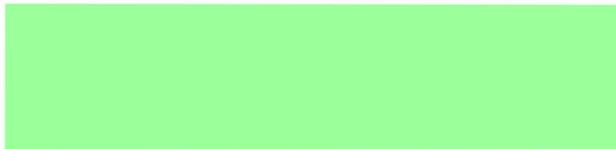




**U.S. Citizenship
and Immigration
Services**

(b)(6)

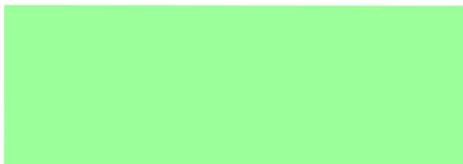


Date: **APR 30 2013** Office: CALIFORNIA SERVICE CENTER FILE:

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 in accordance with the instructions on 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,

for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked the approval of the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The approval of the petition will remain revoked.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Tent & Manufacturing & Rentals" business with 39 employees. It seeks to employ the beneficiary in a full-time capacity in what it designates as an "Industrial Designer" position 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 revoked the approval of the petition on the grounds that the petitioner (1) misstated the beneficiary's qualifications, and (2) failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the approval notice; (5) the director's notice of intent to revoke (NOIR); (6) the petitioner's response to the NOIR; (7) the notice of decision; and (8) the Form I-290B and counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

On April 14, 2008, the petitioner filed an H-1B petition with USCIS. With the visa petition, the petitioner provided employment verification letters stating that the beneficiary worked in Mexico as an industrial designer for [REDACTED] and [REDACTED] for over 16 years. The first letter, written by the director of [REDACTED] dated March 11, 2008, states that the beneficiary worked as an industrial designer of [REDACTED] from February 10th of 1992 up to May 14th of 2007 in which he left the company voluntarily." The second letter, written by the personnel director of the [REDACTED] dated March 24, 2008, states that the beneficiary worked as an industrial designer of [REDACTED] from June 4th 2007 to present." An evaluation of the beneficiary's work experience by [REDACTED] submitted with the petition states that the beneficiary's "professional work experience is equivalent to the U.S. Bachelor's degree in Industrial Design awarded by a regionally accredited university in the United States."

On June 19, 2008, the director issued an RFE. In the RFE, the director requested additional evidence establishing that the beneficiary is qualified to perform the duties of a specialty occupation. In response, counsel for the petitioner submitted, *inter alia*, the following: (1) an "expert opinion letter" by [REDACTED] dated September 9, 2008, stating that the beneficiary's work experience is equivalent to a U.S. bachelor's degree in industrial design; (2) a letter written by the director of [REDACTED] dated September 5, 2008, which listed the duties performed by the beneficiary when he worked as an industrial designer from February 10, 1992, to May 14, 2007; (3) a letter written by the Supervisor of [REDACTED] dated September 5, 2008,

¹ According to the petitioner, the petitioner and [REDACTED] are U.S. companies affiliated with [REDACTED] which is also known as [REDACTED]

which listed the duties performed by the beneficiary when he worked as an industrial designer from June 4, 2007, up to the date that the letter was written; and (4) a second evaluation of the beneficiary's work experience by [REDACTED] in which she reiterates that the beneficiary's work experience is equivalent to a U.S. bachelor's degree in industrial design.

The petition was approved on September 15, 2008. Following the approval of the petition, the director was notified that an investigation by the Fraud Prevention Unit of the United States Consulate in Guadalajara, Mexico, uncovered that the beneficiary was not enrolled in the Mexican social security system for all of the years of his claimed employment; therefore, he does not have the required work experience to qualify him as a specialty occupation worker. Consequently, the director issued an NOIR on February 19, 2010, notifying the petitioner of her intent to revoke the approval of the petition.

The NOIR noted the following adverse evidence:

According to the standard of three years of work experience equaling [one] year of university studies, the beneficiary must provide at least 12 years of work experience in order to have the required bachelor's degree equivalency. The beneficiary claims his previous work experience at [REDACTED] (1992 to 2007) and [REDACTED] (2007 to present) [resulted] in over 12 years of experience.

The consulate reported that the Mexican Constitution (Article 123) and the Social Security Law (Chapter 1, Article 12) mandate that [REDACTED] enroll the beneficiary in the Mexican Social Security Institute (IMSS). During the interview, the beneficiary claimed that he was enrolled in the Social Security system for all years of his employment with the two companies and confirmed that deductions were taken out of every biweekly paycheck. An investigation by the Fraud Prevention Unit of the Consulate uncovered that according to IMSS, the beneficiary was only listed as a registered employee of Publiglobos from August 2002 to March 2006. According to the same government body, the beneficiary has only been listed as an employee of [REDACTED] from March 2009. Because the beneficiary was not enrolled in the IMSS for a total of 12 years with the two industrial firms, the Consulate has determined that he does not have the required work experience as an Industrial Designer.

In response, counsel stated the following in a letter dated March 17, 2010:

First, [the NOIR] misstates what happened with reference to the beneficiary's claims. You state that the beneficiary claimed that ["he was enrolled in the [Mexican] Social Security system for all years of his employment with the two companies and confirmed that deductions were taken out of every weekly paycheck." No. Beneficiary specifically said that as far as he knew he was enrolled in the Mexican Social Security system and that they were taking deductions for as far as [sic] long as

he could remember. He avoided making the blanket assertion that the officer was so keen to get from him. He complained to me as his attorney that the officer was determined to put words into his mouth that he did would [sic] not say, because he could not know for sure if his employers had followed the Mexican social security regulations. He told the officer that like in the United States, the employer in Mexico, not he, is required to file the proper paperwork with the Social Security system. Beneficiary complained bitterly to me about the poor treatment and cavalier way that the officer tried to put words into his mouth. Beneficiary denies making the statement here as written. Beneficiary still asserts that he worked for [REDACTED] from 1992 to 2007. And he has worked from June 4, 2007 to present for [REDACTED] until present [sic] (except the period he was in the [REDACTED] States working for the United States branch of [REDACTED]

Counsel also submitted, *inter alia*, (1) bank records indicating numerous online transfers made by [REDACTED] to the beneficiary, (2) the petitioner's bank records indicating payments made by the petitioner to [REDACTED] in 2007; and (3) an affidavit by the petitioner's chief executive officer (CEO) dated March 19, 2010, in which the CEO stated the following:

[The beneficiary] worked for [the petitioner] from June 2007 to 2009 in the [REDACTED] office of [REDACTED]. He worked for us in the United States for [the petitioner] since then and until he went back to Mexico for his visa interview in 2009. He continues working as an Industrial Designer for [REDACTED] to this date.

[REDACTED] did not pay [the beneficiary] under the Mexican Social Security system for the first two years. We paid him for his work at [REDACTED] as an Industrial Designer thru our U.S[.] Company's [REDACTED] from June 2007 to 2009 as indicated.

However, it is improper of anyone to draw the conclusion that he did not work for us and under our direction for this time. We paid [the beneficiary] by sending money to his [REDACTED] bank account for him and his brother . . . for the entire time that they worked for us there as Industrial Designers.

The director revoked the petition on May 13, 2010. As noted above, the director revoked the approval of the petition on the grounds that the petitioner (1) misstated the beneficiary's qualifications, and (2) failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

On appeal, counsel for the petitioner contends that the evidence does not show that any misrepresentation was made and that even if a misrepresentation were found, it cannot be fairly attributed to the petitioner. Counsel states that the beneficiary's work experience remains valid,

“irrespective of the acts of his employer.” Counsel also reiterates that the beneficiary “had no idea whether his employer had properly enrolled in IMSS or properly paid into it.”

Upon review, the AAO finds that the evidence submitted by the petitioner is insufficient to overcome the director’s determination that (1) the beneficiary’s qualifications were misstated, and (2) the beneficiary is not qualified to perform services in a specialty occupation.

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

(A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

As a preliminary matter, the record contains no indication that counsel was present at the beneficiary’s consular interview in Mexico; therefore, counsel’s claims regarding the beneficiary’s interview do not constitute evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of

counsel do not constitute evidence. *Matter of Obaighena*, 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 record does not contain sufficient evidence to overcome the inconsistencies between the the beneficiary's statement at the consular interview that social security payments were deducted throughout his more than 16 years of employment at [REDACTED] and [REDACTED] in Mexico with the findings of the U.S. consulate that social security deductions were taken only during the beneficiary's employment by [REDACTED] from August 2002 to March 2006, and by [REDACTED] beginning in March 2009. While the petitioner has submitted letters from both [REDACTED] there is no documentary evidence such as pay stubs, bank records, social security statements, and tax returns corroborating the beneficiary's claim that he, indeed, worked for those companies throughout the claimed years. The AAO acknowledges the bank records submitted by the petitioner, but an examination of those records does not reveal that the beneficiary was employed by and paid by [REDACTED] for the duration of the claimed years.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner should understand that the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(2) provides that approval of a visa petition may be revoked on notice if "[t]he statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact." Based upon its review of the entire record of proceeding, the AAO is dismissing this appeal because the AAO finds that, as reflected in the preceding discussion, the statement of facts contained in the petition was inaccurate and not true and correct. It should be noted, then, that the AAO is not making a finding that the petitioner has committed fraud or made deliberate misrepresentations. The petitioner should also note that, whether the discrepancies in the visa petition are attributable to the petitioner or to the beneficiary is irrelevant.

The AAO agrees with the director that the evidence of record indicates that the statement of facts submitted in connection with the instant visa petition was inaccurate and not true and correct, as that evidence does not show that the beneficiary worked as an industrial designer for twelve or more years in Mexico as asserted in the petition. The AAO also finds that the evidence and arguments submitted to address the issues raised in the NOIR and the subsequent revocation decision did not effectively rebut or refute this ground for revocation. Consequently, the appeal will be dismissed and the approval of the visa petition will remain revoked, pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(2).

Next, the AAO also finds that the petitioner has not overcome the additional, separate basis for the director's revocation of the petition's approval, namely, that the approval violated the provisions of

8 C.F.R. § 214.2(h) regarding the evidence required to establish a person as qualified to serve in an H-1B specialty occupation position.

In this regard, the AAO finds that even if the petitioner had established that the beneficiary worked as an industrial designer for over twelve years, the director correctly determined that the beneficiary is not qualified to perform the duties of such a specialty occupation. As discussed earlier, the petitioner is relying on the beneficiary's employment experience to show that he has the equivalent of a bachelor's degree in a specific specialty and he is, therefore, qualified to serve in a specialty occupation.

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires.

The beneficiary in this matter has no post-secondary education and there is no evidence that the proffered position requires a license; therefore, the only remaining avenue for the beneficiary to qualify for the proffered position is pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). Under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the petitioner must establish both (1) that the beneficiary's combined education, specialized training, and/or progressively responsible experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and (2) that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

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

² It must be noted that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not training and/or work experience.

- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience

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

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

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

It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination, and that, also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of recognition of expertise in the specialty occupation.

It is noted that the petitioner submitted two evaluations, each of which state that the beneficiary's work experience is equivalent to a U.S. bachelor's degree in industrial design. However, the evaluations of the beneficiary's work experience submitted by the petitioner are insufficient to

establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty directly related to industrial design. Specifically, the claimed equivalencies were based entirely on the beneficiary's experience; however, there is no evidence that (1) the evaluators have authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, and (2) the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1).

As the petitioner has failed to satisfy any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4), and the AAO will next perform a Service evaluation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation³;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

³ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

As noted above, the record contains letters from the beneficiary's former employers. However, there is no evidence in the record that the beneficiary has recognition of expertise in the industry, membership in a recognized association in the specialty occupation, or published material by or about the beneficiary. Thus, absent corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in a field related to the proffered position or that the beneficiary has recognition of expertise in the industry. Moreover, absent this evidence of recognition of expertise in the specialty, the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) would not have been established in any event and, therefore, it could not be found that the beneficiary was qualified to perform the duties of a specialty occupation, notwithstanding the satisfaction of any one of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D).

The petitioner, therefore, has failed to establish that the beneficiary is qualified to perform the duties of any specialty occupation. Thus, even if the petitioner were able to demonstrate that the beneficiary worked for [REDACTED] for the claimed 16 years, the evidence submitted would still not demonstrate that the beneficiary is qualified to work in a specialty occupation position.

Therefore, the AAO will not disturb the director's decision to revoke the approval of the petition for this additional reason.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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