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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

D2



DATE: **FEB 02 2012** 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, California Service Center, denied the nonimmigrant visa petition. 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 wine import business that seeks to employ the beneficiary as a market research analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 director denied the petition, finding that (1) the position was not a specialty occupation; and (2) the petitioner was not a qualifying United States employer or agent.

On appeal, counsel for the petitioner submits a brief and additional documentation, and asserts that the director's finding that proffered position is not a specialty occupation was erroneous.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The first issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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

An occupation which requires [(1)] 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 [(2)] 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.

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.

In an August 19, 2009 letter, the petitioner explained that it is an importer, wholesaler and distributor of fine and rare wines mainly from France, and was seeking the services of the beneficiary as a market research analyst. The petitioner provided the following overview of duties for the proffered position:

- * Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand (12% of the time).
- * Prepare reports of findings, illustrating data graphically and translating complex findings into written text (8% of the time).
- * Measure and assess customer relations and degree of satisfaction (5% of the time).
- * Forecast and track marketing and sales trends, analyzing collected data (15% of the time).
- * Measure the effectiveness of marketing, advertising, and communications programs and strategies (10% of the time).
- * Conduct research on consumer opinions and marketing strategies, collaborating with marketing professionals, statisticians, pollsters, and other professionals (10% of the time).
- * Seek and provide information to help companies determine their position in the marketplace (15% of the time).
- * Attend staff conferences to provide management with information and proposals concerning the promotion, distribution, design, and pricing of company products or services (15% of the time).

- * Gather data on competitors and analyze their prices, sales, and method of marketing and distribution (5% of the time).
- * Monitor industry statistics and follow trends in trade literature (5% of the time).

The petitioner further contended that performance of the duties of the position required the attainment of a bachelor's degree in business administration.

In a September 23, 2009 RFE, the director requested additional information. Specifically, the director requested more detailed evidence demonstrating that the proffered position is a specialty occupation, including but not limited to a more detailed description of the proffered position, evidence of the beneficiary's prior work product, and information pertaining to the petitioner's business including tax returns and its organizational chart.

In response, the petitioner addressed the director's queries in a response dated October 30, 2009. The petitioner included an employment agreement dated October 1, 2006 between the petitioner and the beneficiary, covering the beneficiary's period of employment through September 30, 2009 with no provision for extension. Although this document included a list of duties for the position of market research analyst, it does not apply to the requested approval period in the instant petition (October 1, 2009 to September 30, 2012) and therefore will not be considered.

The petitioner also submitted evidence pertaining to the duties of the beneficiary under the prior petition's approval, as well as tax documents such as quarterly tax returns and W-2 forms.

On November 13, 2009, the director denied the petition, determining that the petitioner had failed to establish that the proffered position was a specialty occupation. The director found that the duties of the proffered position were not those of a market research analyst but rather were more akin to a marketing manager, since the duties did not correspond to the typical duties of a market research analyst and the industry in which the beneficiary would be employed did not typically require the services of a market research analyst. Noting that the occupation of marketing manager was not one that required a bachelor's degree or higher in a specific specialty, the director concluded that the proffered position was not a specialty occupation.

On appeal, counsel contends that the director's findings were erroneous. Specifically, counsel asserts that a degree requirement is common in parallel positions within the petitioner's industry, and further contends that the beneficiary's degree in business administration is directly related to the field of marketing, thus qualifying the position as a specialty occupation.

In reviewing the record, the AAO observes that the critical element is not the title of the position or 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.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the Department of Labor's (DOL) *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.

The petitioner claims that the proffered position is that of a market research analyst. To determine whether the duties of the proffered position support the petitioner's characterization of its proposed employment, the AAO turns to the 2010-2011 online edition of the *Handbook* for its discussion of market research analysts. As stated by the *Handbook*, the occupation of market research analyst is described as follows:

Market and survey researchers gather information about what people think. Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. While a majority of surveys are conducted through the Internet and telephone, other methods may include focus group discussions, mail responses, or setting up booths in public places, such as shopping malls, for example. Trained interviewers usually conduct the surveys under a market research analyst's direction.

Market opinion research has contributed greatly to a higher standard of living as most products and services consumers purchase are available with the aid of market research. By making recommendations to their client or employer, market research analysts provide companies with vital information to help them make decisions on the promotion, distribution, and design of products or services. For example, child proof closures on medicine bottles exist because research helped define the most workable design; and the growing variety of ready to cook meals, such as microwaveable soups and prepackaged meat products, exist because of increasing public demand for fast and convenient meals. The information also may be used to determine whether the company should add new lines of merchandise, open new branches, or otherwise diversify the company's operations. Market research analysts also help develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways based on their knowledge of the consumer being targeted.

The director found that, based on the description of the occupation of market research analyst, such analysts compile and analyze market data, but do not act upon that data. Noting that the

beneficiary's duties within the structure of the petitioner's company require such actions, the director concluded that, in essence, the proffered position was more akin to that of a marketing manager. The AAO agrees with this finding, and will discuss this issue in further detail below.

It should first be noted, however, that even if the proffered position were deemed that of a market research analyst, market research analyst positions do not comprise an occupational group which categorically includes only positions that normally require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Thus, the proffered position's inclusion within the market research analyst occupation would not be sufficient in itself to establish the position as a specialty occupation by application of the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). In this regard, the *Handbook's* section pertaining to the educational requirements for market and survey researchers states:

While a bachelor's degree is often sufficient for entry-level market and survey research jobs, higher degrees are usually required for advancement and more technical positions. Strong quantitative skills and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also are important for advancement.

Education and training. A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

The *Handbook* does not indicate that a bachelor's degree or higher in a specific specialty or its equivalent is the normal minimum requirement for entry into the position. While the *Handbook* indicates that a bachelor's degree is the most significant source of postsecondary education for persons employed in market and survey research jobs, no specific specialty is identified as the area in which the degree must be obtained. Therefore, even if the proffered position were deemed to be that of a market research analyst, based on duties including gathering information on competitors, the proffered position would not be considered a specialty occupation.

That being said, upon review of the totality of the duties described in the record of proceeding, the AAO finds that, while the proffered position encompasses some of the duties of a market research analyst, the proffered position is most akin to that of a marketing manager as described in the *Handbook's* section pertaining to advertising, marketing, promotions, public relations, and sales managers.

The *Handbook* describes the occupational category of marketing manager as follows:

Marketing managers. Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*, marketing managers estimate the demand for products and

services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firms' customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and they oversee product development.

As discussed above, the duties of the proffered position, which is identified as that of a market research analyst in a wine import business, are most akin to the occupation of marketing manager. For example, while the petitioner claims that the beneficiary will spend some of his time gathering statistical data, which is generally considered a task associated with the position of a market research analyst, the main purpose of the beneficiary's research is to maximize potential markets and increase profits for the petitioner, since the record indicates that the beneficiary will gather data on competitors to examine prices or predict future sales. While market research analysts typically gather statistical data for firms or companies and present their findings to those companies, the beneficiary is tasked with duties such as forecasting market trends, developing pricing strategies, and working with company managers to provide direct input into business and budget plans for the petitioner.

The *Handbook* states as follows with regard to the educational requirements of this occupation:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations.

Education and training. For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

The *Handbook* clearly indicates that educational requirements vary for the position of a marketing manager. While it appears that a bachelor's degree in business administration is often preferred for entry into the field, the *Handbook* does not indicate that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the position. Upon review of the duties of the proffered position, the AAO cannot conclude that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in a specific specialty.

In this matter, the petitioner claims that in order to perform the duties of the proffered position, the incumbent must possess at least the U.S. equivalent of a bachelor's of business administration

degree. On appeal, counsel notes that the beneficiary possesses a U.S. bachelor's degree in business administration from Loyola Marymount University, thereby establishing he is qualified and possesses the requisite background for the proffered position.

The AAO, however, is not persuaded by this contention. When a job, like that of a marketing manager, can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). 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. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position. 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, 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).

The petitioner has therefore failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of a market research analyst/marketing manager as described in the record of proceeding. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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. Factors often considered by USCIS when determining the industry standard include: 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)).

On appeal, counsel for the petitioner submits four job postings advertised at www.jobview.monster.com and www.hotjobs@yahoo.com in support of the contention that a degree is common for parallel positions within the petitioner's industry. The first posting is from Werner Co., which claims to be the world's leading manufacturer and distributor of ladders. This position is not persuasive, since it (1) differs from the petitioner's industry of wine imports; and (2) simply requires a bachelor's degree, without further specification. The second posting is from Piast Meats & Provisions, Inc. which seeks a market research manager with a bachelor's degree in an unspecified field as well as two years of experience. This posting is also insufficient, since the industry differs from that of the petitioner and since the degree requirement is generalized and not specific. The third posting is from an unspecified poster, which requires a market research analyst with a bachelor's degree in communications and/or advertising. Since the industry in which this

company is engaged is not specified, it cannot be deemed a company similar to that of the petitioner. Finally, a posting from [REDACTED], a leading producer of innovative silicon, seeks a market research/market intelligence analyst with a bachelor's degree in engineering. Again, this company is engaged in an industry completely different to that of the petitioner, and requires a degree in a completely different field.

The advertisements provided, therefore, establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry.¹

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty can perform the duties associated with the position. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist him in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed employment. The petitioner has thus failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

¹ According to the *Handbook's* detailed statistics on marketing managers, there were approximately 300 persons employed as marketing managers by beer, wine, and distilled alcoholic beverage merchant wholesalers in 2008. In addition, there were 3,500 persons employed as marketing and sales managers by beer, wine, and distilled alcoholic beverage merchant wholesalers in 2008. *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed January 10, 2012). Moreover, Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just four job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the insurance agency / brokerage industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

As such, even if the job announcements supported the finding that the job of marketing manager for a seven-person wine import company required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The petitioner has not provided any evidence or claim that it has previously employed degreed individuals in the proffered position. The record, therefore, does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them. The AAO notes that while a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. As noted above, however, the petitioner states that an individual with a general bachelor's degree in business administration can perform the duties of the proffered position. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The duties of the position described encompass routine marketing duties. While the petitioner claims that the duties of the proffered position are sufficiently complex, the record does not contain explanations or clarifying data sufficient to elevate the position to one that is so specialized and complex that the knowledge to perform these additional tasks is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO notes that the duties as described in the record of proceeding are broad and numerous and appear to span a variety of marketing functions. However, the AAO finds that, to the extent that they are described, the duties do not convey either the need for the beneficiary to apply a particular body of highly specialized knowledge in a specific specialty, or a usual association between such knowledge and the attainment of a particular educational level in a specific specialty. As the petitioner has not established that the proffered position's specific duties require the application of specialized and complex knowledge usually associated with the attainment of a baccalaureate degree or higher degree in a specific discipline, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO determines that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The next issue is whether the petitioner is a qualifying United States employer or agent, as required by § 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employer-employee

relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

Section 101(a)(15)(H)(i)(b) of the Act, defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The regulation at 8 C.F.R. § 214.2(h)(4)(ii), defines "United States employer" as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The director found that the petitioner was not a qualifying U.S. employer, since [REDACTED] currently employed the beneficiary as evidenced by quarterly tax returns and W-2 forms contained in the record.

Here, the petitioner has established that it has an Internal Revenue Service Tax Identification number, and submits a prior copy of an employment agreement between the petitioner and the beneficiary. The Labor Condition Application (LCA) filed with the DOL indicates that the petitioner will be the beneficiary's employer. Based on the evidence of record, however, and for the reasons discussed in greater detail below, it has not been established by a preponderance of the evidence who in fact will be the beneficiary's United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii). For this reason, the director's denial of the petition on this ground will be affirmed.

Although the petitioner has failed to establish that it will have and continue to have an employer-employee relationship with the beneficiary, this finding is principally based on the petitioner's failure to credibly establish a bona fide offer of employment. Of greater importance in this matter, therefore, is whether the petitioner will comply with the terms and conditions of employment as set forth in the petition.

A review of the record indicates that the beneficiary is the beneficiary of an approved H-1B petition previously filed by the petitioner, which was valid from October 1, 2006 to September 30, 2009. Documentation contained in the record, however, demonstrates that for most of the approved validity period, the beneficiary was employed by [REDACTED] a separate legal entity from the petitioner. Although the petitioner asserts that the petitioner and [REDACTED] are owned by the same individual, and that the petitioner, through [REDACTED], controls the beneficiary's work, it appears that the petitioner did not employ the beneficiary according to the terms and conditions of employment set forth under the previously-filed petition.

The beneficiary's admission and continued stay in the United States is conditioned on the maintenance of the H-1B "nonimmigrant status in which the alien was admitted or to which it was changed under section 248" and compliance "with the conditions" of that status. § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i). In this matter, the record contains W-2 forms and copies of the petitioner's DE-6 California State quarterly tax returns. These documents indicate that the beneficiary was employed as follows:

- In 2006, the beneficiary was employed by the petitioner, according to his W-2 form. No quarterly returns were submitted by the petitioner for this year.
- In 2007, the beneficiary worked for the petitioner through the first quarter of the year, as evidenced by the petitioner's quarterly tax return for the quarter ending March 31, 2007. Quarterly returns for the remaining three quarters of 2007 indicate that the beneficiary was employed by [REDACTED]
- In 2008, the beneficiary worked solely for [REDACTED] as evidenced by [REDACTED] quarterly tax returns and the 2008 W-2 form it issued to the beneficiary.
- In 2009, quarterly tax returns filed by [REDACTED] indicate that it employed the beneficiary (quarterly returns for the petitioner for this same time period, also contained in the record, do not include the beneficiary).

Consequently, the record indicates that after the first quarter of 2007, the petitioner no longer employed the beneficiary as claimed, and [REDACTED] failed to submit a new petition to reflect this change of employment. The unauthorized employment of the beneficiary by [REDACTED] constitutes a failure to maintain and comply with the conditions of his H-1B nonimmigrant status under section 237(a)(1)(C)(i) of the Act. While the AAO observes that the beneficiary's prior H-1B nonimmigrant petition has not yet been revoked pursuant to 8 C.F.R. § 214.2(h)(11), it is clear from the documentation contained in the current record of proceeding that the beneficiary violated his prior, approved H-1B nonimmigrant status by working for [REDACTED] before a new H-1B petition had been filed on his behalf pursuant to section 214(n)(1) of the Act, 8 U.S.C. § 1184(n)(1). In fact, this unauthorized employment in itself disqualifies the beneficiary for the portability provisions of section 214(n)(1) of the Act, making all employment with [REDACTED] and the petitioner, even after the filing of the instant petition,

unauthorized. See § 214(n)(2)(C). Accordingly, the AAO recommends that the director issue a Notice to Appear and commence proceedings to remove the beneficiary from the United States in accordance with section 239 of the Act, 8 U.S.C. § 1229. The AAO further recommends that the director refer this matter, and the AAO's findings, to U.S. Immigration and Customs Enforcement for investigation and possible imposition of civil penalties for the unauthorized employment of the beneficiary in violation of section 274A of the Act, 8 U.S.C. § 1324a.

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.

FURTHER ORDERED: The director shall review the prior, approved H-1B petition filed on behalf of the beneficiary (EAC-06-168-51841) for possible revocation in accordance with 8 C.F.R. § 214.2(h)(11)(iii).