

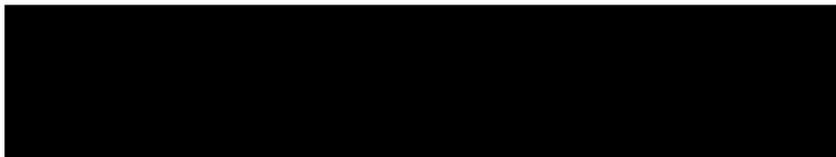
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **MAY 02 2011** Office: CALIFORNIA 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center 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.

The petitioner is a business, IT consulting and staffing firm. It seeks to employ the beneficiary as an Engineer Recruiter pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the petitioner failed to establish that it qualifies as a U.S. employer or agent or that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

In the petition submitted on March 23, 2009, the petitioner stated it has 125 employees and a gross annual income of \$12 million. The petitioner indicated that it wished to continue to employ the beneficiary as an Engineer Recruiter from April 5, 2009 to June 22, 2011 at an annual salary of \$70,000.

The support letter states that the beneficiary will perform the following duties:

- Drive innovation and outreach to effectively target IT and engineering professionals;
- Negotiate between hiring authorities and client companies, develop a referral program, design salary packages, and analyze shifts and trends in employment markets;
- Create and define internal Standard Operating Procedures for the recruitment process;
- Liaise with university career centers; and
- Interface with business partners, client firms, and candidates.

The petitioner states the proffered position requires at least a Master's degree in Industrial Engineering or the equivalent.

The Form I-129 indicates that the beneficiary will work at three locations – in Lafayette, CA, Tempe, AZ, and Peoria, IL. The petitioner filed LCAs covering these locations.

The petitioner submitted the beneficiary's education documents, indicating that he has a U.S. Master of Industrial Engineering degree.

On April 2, 2009, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised to submit documentation clarifying the petitioner's relationship with the beneficiary, which could include an itinerary of definite employment, listing the names of the employers and locations where the beneficiary would provide services, as well as copies of its contractual agreements with its clients. The RFE specifically noted that "[t]he evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be

performed. . . .” The director also requested evidence regarding the petitioner’s business.

The petitioner responded that the beneficiary is a Senior Recruiter for engineers and IT-related positions. In the petitioner’s letter, the petitioner refers to the beneficiary by a different name than the one listed in the petition. The petitioner provides brief descriptions of accounts it has with clients for which the beneficiary finds candidates. The petitioner also included copies of its client contracts regarding these accounts. The contract the petitioner has with a company called [REDACTED] provides that the positions to be recruited include Application Programmers, Computer Architects, Business Analysts, Database Administrators, Network Administrators, Network Application Programmers, Network Architects, Network Communication Designers, Project Analysts, Project Managers, System Administrators, System Programmers, Systems Support personnel, Technical Writers, and Testing personnel. Additionally, a Statement of Work (SOW) provided for another contract states that the professions to be recruited are Java Developers. The petitioner did not provide any explanation of how a Master’s degree in Industrial Engineering is required for the proffered position when the majority of the positions to be recruited by the beneficiary are IT personnel.

The petitioner also submitted an offer letter, again addressed to a different name than the one provided for the beneficiary in the petition.

The director denied the petition on May 7, 2009.

On appeal, counsel explains that the beneficiary is known both by the name provided in the petition as well as the name listed in the documents submitted with the petitioner’s response to the RFE. Counsel has submitted affidavits explaining that the beneficiary is the same person referred to by both names. The AAO finds that the petitioner has demonstrated that the beneficiary is known by both names and, therefore, the offer letter provided in response to the RFE is an offer letter that was addressed to the beneficiary. Further, the copies of the beneficiary’s Forms W-2, which match the name the beneficiary uses in his passport and that was provided in the petition, indicate that he was paid by the petitioner in 2006, 2007, and 2008, which demonstrates that he was employed by the petitioner. The petitioner has also provided an updated offer letter referring to the beneficiary by all of his names.

The petitioner explains on appeal that, as a recruiter, the beneficiary will not work at client sites and will only have minimal contact with the clients. The petitioner further explains that two of the three worksites listed in the petition are home offices and that it is common for recruiters to work from home. Additionally, the petitioner states that the third worksite listed in the petition is the petitioner’s corporate office address, but the beneficiary will only be traveling to the corporate offices on occasion.

Additionally, the petitioner has submitted an expert opinion letter on appeal by [REDACTED]

[REDACTED] of Engineering, at [REDACTED] [REDACTED] argues that the person filling the proffered position has to possess knowledge in different engineering, information technology, and management fields and that the undergraduate of industrial engineering provides “the underpinning of knowledge that covers these diverse fields of

expertise.”

Upon review, the record establishes that the petitioner will be the employer of the beneficiary for the duration of the petition, and the director’s decision to the contrary shall be withdrawn. The petitioner is an IT consulting and staffing firm that, with regard to the beneficiary in this matter, is using the beneficiary to recruit workers for its clients and will not actually assign the beneficiary to work at its client sites. Moreover, the beneficiary will report directly to the petitioner’s Director of Accounts. At all times, therefore, the petitioner is responsible for, and controls all aspects of employment for the personnel it assigns to this client project. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise control the beneficiary’s work, as evidenced by the fact that: (1) it will have and maintain direct control over the work by having the beneficiary report directly to the petitioner’s Director of Accounts; (2) the beneficiary will not work at client sites; and (3) there exists written intent of both the petitioner and the beneficiary to enter into an employer-employee relationship. The petitioner therefore qualifies as a United States employer with regard to the beneficiary in this instance and the director’s finding to the contrary is withdrawn.

Next, the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one that requires:

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

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

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 an Engineer Recruiter.

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 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)).

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

The AAO notes that, despite the position's title, the petitioner has failed to submit any evidence that the beneficiary will recruit engineers. The majority of positions listed in the contracts are IT workers. The AAO finds that the proffered position of Engineer Recruiter falls under the section on human resources, training, and labor relations managers and specialists as described in the *Handbook*, which describes recruitment specialists as follows:

Recruitment specialists maintain contacts within the community and may travel considerably, often to job fairs and college campuses, to search for promising job applicants. Recruiters screen, interview, and occasionally test applicants. They also may check references and extend job offers. These workers must be thoroughly familiar with their organization, the work that is done, and the human resources policies of their company in order to discuss wages, working conditions and advancement opportunities with prospective employees. They also must stay informed about equal employment opportunity (EEO) and affirmative action guidelines and laws, such as the Americans with Disabilities Act.

This description seems the most appropriate given that a large part of the beneficiary's duties entails searching for and recruiting applicants.

With respect to education and training requirements for human resources, training, and labor relations managers and specialists, the *Handbook* states:

The educational backgrounds of human resources, training, and labor relations managers and specialists vary considerably, reflecting the diversity of duties and levels of responsibility. In filling entry-level jobs, many employers seek

college graduates who have majored in human resources, human resources administration, or industrial and labor relations. Other employers look for college graduates with a technical or business background or a well-rounded liberal arts education.

Education and training. Although a bachelor's degree is a typical path of entry into these occupations, many colleges and universities do not offer degree programs in personnel administration, human resources, or labor relations until the graduate degree level. However, many offer individual courses in these subjects at the undergraduate level in addition to concentrations in human resources administration or human resources management, training and development, organizational development, and compensation and benefits.

Because an interdisciplinary background is appropriate in this field, a combination of courses in the social sciences, business administration, and behavioral sciences is useful. Some jobs may require more technical or specialized backgrounds in engineering, science, finance, or law. Most prospective human resources specialists should take courses in principles of management, organizational structure, and industrial psychology; however, courses in accounting or finance are becoming increasingly important. Courses in labor law, collective bargaining, labor economics, and labor history also provide a valuable background for the prospective labor relations specialist. As in many other fields, knowledge of computers and information systems is useful. . . .

In other words, according to the *Handbook*, a bachelor's degree in a *specific specialty* is not required for recruitment specialists. The AAO notes the *Handbook's* comment that "some jobs may require more technical or specialized backgrounds in engineering, science, finance, or law." However, upon review of the totality of the record of proceeding, the AAO finds that the petitioner failed to establish that the proffered position requires a background in industrial engineering, let alone a bachelor's or higher degree in that particular specialty.

As the *Handbook* indicates no specific degree requirement for employment as a recruitment specialist, 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).

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.

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

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The expert letter provided by [REDACTED] is based in pertinent part on the following job duty provided to [REDACTED] by the petitioner: "[d]riving innovation outreach to target Information Technologists and Engineering Professionals in highly specialized areas of technology, manufacturing and engineering . . ." As discussed previously, the evidence provided by the petitioner does not suggest that the beneficiary is primarily targeting engineering professionals in highly specialized areas of technology, manufacturing and engineering. Instead, the contracts provided by the petitioner demonstrate that the vast majority of people recruited by the beneficiary are computer programmers and analysts. Therefore, the letter from [REDACTED] is not based on an accurate depiction of the beneficiary's actual duties. Further, the AAO finds that neither the professor's evaluation, its attached 20-page resume, or any other evidence in the record of proceeding establishes the professor as an expert or recognized authority on recruiter positions or their educational requirements. 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).

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 a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than technical recruiter positions that can be performed by persons without a specialty degree or its equivalent.

Although the evidence indicates that the petitioner employs other recruiters in addition to the beneficiary, no evidence was provided that the petitioner a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 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. The AAO does not find that the evidence supports that the proposed duties reflect a higher degree of knowledge and skill than would normally be required of recruiters not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. As discussed previously, the petitioner failed to demonstrate that the person filling this position must have at least a Master's degree in Industrial Engineering or the equivalent, given that a large number positions to be recruited by the beneficiary appear to be IT workers, not engineers. 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).

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petition will be denied and the appeal dismissed. 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.