

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

PUBLIC COPY

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

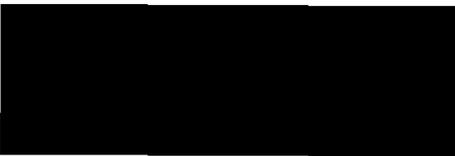
Date: **JUN 11 2012** Office: CALIFORNIA SERVICE CENTER

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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. The appeal is now before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner claims to be a general construction/contractor management company with three employees and a gross annual income of \$375,000. It seeks to continue to employ the beneficiary as a "civil engineer" for 30 hours per week and 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 director denied the petition on the grounds that the petitioner failed to establish that the beneficiary possesses the appropriate licensure as required by the proffered position, or has proven an exemption or exception from said requirement.

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

Although the director denied the petition based on the proffered position's licensure requirement, a review of the record demonstrates a more critical issue pertaining to the petitioner's proffered position. Specifically, the primary issue before the AAO is whether the petitioner's proffered position is a civil engineer technician position or a civil engineer position.

In the petition signed on March 29, 2010, the petitioner indicated that it wished to continue to employ the beneficiary as a civil engineer for 30 hours per week. In the support letter dated March 24, 2010, the petitioner stated that the beneficiary will perform the following duties and responsibilities:

- Prepare structural drawing design for approval/certification of licensed civil engineer; 20%
- Estimate materials and check availability in the market; 15%
- Calculate costs and determine feasibility of projects based on analysis of collected data, applying knowledge and techniques of engineering and advanced mathematics; 10%
- Use computer software, including AutoCAD, Microstation, Xstabl and GINT to design projects and prepare reports; 10%
- Analyze foundation designs and ground improvement concepts in area subject to liquefaction and critical soil expansion; 10%
- Recommend engineering design alternatives and confer with management and coordinate with clients to discuss issues and possible resolutions; 10%
- Confer with supervisor during preliminary and design stages of work and discuss technical and policy problems; 10%
- Update c [sic] [r]ecommend [a]lternative if construction flaws or structural site problems are detected; 05%
- Conduct random inspections by verifying if work performed conforms to the structural plans and specifications; and 05%

- Evaluate field conditions for safe storage of equipment and materials at the jobsite and provide adequate safeguards to protect both workers and non-workers from risks of accidents. 05%

In addition, the petitioner indicated that “a professional license is not mandatory because the work products of [the beneficiary] will be certified/approved by [REDACTED] a licensed Civil Engineer” and cited the California Professional Engineers Act’s Business and Professional Code Section 6740.¹

The AAO recognizes the U.S. Department of Labor’s (DOL’s) *Occupational Outlook Handbook* (hereinafter the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.²

As the petitioner has identified its proffered position as that of a “civil engineer”, the AAO turns first to the 2012-2013 edition of the *Handbook* and its discussion of this occupation. As stated in the *Handbook*:

¹ It must be noted that Section 6740 of the California Professional Engineers Act states the following:

6740. Exemption of subordinates

A subordinate to a civil, electrical or mechanical engineer licensed under this chapter, or a subordinate to a civil, electrical or mechanical engineer exempted from licensure under this chapter, insofar as he acts solely in that capacity, is exempt from licensure under the provisions of this chapter. This exemption, however, does not permit any such subordinate to practice civil, electrical or mechanical engineering in his own right or to use the titles listed in Section, 6732, 6736, and 6736.1.

Professional Engineers Act (Business and Professions Code §§ 6700 – 6799), available at http://www.pels.ca.gov/licensees/pe_act.pdf.

In addition, according to the California Professional Engineers Act’s Business Professional Code Section 6705, a subordinate is defined as follows:

6705. Subordinate defined

A subordinate is any person who assists a registered professional engineer in the practice of professional engineering without assuming responsible charge of work.

Id.

Further, Section 6732 of the California Professional Engineers Act states “[i]t is unlawful for anyone other than a professional engineer licensed under this chapter to . . . use the title . . . “civil engineer,” . . .”
Id.

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are to the 2012 – 2013 edition available online.

Civil engineers design and supervise large construction projects, including roads, buildings, airports, tunnels, dams, bridges, and systems for water supply and sewage treatment.

Duties

Civil engineers typically do the following:

- Analyze survey reports, maps, and other data to plan projects
- Consider construction costs, government regulations, potential environmental hazards, and other factors in planning stages
- Test soils to determine the adequacy and strength of foundations
- Test building materials, such as concrete, asphalt, or steel, for use in particular projects
- Provide cost estimates for materials, equipment, or labor to determine a project's economic feasibility
- Use design software to plan and design transportation systems, hydraulic systems, and structures in line with industry and government standards
- Oversee, or participate in, surveying to establish reference points, grades, and elevations to guide construction
- Present their findings to the public on topics such as bid proposals, environmental impact statements, or property descriptions

Many civil engineers hold supervisory or administrative positions ranging from supervisor of a construction site to city engineer. Others work in design, construction, research, and teaching. They work with others on projects and may be assisted by civil engineering technicians and technologists.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Civil Engineers," <http://www.bls.gov/ooh/architecture-and-engineering/civil-engineers.htm#tab-2> (accessed May 30, 2012).

Although the AAO finds certain similarities between the above description and the petitioner's description of its proffered position, it does not find these similarities to establish the proffered position as that of a civil engineer. Instead, the AAO concludes that the proffered position is most closely aligned to that of a civil engineer technician, employment described by the *Handbook* as follows:

Civil engineering technicians help civil engineers plan and design the construction of highways, bridges, utilities, and other major infrastructure projects. They also help with commercial, residential, and land development.

Duties

Civil engineering technicians typically do the following:

- Read and review project blueprints to determine dimensions of structures
- **Confer with their supervisors about preparing plans and evaluating**

field conditions

- **Inspect project sites and evaluate contractors' work to detect problems with a design**
- **Help to ensure that projects conform to design specifications and applicable codes**
- **Develop plans and estimate costs for installing systems and operating facilities**
- Prepare reports and document project activities and data

Civil engineering technicians must work under the direction of a licensed civil engineer. For more information, see the profile on civil engineers.

Civil engineering technicians generally help civil engineers, often doing many of the same tasks as the engineers. However, because they are not licensed, civil engineering technicians cannot approve designs or supervise the overall project.

These technicians sometimes estimate construction costs and specify the materials to be used. Other times, they prepare drawings or survey land. Civil engineering technicians may also set up and monitor various instruments for studies of traffic conditions.

Handbook, 2012-13 ed., "Civil Engineer Technicians," <http://www.bls.gov/ooh/architecture-and-engineering/civil-engineering-technicians.htm#tab-2> (accessed May 30, 2012) (emphasis added).

The petitioner's description of its position, as provided with the initial petition, indicates that the beneficiary would prepare structural drawing design for approval/certification of licensed civil engineer for 20% of the time, calculate costs and determine feasibility of projects for 10% of the time, confer with supervisor during preliminary and design stages of work for 10% of the time, and conduct random inspections for 5% of the time, the type of work just described as being performed by civil engineer technicians.

In addition, as indicated by the California Professional Engineers Act, a subordinate is any person who assists a registered professional engineer in the practice of professional engineering without assuming responsible charge of work and, therefore, is exempt from licensure. See Professional Engineers Act (Business and Professions Code §§ 6700 – 6799), available at http://www.pels.ca.gov/licensees/pe_act.pdf. This is essentially a description of a civil engineer technician position.

Further, as indicated by the California Professional Engineers Act, "[i]t is unlawful for anyone other than a professional engineer licensed under this chapter to . . . use the title . . . "civil engineer," . . ." *Id.* Thus, the proffered position cannot be titled as a civil engineer position without the beneficiary being licensed to use tht title. And, therefore, the petitioner's claim that a license is not required to perform the duties of the proffered position further indicates that this is a civil engineer technician position.

Having determined the proffered position to be that of a civil engineer technician, the AAO turns to 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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, a proposed 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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO first 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 *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)).

Under the *Handbook’s* “How to Become a Civil Engineer Technician” section of civil engineer technicians, it states:

Although not always required, an associate’s degree in civil engineering technology is preferred for civil engineering technicians. It is best to seek programs that ABET (formerly the Accreditation Board for Engineering and

Technology) has certified.

Prospective civil engineering technicians should take as many high school science and math courses as possible to prepare for programs in engineering technology after high school.

Employers generally want engineering technicians to have an associate's degree from an ABET-accredited program, although the degree is not always required. Engineering technology programs are also available at technical or vocational schools that award a postgraduate certificate or diploma.

Courses at technical or vocational schools may include engineering, design, and computer software. To complete an associate's degree in civil engineering technology, students also usually need to take other courses in liberal arts and the sciences.

Workers with less formal engineering technology training need to learn some skills on the job.

In contrast to civil engineering technicians, civil engineering technologists need a bachelor's degree in civil engineering technology to master and apply high-level principles of civil engineering in their work.

Handbook, 2012-13 ed., "Civil Engineer Technicians," <http://www.bls.gov/ooh/architecture-and-engineering/civil-engineering-technicians.htm#tab-4> (accessed May 30, 2012) (emphasis added).

Because the *Handbook* indicates that entry into a civil engineer technician occupation does not normally require a degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation. Further, there is nothing in the evidence of record that otherwise establishes that the duties described for the proffered position would require the application of at least a bachelor's degree level of highly specialized knowledge in any specialty.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied 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.

As stated earlier, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry

requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

Here and 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 or its equivalent.

In addition, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

The petitioner also does not provide any job-vacancy advertisements evidencing a common degree-in-a-specific-specialty requirement in the petitioner's industry for positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

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. Furthermore, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than civil engineer technician positions, as described in the *Handbook*, that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).³

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate

³ 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 claimed 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 artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F.3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

or higher degree in a specific specialty or its equivalent. As discussed *supra*, a review of the *Handbook* reveals that the description of the duties of the proffered position is analogous to that of a civil engineer technician occupation that does not require a bachelor's degree in a specific specialty. There is no evidence in the record that shows that the duties of the proffered position rise beyond this level. Consequently, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. For this reason, the appeal must be dismissed and the petition denied.

The AAO will now review the issue whether the petitioner has demonstrated that the beneficiary possesses the appropriate licensure as required by the proffered position, or has proven an exemption or exception from said requirement.

As discussed previously, the proffered position is that of a civil engineer technician, an occupation that does not require a license to perform the duties of the occupation. Therefore, the licensure requirement would normally be irrelevant to the instant petition if that title had been used by the petitioner.

It must be noted, however, that as the petitioner uses the title of civil engineer in reference to the proffered position, the licensure requirement is relevant to the instant petition and the director did not err in concluding that the petitioner failed to establish that the beneficiary possesses the appropriate licensure as required by the proffered position, or has proven an exemption or exception from said requirement.

As mentioned previously, the petitioner indicated in its support letter dated March 24, 2010 that the beneficiary is not required to have a license because he will be supervised by a licensed civil engineer, [REDACTED] pursuant to the California Professional Engineers Act's Business and Professionals Code Section 6740.

In response to the director's RFE dated May 18, 2010, counsel for the petitioner submitted a letter from [REDACTED] stating that he is an engineering consultant for the petitioner and that all of the petitioner's technical staff is under his supervision and guidance.

On appeal, counsel submitted a declaration under penalty of perjury from [REDACTED] six contractor and owner agreements, and copies of blue prints of projects signed by [REDACTED] as evidence that a licensed engineer is supervising the work.

The AAO finds that there is insufficient evidence showing the level or frequency of supervision of the beneficiary by [REDACTED] to establish that the beneficiary could fully perform the duties of the proffered position under the supervision of a licensed engineer. For instance, the letter from Mr. [REDACTED] submitted in response to the RFE and the declaration from Mr. [REDACTED] submitted on appeal do not indicate the number of hours he will be supervising the beneficiary. In addition, while the contractor and owner agreements indicate that Mr. [REDACTED] is the supervising engineer on the projects, the agreements do not indicate that the

beneficiary will be working on these projects. Further, there is no evidence that [REDACTED] is in fact a consultant to the petitioner as the record lacks any agreements or invoices between the [REDACTED] and the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The fact remains, however, that the petitioner claims the position to be a civil engineer position and uses that title in reference to the beneficiary. Whether the beneficiary would perform his duties under the supervision of a licensed civil engineer or not, the use of that title mandates that the beneficiary possesses a California license permitting its use. Therefore, the petitioner failed to establish that the beneficiary possesses the appropriate licensure as required by the proffered position, or has proven an exemption or exception from said requirement. The appeal will be dismissed and the petition denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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.