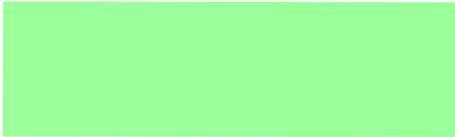


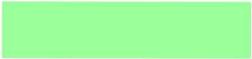
(b)(6)

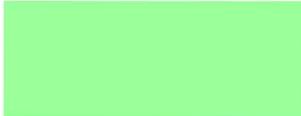
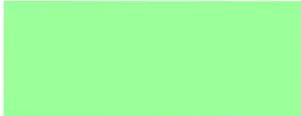


U.S. Citizenship  
and Immigration  
Services



DATE: JAN 04 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:

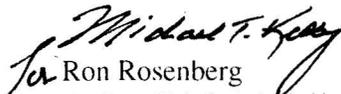


INSTRUCTIONS:

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 approval of the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition is revoked.

On the Form I-129 visa petition, the petitioner describes itself as a company established in 1996 that provides a full range development services. In order to employ the beneficiary in what it designates as an architectural designer position, the petitioner filed and had an H-1B approved 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 approval of the petition on the basis of her finding that the petitioner had failed to demonstrate: (1) the validity of the certified Labor Condition Application (LCA) the petitioner submitted in support of the petition; (2) that the proffered position qualifies for classification as a specialty occupation; and (3) that it had complied with the terms and conditions of the petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the RFE; (3) the director's notice of intent to revoke approval of the petition (NOIR); (4) counsel's response to the NOIR; (5) the director's letter revoking approval of the petition; and (6) the Form I-290B and supporting documentation.

Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the director's grounds for revoking the approval of this petition. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

When it filed the petition, the petitioner proposed employing the beneficiary as an architectural designer from September 15, 2008 through September 14, 2011. The petitioner stated on the Form I-129 that the beneficiary would work 19 hours each week at a rate of \$15.10 per hour. The petitioner also stated on the Form I-129 that the beneficiary would work at [REDACTED] in Los Angeles, California, and the LCA the petitioner submitted also listed the beneficiary's work address as being located in Los Angeles. The director approved the petition on January 5, 2009.

U.S. Citizenship and Immigration Services (USCIS) attempted to conduct an administrative site visit to the petitioner's business premises on December 3, 2009. However, the site investigator discovered that the petitioner was no longer associated with the [REDACTED]. Upon consultation with the California Secretary of State, the site investigator discovered another address associated with the petitioner, located at [REDACTED] in El Monte, California. However, when the site investigator visited the [REDACTED] address on January 28, 2010 the building appeared vacant, and no one was available for interview.

The site investigator then called the telephone number the petitioner provided in the petition, and found that the number had been changed. The site investigator called the second number, and learned that that number had been changed as well. When the site investigator called the third number, the investigator spoke with the petitioner's president. The petitioner's president informed

the site investigator that the company did not have an office location, and that all of its employees were working from their homes.

Accordingly, the director issued the NOIR on April 5, 2010. Although counsel submitted a timely response, the director found it insufficient, and she revoked approval of the petition on May 15, 2010. Counsel submitted a timely appeal.

In general, the authority to revoke approval of an H-1B petition is found at 8 C.F.R. § 214.2(h)(11), which states, in pertinent part, the following:

*Revocation of approval of petition.*

(i) *General.*

- (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. . . .
- (B) The director may revoke a petition at any time, even after expiration of the petition.

\* \* \*

(iii) *Revocation on notice—*

- (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
  - (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. . . .

*Existence of a Valid Labor Condition Application*

As noted above, the director's first basis for revoking approval of this petition was her determination that the petitioner had failed to demonstrate the validity of the certified LCA it submitted in support of the petition. The AAO agrees.

In his May 3, 2010 letter submitted in response to the NOIR, counsel claimed that the petitioner conducted business at the [redacted] address in Los Angeles from September 2008 until December 2008; at the [redacted] address in El Monte from January 2009 until October 2009; at [redacted] in Los Angeles from November 2009 until April 2010; and that it moved to [redacted] in Walnut, California in May 2010. The petitioner also submitted a copy of a lease agreement dated April 30, 2010 for the [redacted] address in Walnut as well as photographs that allegedly depicted that leased property.

As the director noted in her May 25, 2010 decision revoking approval of the petition, although counsel claimed that the petitioner conducted business at the [redacted] address in El Monte from January 2009 until October 2009, it submitted a change-of-address request to USCIS on January 27, 2009 to transfer its address to [redacted] in Monrovia, California. Furthermore, both the petitioner's tax returns and the beneficiary's Forms W-2 displayed the petitioner's address as being the [redacted] address in El Monte, despite the fact that counsel claimed the petitioner had ceased operating from that address in October 2009. The director noted further that the website of the California Secretary of State also showed the petitioner's address as [redacted] address in El Monte. Still further, the director noted that although counsel claimed in his letter that the petitioner had conducted business at the [redacted] address from November 2009 until April 2010, the petitioner's president notified the USCIS site investigator via telephone in January 2010 that the petitioner did not have an office location and that all of its employees were working from their homes. The director also observed that the lease agreement submitted by the petitioner for the office space [redacted] address in Walnut was executed after the director issued her NOIR. Finally, the director noted that no documentation had been submitted to show the beneficiary's precise work location on the day of the site visit.

In its June 21, 2010 letter submitted on appeal, the petitioner claimed that it had been required to relocate its office several times over the previous two years "in order to deal with the difficulties in

the construction industry created by the major problems in the overall economy.” The petitioner also stated that it neglected to update its address on its tax documents due, in part, to the frequency of its moves. Finally, the petitioner also claimed that in addition to the list of aforementioned addresses submitted in response to the director’s NOIR, it conducted business from the [REDACTED] address in Monrovia between November and December of 2008.

In his June 21, 2010 memorandum of law, counsel reiterated the petitioner’s explanation regarding its motives for relocating its office so frequently; argued that the multiple relocations did not violate the terms of the LCA; and claimed that the evidence of record establishes that the beneficiary was indeed working for the petitioner during this period of time.

Counsel’s assertions regarding the petitioner’s ability to relocate its office without violating the terms of the LCA are off point, as the director did not claim that office relocation is an inherent LCA violation. The issue is whether the record contains sufficient documentary evidence to establish that the change in the beneficiary’s work location was permissible given the petitioner’s assertions on this particular LCA.

The regulation at 8 C.F.R. § 214.2(h)(2)(E) states the following:

*Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien’s eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary’s work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer’s petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[emphasis added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a “DOL-certified LCA attached” that actually supports and corresponds with the petition on the petition’s filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition’s filing. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new petition, with fee, whenever a beneficiary’s job location changes such that a new LCA is required to be filed with DOL.

In this case there is no question that the beneficiary’s work location changed. The question, then, becomes whether that change necessitated the filing of a new LCA and, by extension, the filing of an amended Form I-129. The AAO finds that the petitioner has failed to establish that such was not the case.

In her May 25, 2010 decision revoking the approval of the petition, the director specifically stated that “[n]o documentation was provided to show the exact work location of the beneficiary at the time of the site visit[s].” Neither counsel nor the petitioner addresses this deficiency on appeal.<sup>1</sup> As such, for this reason alone the petitioner has failed to demonstrate the validity of the LCA for the locations of the beneficiary’s work, because absent documentation establishing the beneficiary’s actual work location, it is impossible for the AAO to determine whether he was actually working in a geographical area covered by that LCA.

However, the petitioner’s failure to document the beneficiary’s actual work location extends beyond the time during which the site visits took place. The list of four addresses provided by counsel in his May 3, 2010 letter purported to list the petitioner’s business locations since September 2008 is of little evidentiary value, as the evidence of record and the testimony of the petitioner reveals multiple inaccuracies in that list. Counsel claimed that the first address on that list, [REDACTED] in Los Angeles, was the petitioner’s business location from September 2008 until December 2008. However, on appeal the petitioner claimed that it actually operated from another address – [REDACTED] in Monrovia – for two months of that three-month period. Counsel claimed that the second address on that list, [REDACTED] address in El Monte, was the petitioner’s business location from January 2009 until October 2009. However, the director noted in her decision that the petitioner submitted a change-of-address request to USCIS on January 27, 2009

---

<sup>1</sup> As noted, the site visits occurred in December 2009 and January 2010. Although the petitioner claims it was conducting business at the [REDACTED] address in Los Angeles from November 2009 until April 2010, the statements made by the petitioner’s president to the site investigator undermine that claim. Again, in January 2010 the petitioner’s president notified the USCIS site investigator via telephone that the petitioner did not have an office location and that all of its employees were working from their homes. This inconsistency has not been acknowledged, let alone resolved. 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).

transferring its address to the [REDACTED] in Monrovia. Counsel claimed that the third address on that list, [REDACTED] in Los Angeles, was the petitioner's business location from November 2009 until April 2010. However, in January 2010 the petitioner's president told the USCIS site investigator that the petitioner did not have an office location, and that all of its employees were working from their homes. With regard to the fourth address provided by counsel – 20455 Valley Boulevard in Walnut, California – the AAO notes, as did the director, that the petitioner only signed the lease on this property after the NOIR was issued. Accordingly, there are questions surrounding each of the four office locations identified by counsel in his May 3, 2010 letters. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Given these enumerated discrepancies, the record does not establish that the beneficiary ever actually worked at any of these four addresses. Given the petitioner's failure to establish the beneficiary's work location, the petitioner has failed to demonstrate the validity of the LCA for the locations of the beneficiary's work, because absent documentation of the beneficiary's actual work location, it is impossible for the AAO to determine whether he was actually working in a geographical area covered by that LCA

As the petitioner has failed to demonstrate where the beneficiary was actually working, it has failed to demonstrate the validity of the LCA. The director therefore properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(4).

#### *Specialty Occupation*

The director's second basis for revoking approval of this petition was her determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation. The AAO agrees.

In its September 9, 2008 letter of support, the petitioner stated that the duties of the proffered position would include the following tasks:

- Providing architectural design and documentation services for architectural projects, applying his knowledge of building codes, regulations, and standards;
- Using programming materials and other technical information to prepare schematic design drawings and construction documents;
- Using specialized computer software to create three-dimensional representations of the buildings under design; and

- Participating in meetings with clients and consulting engineers to ensure the successful completion of a building's design.

The petitioner claimed that the minimum educational requirement for this position is a bachelor's degree, or the equivalent, in architecture.

Based upon a complete review of the record of proceeding, the AAO finds that the evidence of record fails to establish that the position as described constitutes a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

An occupation which requires [(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 (5<sup>th</sup> 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, 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 rely simply upon a proffered position’s title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree *in the specific specialty* as the minimum for entry into the occupation, as required by the Act.

The AAO finds that, even when read in the aggregate, neither the earlier quoted duty descriptions, nor any other in this record of proceeding, distinguish the proposed duties, or the position that they comprise, as so complex, specialized, and/or complex as to require the practical and theoretical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as required to establish a specialty occupation in accordance with the definitions at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). Rather, the AAO finds, the proffered position and its duties are described in terms of numerous but generalized functions that are neither explained nor documented in substantial details that would establish both the substantive aspects of actual work into which their actual performance would translate, and any necessary correlation between knowledge that must be applied in that work and attainment of any particular level of highly specialized knowledge in a specific specialty.

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>2</sup> The duties of the proffered position align with those of architectural drafters,<sup>3</sup> as those positions are described in the *Handbook*. The *Handbook's* discussion of the duties typically performed by architectural drafters states, in pertinent part, the following:

---

<sup>2</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

<sup>3</sup> Although the petitioner claimed that the performance of the duties of the proffered position requires a bachelor's degree, or the equivalent, in architecture, the LCA that the petitioner submitted in support of the petition was not certified for an architect. The prevailing wage of the position for which the LCA was certified was \$15.10 per hour. However, the Level I (entry) prevailing wage for an architect in Los Angeles County, California at the time this petition was filed was \$24.67 per hour. The Level II (qualified) prevailing wage was \$31.38 per hour; the Level III (experienced) prevailing wage was \$38.08 per hour; and the Level IV (fully competent) prevailing wage was \$44.70 per hour. It is therefore clear that this LCA was not certified for an architect. See U.S. Dep't of Labor, Office of Foreign Labor Certification, Foreign Labor Certification Date Center, Online Wage Library, All Industries Database for July 2008 – June 2009, "Architects, Except Landscape and Naval," <http://www.flcdatacenter.com/OesQuickResults.aspx?area=31084&code=17-1011&year=9&source=1> (last accessed November 16, 2012). While this LCA was clearly not certified for an architect, the wage specified on the LCA aligns with the Level I prevailing wage for architectural and civil drafters in Los Angeles County, California at the time this petition was filed, which was \$15.10 per hour. See U.S. Dep't of Labor, Office of Foreign Labor Certification, Foreign Labor Certification Date Center, Online Wage Library, All Industries Database for July 2008 – June 2009, "Architectural and Civil Drafters," <http://www.flcdatacenter.com/OesQuickResults.aspx?area=31084&code=17-3011&year=9&source=1> (last accessed November 16, 2012).

Drafters use software to convert the designs of engineers and architects into technical drawings and plans. Workers in production and construction use these plans to build everything from microchips to skyscrapers. . . .

Drafters typically do the following:

- Design and prepare plans for using computer-aided design and drafting (CADD) software
- Produce effective product designs by using their understanding of engineering and manufacturing techniques
- Add structural details to architectural plans from their knowledge of building techniques
- Prepare multiple versions of designs for review by engineers and architects
- Specify dimensions, materials, and procedures for new building projects or products
- Work under the supervision of engineers or architects

\* \* \*

There are several kinds of drafters, and the most common types of drafters are the following:

\* \* \*

**Architectural drafters** draw architectural and structural features of buildings for new construction projects. These workers may specialize in a type of building, such as residential or commercial. They may also specialize in materials, such as steel, wood, and reinforced concrete.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Drafters," <http://www.bls.gov/ooh/architecture-and-engineering/drafters.htm#tab-2> (accessed November 16, 2012).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Drafters usually need some postsecondary education, such as an associate's degree, to enter the occupation. . . .

Employers prefer applicants who have completed postsecondary education in drafting, typically an associate's degree from a technical institute or community college. Drafters who specialize in architecture may need a higher degree, such as a bachelor's degree. To prepare for postsecondary education, high school courses in

mathematics, science, computer technology, design, computer graphics, and, where available, drafting, are useful.

Technical institutes offer focused technical education in topics such as design fundamentals, sketching, and CADD software. They award certificates or diplomas, and programs vary considerably in length and in the types of courses offered. Many technical institutes also offer associate's degree programs.

Community colleges offer programs similar to those in technical institutes but typically include more classes in drafting theory and often require general education classes. Courses taken at community colleges are more likely to be accepted for credit at colleges or universities. After completing an associate's degree program, graduates may get jobs as drafters or continue their education in a related field at a 4-year college. Most 4-year colleges do not offer training in drafting, but they do offer classes in engineering, architecture, and mathematics that are useful for obtaining a job as a drafter.

These findings do not indicate that a bachelor's degree in a specific specialty, or the equivalent, is normally required for entry into this occupation. As noted, the *Handbook* states that drafters usually need "some" postsecondary education, such as an associate's degree. While the *Handbook* does state that architectural drafters "may" need a bachelor's degree, it does not state that a bachelor's degree is a normal minimum entry requirement. Moreover, the *Handbook* does not state that of those architectural drafting positions for which a bachelor's degree "may" be a requirement, a bachelor's degree *in a specific specialty* is required.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, 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 calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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. Also, 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. Nor does the record of proceeding contain any evidence to otherwise establish eligibility under this prong.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor’s degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not 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.”

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor’s degree, or the equivalent, in a specific specialty. The duties proposed for the beneficiary are very similar to those outlined in the *Handbook* as normally performed by architectural drafters, and the petitioner’s description of the duties which collectively constitute the proffered position lacks the detail and specificity required to establish that they surpass or exceed the duties performed by typical architectural drafters in terms of complexity or uniqueness. As noted above the *Handbook* indicates that the performance of these typical duties does not require a bachelor’s degree, or the equivalent, in a specific specialty. The AAO finds further that, even outside the context of the *Handbook*, the petitioner has simply not established complexity or uniqueness as attributes of the proffered position, let alone as attributes of such an elevated degree as to require the services of a person with at least a bachelor’s degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary’s responsibilities and day-to-day duties constitute a position so complex or unique it can be performed only by an individual with at least a bachelor’s degree, or the equivalent, in a specific specialty.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor’s degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>4</sup> In the instant case, the record 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.

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 assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration

---

<sup>4</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the occupation.

of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner in this case has submitted no evidence regarding its previous hiring and recruiting practices for positions similar to the one it proffers here. Accordingly, the record of proceeding lacks evidence for consideration under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

The *Prevailing Wage Determination Policy Guidance*<sup>5</sup> issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

---

<sup>5</sup> Available at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf) (last accessed November 16, 2012).

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only “moderately complex tasks that require limited judgment.” The fact that this higher-than-here-assigned, Level II wage rate itself indicates performance of only “moderately complex tasks that require limited judgment,” is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer’s job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment’s procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner’s submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL’s instructive comments about the next higher level (Level II), the proffered position did not even involve “moderately complex tasks that require limited judgment” (the level of complexity noted for the next higher wage-level, Level II). The AAO also finds that, separate and apart from the petitioner’s submission of an LCA with a wage-level I designation, the petitioner has also failed to

provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. The director therefore properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

*Compliance with the Terms and Conditions of the Approved Petition*

The director's third basis for revoking the approval of this petition was her determination that the petitioner had failed to demonstrate that it has complied with the terms and conditions of the approved petition. In arriving at this conclusion, the director stated the following:

The evidence provided is not sufficient to show that the petitioner has complied with the terms and conditions of employment. Because [USCIS ] was unable to determine if the petitioner is operating in the capacity stated in the petition during the site visits and the petitioner did not provide sufficient evidence to show that it has done so, [approval of] the petition is revoked.

The AAO incorporates here by reference and reiterates its earlier comments regarding the petitioner's failure to establish the location of the beneficiary's actual work location, which makes it impossible for the AAO to determine whether he was actually working in a geographical area covered by that LCA. As the petitioner failed to demonstrate where the beneficiary was actually working, it has failed to demonstrate that it has complied with the terms and conditions of the approved petition, and consequently the director properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

*Conclusion*

As discussed above, the petitioner has failed to overcome any of the three grounds upon which the director revoked the approval of the petition. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed. Approval of the petition is revoked.