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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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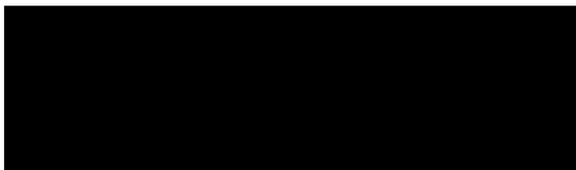
Petitioner:

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 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 April 1, 2009, the petitioner stated that it is a "Consulting services for testing, commissioning and system integration for transportation/communications systems" firm established in 2006. In the space provided to state its number of employees, the petitioner entered "1 (varies according to projects)." To employ the beneficiary in a position it designates as a senior testing/commissioning engineer position, the petitioner endeavors to classify him 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 visa petition states that the beneficiary would work at an address in Ogden, Utah.

On that visa petition, which the petitioner's owner signed on March 13, 2009, the petitioner's owner stated that the petitioner had \$458,068 in gross annual income. However, the petitioner's 2008 Form 1065 Return of Partnership Income, which was subsequently submitted, stated that it had gross receipts or sales of only \$42,207 during that year. The petitioner submitted nothing that reconciles that apparent discrepancy.

Doubt cast on any aspect of the petitioner's assertions and proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining assertions and evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The appeal is filed to contest each of the three 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 or locations where the beneficiary would work, and (3) that the petitioner has standing to file the visa petition as the beneficiary's prospective United States employer within the meaning of the regulation at 8 C.F.R. § 214.2(h)(4)(ii) or an agent within the meaning of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

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.

Based upon its review of the entire record of proceeding, as supplemented by this appeal, the AAO finds that the director was correct to deny the petition on each of the three independent grounds that she cited in her decision. While fully affirming the director's decision, the AAO will further address in detail only the specialty occupation basis of the director's decision, as specialty occupation status

is the first eligibility requirement that must be established and, without which, the remaining issues in this proceeding become moot.

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.

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 (5th 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.

With the petition, counsel submitted a letter, dated March 16, 2009, from the petitioner’s owner, who described the duties of the proffered position as follows:

In this position, [the beneficiary] will develop complicated concepts for the revision of systems design and their subsequent manufacturing processes. He will be responsible for the planning and logistics of work performance, organizing a cohesive team, and the education and motivation of individuals of multiple skill levels. He will manage projects that involve the following: [REDACTED] and data communication systems, testing and commissioning of communication and automatic train control systems, master clock systems, fire alarm systems, fare collection systems, VMS systems, and intrusion control systems.

The petitioner's owner further stated, "The [proffered] position requires an individual with a Bachelor's degree or foreign equivalent in Engineering or Engineering Management"

Because the evidence submitted was insufficient to show that the petition was approvable, the service center, on May 16, 2009, issued an RFE in this matter. The service center requested, *inter alia*, the petitioner's quarterly wage reports for the preceding four quarters and evidence that the petitioner will be either the beneficiary's employer or his agent.

In response, counsel submitted, *inter alia*, an employment contract between the petitioner and the beneficiary. That employment contract is dated June 16, 2009, a date after the submission of the visa petition on April 1, 2009. That contract is not evidence that any of the terms contained therein were agreed to when the visa petition was submitted. In his own letter, dated June 24, 2009, counsel stated that the petitioner had no employees during 2007 and 2008 and did not, therefore, have any quarterly wage reports to provide.

The director denied the visa petition on July 13, 2009 finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation position, had not demonstrated that it would be the beneficiary's U.S. employer or agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A) or 8 C.F.R. § 214.2(h)(2)(i)(F), and had not demonstrated that the LCA submitted is valid for employment in all of the locations where the beneficiary would work. Because it had not demonstrated that the LCA was valid for all of the anticipated locations, the director found that it had not demonstrated that the LCA corresponded with the visa petition and could be used to support it.

On appeal, counsel submitted a brief and an affidavit from the petitioner's majority owner. In the affidavit, the petitioner's majority owner asserted that the beneficiary would work exclusively at the petitioner's location in Ogden, Utah and that she would supervise the beneficiary's performance. She also reiterated that the proffered position requires a bachelor's degree in engineering or engineering management.

Counsel and the petitioner assert that the petitioner obtains contracts with other firms for updating and improving their communications systems and various other systems. The petitioner provided no contracts showing that, when it filed the visa petition on April 1, 2009, it had secured work for the beneficiary to perform.

The petitioner's 2008 tax return shows that it had gross receipts or sales of \$42,207 during that year. This suggests that the petitioner had very little work during that year.

The petitioner reported that it has one employee, but that the number varies according to the work available. In response to a request for quarterly wage reports for the previous four quarters, counsel acknowledged that the petitioner had no employees during 2007 and 2008. Because that request was made on May 16, 2009, and counsel did not provide a quarterly report for the first quarter of 2009, the petitioner appears to have had no employees during that quarter either. This suggests that the petitioner had either no work or very little work to perform during 2007, 2008, and the first quarter

of 2009. The AAO observes that the visa petition in this matter was filed on the first day of the second quarter of 2009. The record contains no indication that the petitioner's fortunes had changed dramatically since the previous day. The record contains no indication that, when the petitioner filed the visa petition, it had any work for the beneficiary to perform.

Further, many of the duties attributed to the proffered position appear to be managerial, including "organizing a cohesive team," "education and motivation of individuals" and "manage(ing) projects." There is evidence in the record that suggests that the petitioner had no employees for the beneficiary to manage when it submitted the instant visa petition and no evidence to suggest that, to the contrary, it was then employing anyone. Contrary to the job description submitted, the record strongly suggests that the petitioner, when it filed the visa petition, had no managerial duties for the beneficiary to perform.

Employment not demonstrated by the record to have existed and to have been available to the petitioner to provide to the beneficiary at the time the H-1B petition was filed is speculative employment that does not support approval of the petition. USCIS regulations affirmatively 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 based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Neither a petitioner's nor its counsel's unsupported assertion that the petitioner will provide H-1B caliber work for the beneficiary establish that, at the time the petition was filed, the petitioner had definite H-1B employment for the beneficiary for the period sought in the petition. Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel cannot satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has not demonstrated that, when it filed the visa petition in this matter, it had any employment at all to which it could have assigned the beneficiary. This clearly precludes a finding that it had specialty occupation position employment for the beneficiary at that time and that it would employ the beneficiary in a specialty occupation position. This is sufficient reason, in itself, to dismiss the appeal and deny the visa petition. However, the AAO will continue its analysis of the specialty occupation issue.

Into its discussions and analyses of each criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO hereby incorporates and adopts this decision's earlier discussions regarding the proffered position and the petitioner's failure to provide documentary evidence sufficient to demonstrate that the petition was based upon definite, non-speculative work that, at the time of the petition's filing, had been secured for the beneficiary for the period specified in the petition. Again, as noted above, this factor by itself precludes approval of this petition, but it also obviously fatally undermines the petitioner's

attempts to qualify the proffered position as a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

Again, to prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration or engineering, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

In asserting that a degree in engineering, without further specificity, would be a sufficient academic qualification for the proffered position, the petitioner's owner has made clear that it is not a position in a specialty occupation, as it does not qualify pursuant to section 214(i)(1)(B) of the Act. This is sufficient reason, in itself, to deny the visa petition. However, the AAO will continue its analysis of the specialty occupation issue.

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. Here, however, the AAO finds that to the extent the duties of the proffered position are described in the record of proceeding, the proffered position does not comport with any occupational category for which the *Handbook* reports a requirement for at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* cannot be relied upon to show that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. Further, given that the petitioner's owner has indicated that any engineering degree would suffice for the proffered position, the AAO would not find that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty, even if the *Handbook* supported that position.

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)(I).

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. The petitioner provided no letters or affidavits from other businesses stating educational requirements for parallel positions in other firms. Further, the record contains no vacancy announcements stating the educational requirements of other firms attempting to fill such positions.

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 clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) is satisfied if the petitioner demonstrates that, notwithstanding that similar positions do not typically require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position the petitioner is offering, is so complex or unique that it can only be performed by an individual with such a degree.

Nothing in the duties of the position, however, suggests that the proffered position is sufficiently complicated to require such a degree. "[D]evelop[ing] complicated concepts for the revision of systems design," "planning and logistics of work performance," "organizing a cohesive team," "educat[ing] and motivate[ing] . . . individuals of various skill levels," and "managing projects" are all so abstractly described that they cannot be found to require any particular level of education in any particular subject.

Further, as was noted above, the petitioner's owner and counsel have stated that the educational requirements of the proffered position can be satisfied by a bachelor's degree in engineering, which, as already noted, as a degree in a broadly defined field without further specification, is not indicative of a specialty occupation position. This makes clear that the proffered position is not so unique or sufficiently complicated such that it requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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).

The final consideration pertinent to 8 C.F.R. § 214.2(h)(4)(iii)(A) is 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.

Again, the description of the duties of the proffered position is so abstract that it fails to establish any level of knowledge that would usually be associated with their performance. For instance, "develop[ing] complicated concepts for the revision of systems design and their subsequent manufacturing processes" cannot be shown to require a bachelor's degree in a specific specialty absent evidence pertinent to the complexity of the systems to be designed and the "complicated concepts" to be developed for their revision. Similarly, the "planning and logistics of work performance, organizing a cohesive team, and the education and motivation of individuals of multiple skill levels" is essentially a managerial function. It may or may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, depending upon what, more specifically, the beneficiary would be obliged to do to accomplish those tasks, and this the petitioner has failed to establish.

Additionally and separately, as was noted above, the petitioner's owner and counsel have asserted that the duties of the proffered position can be performed by an individual with a bachelor's degree in engineering which, absent further specification, is not a specific specialty. Because a degree in engineering, without further specification, is not a degree in a specific specialty, this assertion is tantamount to conceding that the duties of the proffered position do not require a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not demonstrated 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 in a specific specialty. 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)

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation position. The appeal will be dismissed and the visa petition will be denied on this basis.

As this adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO will not further address its affirmance of the director's denial of the petition for the petitioner's failure to establish its standing to file this petition as either a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); and will not further address its affirmance of the director's denial of the petition for the petitioner's failure to establish that the LCA submitted corresponds to the visa petition and may be used to support it, other than to state that the AAO finds that, in light of the petitioner's failure to establish actual work for the beneficiary and the particular contractual terms under which the work would be performed, (1) the specific relationships that would exist between any client, the beneficiary, and the petitioner in terms of actual control over and determination of the particular work that the beneficiary would perform day-to-day have not been established so as to resolve the factor of control over the beneficiary and his work as required by the common law for determination of employer-employee relationships, and (2) that the locations where the beneficiary would work also have not been established, thus rendering speculative whether the LCA filed with this petition would correspond to the locations where the beneficiary would actually work – if in fact there were any work for him to perform. Again, claims of the petitioner and/or counsel that are not supported

by documentary evidence will not suffice to meet the petitioner's burden of proof. Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190); and without documentary evidence to support the claim, the assertions of counsel cannot satisfy the petitioner's burden of proof, as the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

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.