees are in nonfarm occupations,

working as truck drivers, sales representatives, bookkeepers, and computer specialists.

Agricultural managers usually do not plant, harvest, or perform other production activities; instead, they hire and supervise farm and livestock workers, who perform most daily production tasks. Managers may establish output goals; determine financial constraints; monitor production and marketing; hire, assign, and supervise workers; determine crop transportation and storage requirements; and oversee maintenance of the property and equipment.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos176.htm> (last accessed June 16, 2011). The training and qualifications required for farmers, ranchers, and agricultural managers are described as follows:

Experience gained from growing up on or working on a family farm is the most common way farmers learn their trade. However, modern farming requires making increasingly complex scientific, business, and financial decisions, so postsecondary education in agriculture is important, even for people who were raised on farms.

Education and training. Most farmers receive their training on the job, often by being raised on a farm. However, the completion of a 2-year associate degree or a 4-year bachelor's degree at a college of agriculture is becoming increasingly important for farm managers and for farmers and ranchers who expect to make a living at farming.

Id. Therefore, although either a 2-year or 4-year degree in agriculture may be preferred, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty or its equivalent is required for entry into the occupation in the United States.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

As the *Handbook* indicates no specific degree requirement for employment as a farmer, rancher, or agricultural manager, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that

the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As will now be discussed, upon careful review of the letter from [REDACTED] - which opines on the educational requirements for the proffered position - the AAO concludes that the letter has no probative value with regard to establishing the proffered position as a specialty occupation. [REDACTED] does not cite studies, surveys, any empirical evidence, or any reference materials in support of his opinion about the educational requirements for the proffered position. Further, [REDACTED] focuses on the position description provided by the petitioner, which, the AAO finds to be inaccurate. As discussed previously, the position duty breakdown provided by the petitioner adds up to 120% of the beneficiary's time, rather than 100% of the beneficiary's time. Consequently, it is not clear how much time the beneficiary will actually spend on each of the proffered duties. Second, as will be discussed in further detail below, it does not appear that the petitioner's farm is profitable enough to sustain the beneficiary's employment as a nursery production and sales manager performing the proffered duties on a full-time basis.

Third, [REDACTED] also bases his opinion about the beneficiary's management responsibilities on the petitioner's organizational chart which, as previously discussed, demonstrates only that the beneficiary will oversee volunteers. No evidence was provided that any of these volunteers have made a long-term commitment to their work on the petitioner's farm, have at least a bachelor's degree or the equivalent in a specific specialty related to agriculture, or work full-time. Further, [REDACTED] does not address the authoritative information in the *Handbook* about the educational credentials of farmers, ranchers, and agricultural managers or the evidence provided by the petitioner indicating that a four-year bachelor's degree in a specific specialty is not usually required for the proffered position.

For the reasons discussed above, the AAO finds that [REDACTED] evaluation has no significant evidentiary weight, and that it is not probative evidence on the specialty occupation issue. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Therefore, the AAO finds that the letter from [REDACTED] does not establish that the proffered position is a specialty occupation.

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 alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Indeed, the petitioner states that it would be nearly impossible to find another similar employer that employs someone in a parallel position to the one proffered here that requires at least a bachelor's degree or the equivalent in a specific specialty. The documentation that was submitted in response to the RFE further supports this conclusion. As a result, the petitioner has not established that similar farms routinely require at least a bachelor's degree in a specific specialty.

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 qualifications for farmers, ranchers, and agricultural managers, including degrees not in a specific specialty. Although the petitioner states that the proffered position is unique from or more complex than other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent, the supporting evidence provided by the petitioner, including evidence that the petitioning farm has made little income and uses volunteer labor to survive, does not support the petitioner's statement that her business can sustain someone to perform the proffered duties, including the management of other workers, on a full-time basis.

As the record has not established a prior history of recruiting and 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).¹

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to

¹ To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO here augments its earlier comments regarding the petitioner's failure to establish this criterion. As discussed previously, the AAO does not find that the proposed duties are accurate given that the petitioner is unlikely to be able to employ the beneficiary to perform these duties on a full-time basis. Further, the evidence does not establish a job that would require the beneficiary to possess skills and qualifications beyond those of a farmer, rancher, or agricultural manager as described in the *Handbook* for which at least a bachelor's degree in a specific specialty or its equivalent is not a minimum entry requirement. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the AAO finds that the petitioner failed to establish filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (CIS) on April 1, 2009.

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):

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.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must 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 Department of Labor when submitting the Form I-129.

In the instant matter, the petitioner requested H-1B employment but did not submit a signed LCA in support of this request. U.S. DOL regulations specifically require that "a copy of the *signed*, certified Form ETA 9035 or ETA 9035E" be submitted to USCIS. 20 C.F.R. § 655.730(c)(3) (emphasis added). Consequently, the petitioner failed to submit a signed, certified LCA to

establish that it had complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) and 20 C.F.R. § 655.730(c)(3), that it had properly attested that the statements in the LCA are true, and that it promised to comply with these attestations as required by 20 C.F.R. § 655.730(c)(2). The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i).

A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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 petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The record establishes that, at the time of filing, the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Further, the petitioner failed to establish that it has the financial ability to comply with the terms and conditions of employment as the petitioner has not demonstrated that it has sufficient funds to pay the beneficiary the proffered wage. Under the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner must state on the petition that it will comply with the terms and conditions of the LCA for the duration of the beneficiary's stay. The petitioner has not established with consistent evidence that it will comply with the terms and conditions of the current LCA. *Matter of Ho*, 19 I&N Dec. at 591. To the contrary, the evidence of record indicates that the petitioner will not comply with the terms and conditions of employment and pay the beneficiary the wage proffered. For this reason, the petition may not be approved.

Also beyond the decision of the director, the AAO finds that the petitioner did not submit sufficient documentation to show that the beneficiary qualifies to perform services in any specialty occupation requiring a degree in horticultural management or a related field under 8 C.F.R. § 214.2(h)(4)(iii)(C).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the

specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

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 the 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:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The beneficiary only attained two years of college education. Therefore, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), in order for the beneficiary to qualify for a specialty occupation requiring a degree in horticultural management or a related field, the record must demonstrate that he has education, specialized training, and/or progressively responsible experience equivalent to a U.S. baccalaureate or higher degree in horticultural management, as well as recognition of his expertise through progressively responsible positions directly related to this specialty.

The evaluation from [REDACTED] at the Trustforte Corporation does not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). No evidence was submitted to establish that [REDACTED] has the authority to grant credit for training and/or work experience, which is a requirement under the regulation. Therefore, the evaluation does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), and the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

Aside from the decisive fact that the evidence of record does not establish [REDACTED] as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate experience, the AAO finds that the content of his evaluation of the beneficiary's experience would merit no weight even if [REDACTED] were qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

As stated under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. Therefore as the beneficiary has two years of college-level training, the petitioner must demonstrate that the beneficiary has at least six years of specialized training and/or work experience.

[REDACTED] bases his evaluation of the beneficiary's experience on a skeletal letter of the beneficiary's former employer, which only establishes approximately 4.5 years of employment, and the beneficiary's resume. He then concludes, without analysis, that "[the beneficiary] has completed at least eleven years and eight months of increasingly advanced employment experience and training, concentrated in horticultural management, and related disciplines, under the supervision of managers, and together with peers, at a bachelor's-level of practical experience." As this evaluation does not establish a substantive basis for its conclusion, it would have no probative value even if it were rendered by an official qualified under 8 C.F.R. §

214.2(h)(4)(iii)(D)(1). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), USCIS may determine that the beneficiary has the equivalent of a degree in horticultural management if he has a combination of education, specialized training, and/or work experience in areas related to this specialty. The evaluation on record is not supported by specific evidence. The letter from the beneficiary's former employer does not establish that he has at least six years of relevant experience gained while working with peers, supervisors, and subordinates who have a degree or its equivalent in horticultural management. The evidence does not establish that the beneficiary is qualified to perform a specialty occupation.

For the reasons discussed above, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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