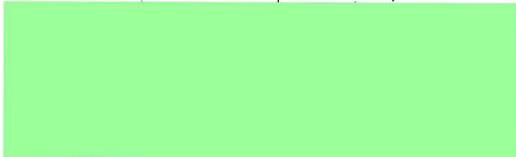


(b)(6)

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



Date: **JAN 11 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:

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner stated that it is a physical therapy firm. To employ the beneficiary in what it designates as a research and development engineer position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

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.

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 a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). 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.

With the visa petition, counsel submitted a letter, dated December 16, 2009, from the petitioner's owner and a separate document describing the proffered position. The petitioner's letter contains the following description of the duties of the proffered position:

As a Research and Development Engineer with [the petitioner], [the beneficiary] will be responsible for the research and development of mechanical and electrical apparatuses (not currently existing or available) and maintaining optimum performance of all equipment. Specific duties will include designing and

implementing cost-effective equipment modifications to help improve safety, reliability and throughput; developing project specification; developing, testing and evaluating theoretical designs; discussing and solving complex problems with manufacturing departments, subcontractors, suppliers and customers; making sure a product can be made again reliably and will perform consistently in specified operating environments; and managing projects using engineering principles and techniques.

The separate description of the proffered position adds the following duties:

- planning and designing new production processes;
- producing details of specifications and outline designs;
- recommending modifications following prototype test results with patients;
- considering the implications of issues such as cost, safety and time constraints;
- working with other professionals, within and outside the engineering specializing in physical therapy [sic].

Both the petitioner's letter and the separate description of the proffered position state, without analysis, that the position requires a bachelor's degree in mechanical engineering, electrical engineering or equivalent work experience in the fields of mechanical and/or electrical engineering.

On December 30, 2009, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center explicitly requested that the petitioner provide a more detailed description of the duties of the proffered position and, "Also, explain why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupational field."

In response, counsel submitted (1) four vacancy announcements; (2) another description of the proffered position; and (3) a letter, dated February 8, 2010, from counsel. The vacancy announcements will be discussed below.

The description of the proffered position states the following:

Research Develop, design and provide high quality adjustable physical therapy exercise equipment specifically created to meet the needs of physical therapy patients giving [the petitioner] a competitive edge over other physical therapy providers that do not currently have access to such equipment.

- Works closely with the physical therapist/owner to:
  1. Makes otherwise unavailable improvements to currently utilized physical therapy exercise equipment to permit the equipment to be tailored to the diverse needs of physical therapy patients. Stated differently, the Research and Development Engineer works with

the physical therapist/owner to fit exercise equipment to the patient rather than force the patient to fit the exercise equipment.

2. Develops, tests, and monitors exercise equipment that is not currently available in any form to meet the diverse needs of a diverse patient demographic/population.
- Analyzes and interprets the problems with and/or short comings of currently available exercise equipment where no other equipment exists in the industry that addresses such problems and shortcomings. Researches and develops specific exercise equipment to solve these problems and/or shortcomings. To perform this job duty, the Research and Development Engineer must rely on knowledge of and experience in the following scientific and engineering areas:

1. Mechanical Engineering/Physics

- a. Pulleys
- b. Levers
- c. Force
- d. Magnetic materials
- e. Electromagnetics
- f. Friction
- g. Rotational dynamics
- h. Inertia
- i. Momentum
- j. Newton's law of motion
- k. Work
- l. Kinetic energy
- m. Potential energy
- n. Vectors

2. Electrical Engineering

- a. AC applications
- b. DC applications
- c. Current
- d. Voltage
- e. OHMS Law

3. Electronics: Electronic monitoring of mechanical equipment (i.e., tabulating repetitions meeting a predetermined minimum quantifiable effective effort so that poor effort will not count toward acceptable repetitions to ensure the highest quality of exercise performed.)

4. Materials: favorable vs. unfavorable stresses and strains in different readily available and/or lesser available materials to safely, efficiently, and cost effectively product the exercise equipment.

5. Carpentry

- a. Joinery
- b. Properties of different woods

- c. Different grain types
  6. Welding
    - a. Electrical
    - b. Gas
  7. Metal working
    - a. Lathe work
- Researching existing sources, such as the internet and catalogs to identify existing exercise equipment so as not to design and develop exercise equipment that is more cost effective to purchase rather than produce in-house.
  - Effectively combines the best elements of similar types of existing equipment to produce a single superior piece of equipment.
  - Performs research on appropriate and cost-effective patenting process for produced equipment.
  - Assists owner in making presentations to parties interested in mass producing equipment to be marketed to the general physical therapy provider population while protecting [the petitioner's] ideas and intellectual property.

Although the petitioner responded with a more detailed description of the duties of the proffered position, that description still fails to demonstrate that the duties require a minimum of a bachelor's degree in a specific specialty or its equivalent to perform. For instance, carpentry, welding, and metalworking do not necessarily require a college degree. Further, there is no indication that an understanding of pulleys, levers, force, magnetic materials, etc., is only available through at least a baccalaureate-level college education in a specific specialty. Further still, the exercise equipment the beneficiary would design and the modifications he would make to existing equipment are described only abstractly; there is no indication that those inventions and modifications would be of such complexity, uniqueness, or specialization that they would require any particular level of education. The AAO finds that, to the extent that the proposed duties are described, those duties fail to evince any particular level of specialization, complexity, or uniqueness that would require any particular level of education, as will be discussed further below.

The director denied the petition on April 1, 2010, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation in that the evidence did not establish that the performance of its duties requires a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In that decision, the director characterized the proffered position as an engineering technician position, rather than as an engineer position, as the petitioner and counsel have characterized it, and analyzed its entry educational requirements as such.

On appeal, counsel objected to the director's classification of the proffered position as an engineering technician. Counsel noted that the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that engineering technicians work under the supervision of engineers, and that the beneficiary will have no such supervision. Counsel also stated:

[The petitioner's] evidence established beyond a preponderance of the evidence that the position upon which its petition is based is an engineering position requiring at least a Bachelor's degree or equivalent in engineering.

The AAO will now discuss the application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding. As was observed above, neither of the descriptions of the duties of the proffered position provides sufficient detail to demonstrate that the complexity, uniqueness, or specialization inherent to those duties. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Nevertheless, the AAO will address the specific requirements of the subsections of 8 C.F.R. § 214.2(h)(4)(iii)(A) in more detail.

We will first address the supplemental, alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner demonstrates that the normal minimum entry requirement for the proffered position is a bachelor's or higher degree in a specific specialty or its equivalent.

The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup>

As was observed above, however, the descriptions provided of the duties of the proffered position provide insufficient detail to demonstrate that those duties require any particular level of education. The nature of the modifications to existing equipment that the beneficiary would make, and the nature of the machinery he would design, are not described. Without this information, the duty descriptions cannot demonstrate whether the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty, or whether some lesser amount of education would suffice to perform them.

---

<sup>1</sup> 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.

In the "Electrical and Electronics Engineering Technicians" chapter, the *Handbook* provides the following descriptions of the duties of electrical engineering positions:

Electrical engineering technicians typically do the following:

- Put together electrical and electronic systems and prototypes
- Build, calibrate, and repair electrical instruments or testing equipment
- Visit construction sites to observe conditions affecting design
- Identify solutions to technical design problems that arise during construction of electrical systems
- Inspect designs for quality control, report findings, and make recommendations
- Draw diagrams and write specifications to clarify design details of experimental electronics units
- Install and maintain electrical control systems and equipment
- Set up test equipment and evaluate the performance of developmental parts, assemblies, or systems under simulated conditions
- Analyze test information to resolve design-related problems
- Modify electrical prototypes, parts, and assemblies to correct problems

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Electrical and Electronics Engineering Technicians," <http://www.bls.gov/ooh/architecture-and-engineering/electrical-and-electronic-engineering-technicians.htm#tab-2> (last visited January 8, 2013).

In the "Mechanical Engineering Technicians" chapter, the *Handbook* provides the following descriptions of the duties of those positions:

Mechanical engineering technicians typically do the following:

- Evaluate drawing designs for new or changed tools by measuring dimensions on the drawing and comparing them with the original specifications
- Prepare layouts and drawings of parts to be made and the process for putting them together
- Discuss changes with coworkers—for example, in the design of the part, in the way it will be made and put together, and in the techniques and process they will use
- Review instructions and blueprints for the project to ensure the test specifications, procedures, and objectives

- Plan, make, and put together new or changed mechanical parts for products, such as industrial machinery or equipment
- Set up and conduct tests of complete units and of parts as they would really be used, as a way to investigate proposals for improving equipment performance
- Record test procedures and results, numerical and graphical data, and recommendations for changes in product or test methods
- Analyze test results in regarding design specifications and test objectives

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Mechanical Engineering Technicians," <http://www.bls.gov/ooh/architecture-and-engineering/mechanical-engineering-technicians.htm#tab-2> (last visited January 8, 2013).

To the extent that they are susceptible to analysis, the abstract descriptions of the duties of the proffered position are consistent with an electrical and electronics engineering technician position, and/or a mechanical engineering technician position.

As to the educational requirements of electrical engineering technician positions, the *Handbook* states, "Programs for electrical . . . engineering technicians usually lead to an associate's degree in electrical . . . engineering technology." As to the educational requirements of mechanical engineering technician positions, the *Handbook* states, "Prospective mechanical engineering technicians usually take courses in fluid mechanics, thermodynamics, and mechanical design in a program leading to an associate's degree." The *Handbook* does not support the contention that either electrical and electronics engineering technician positions or mechanical engineering technician positions require a minimum of a bachelor's degree in a specific specialty or its equivalent.

The AAO finds that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge of mechanical and electrical design, but do not establish by a preponderance of the evidence any particular level of formal, baccalaureate or higher level, education as minimally necessary to attain such knowledge. The record contains no blueprints, patents, or evidence of machines sold to indicate that the complexity and specialization of the proffered position, as practiced in the context of the petitioner's business operations, would exceed the complexity and specialization inherent to other electrical or mechanical engineering technicians.

Counsel's reliance on the claim that the beneficiary would not be supervised by an engineer, absent any indication of the complexity of the beneficiary's duties, is insufficient to show that it requires a degree or the equivalent. Further, assuming *arguendo* that the proffered position were that of an engineer, there is no evidence that the beneficiary would be relieved of having to perform the duties of an engineering technician, as he would not have a subordinate engineering technician to perform those lower-level duties. In other words, based on counsel's logic, i.e., where there is an engineering technician there must be an engineer; it is more likely, or at least just as likely, that the reverse would

be true, i.e. where there is an engineer there must be an engineering technician. The AAO does not find that either must be true. Instead, based on the duties, as described and as examined, within the context of a physical therapy office, it appears more likely than not that the beneficiary would be employed as an engineering technician with some maintenance and repair worker duties and not as an engineer.

The petitioner has not demonstrated that a bachelor's degree or the equivalent in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, satisfied the criterion of 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.

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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was observed above, the *Handbook* provides no support for the proposition that the petitioner's industry, or any other, normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty to perform the duties of the proffered position. The record contains no evidence pertinent to a professional association that requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry in order to perform those duties. The record contains no letters or affidavits from others in the physical therapy industry.

As was noted above, counsel did provide four vacancy announcements. Two were placed by Life Fitness, and one was placed by Star Trac. Both of those are manufacturers of exercise machinery. The fourth vacancy announcement was placed by Brooks Sports, a sporting goods manufacturer. None of those companies is in the physical therapy industry.

One of the vacancy announcements is for a mechanical engineering manager to design new exercise equipment and modifications of existing exercise equipment. Another is for a quality engineer to test new exercise products. Another would design new sports shoes for prototype manufacturing and testing. The last vacancy announcement is for a mechanical sustaining engineer to resolve production issues, and implement cost reduction measures in the process of manufacturing exercise equipment. Because the complexity of the design responsibilities of the proffered position have never been satisfactorily explained, the AAO is unable to determine whether those positions could be considered parallel to the proffered position even if they were in the same industry and with organizations similar to the petitioner.

None of the positions described is in the petitioner's industry, and none have been shown to be a position parallel to the proffered position in an organization similar to the petitioner. Further, even if all four positions were demonstrated to be for parallel positions in the petitioner's industry with organizations similar to the petitioner, the submission of the four consciously selected announcements is statistically insufficient to demonstrate an industry-wide requirement.<sup>2</sup> The record contains no independent evidence that the announcements are representative of recruiting and hiring practices for electrical or mechanical engineering technicians in the physical therapy industry.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, satisfied the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which may be satisfied if the petitioner establishes that, notwithstanding that other positions designing equipment and designing modifications to existing equipment for physical therapy service providers may not require a minimum of a bachelor's degree in a specific specialty, or its equivalent, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such credentials.

As was observed above, the description of the duties of the proffered position is too abstract to show that the designs and modifications that the beneficiary would be called on to make are sufficiently complex or unique that they would require any specific, formal baccalaureate or higher level education or the equivalent.

---

<sup>2</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from four job postings with regard to determining the common educational requirements for entry into engineering technician positions in similar companies in the physical therapy industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of electrical or mechanical engineering technician for a physical therapy firm required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that may have been consciously selected could demonstrate that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations.

The record contains no other evidence to show that the proffered position is complex or unique such that it requires a minimum of a bachelor's degree in a specific specialty or its equivalent. The petitioner has not, therefore, satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).<sup>3</sup>

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, however, designing and implementing equipment modifications, developing project specifications; developing, testing and evaluating theoretical designs; discussing and solving production problems; planning and designing production processes; producing details of specifications and outline designs; recommending modifications following prototype test results with patients; considering cost, safety and time constraints; working with other professionals; etc., contains insufficient indication of complexity or specialization of those duties such that the knowledge required to perform them would usually be associated with a minimum of a bachelor's degree in a specific specialty or its equivalent, especially given the lack of evidence that the petitioner engages in the production of "mechanical and electrical apparatuses," as opposed to only providing physical therapy services. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

In conclusion, the AAO finds that the director did not err in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the submissions on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

---

<sup>3</sup> 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 a 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").

The record suggests an additional issue that was not addressed in the decision of denial. Specifically, the petitioner has also failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

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, 8 U.S.C. § 1184(i)(2), 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 is 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. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the

completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In the instant case, the record contains no evidence that the beneficiary has received any U.S. baccalaureate or higher degree, or that he holds a foreign degree determined to be equivalent to a U.S. baccalaureate or higher degree. In addition, there is no indication that licensure is required to perform the duties of the proffered position. To find the beneficiary qualified to perform the duties of a specialty occupation, the petitioner must therefore demonstrate that the beneficiary satisfies the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree under 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:

- (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;<sup>4</sup>
- (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;
- (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 the instant case, as the record contains no evidence of passage of recognized college-level equivalency examinations or special credit programs as described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), the petitioner has not demonstrated that the beneficiary is qualified to work in a specialty occupation position pursuant to that section.

---

<sup>4</sup> The petitioner should note 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.

(b)(6)

The petitioner is not relying on the beneficiary's formal education to show that he is qualified to work in a specialty occupation position and, thus, the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) is inapplicable.

The record contains no evidence of certification or registration from a nationally-recognized professional engineering association or society and, therefore, the petitioner has not demonstrated that the beneficiary is qualified pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(4).

The evidence in the record is sufficient that USCIS may find that the beneficiary has extensive experience installing electrical and electronic devices, but insufficient for USCIS to make an independent determination that he has achieved recognition of expertise in any branch of engineering as a result of that experience. Accordingly, the AAO does not find that the beneficiary is qualified to work in a specialty occupation position pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The remaining subsection is 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), the criterion of which may be satisfied if the petitioner provides a credible 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.

The petitioner did, in fact, provide an evaluation of the beneficiary's qualifications. That evaluation states that, as a result of his employment experience, the beneficiary has the equivalent of a bachelor's degree in electrical engineering technology from a U.S. institution.

However, that evaluation is accompanied by no evidence that the evaluator has the 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.<sup>5</sup> The evaluator has not been shown to be competent to evaluate the beneficiary's employment experience pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and, as such, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation pursuant to that subsection.

Lastly, in addition to failing to establish any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(D), the petitioner has also failed to establish the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). Specifically, there is insufficient evidence in the record that the beneficiary has "recognition of expertise in the specialty through progressively responsible positions directly related to the specialty." For this additional reason, it cannot be found based on the record as currently constituted that the beneficiary is qualified to perform the services of a specialty occupation.

---

<sup>5</sup> In fact, that evaluation does not even contain an allegation to that effect.

The beneficiary has not been shown to be qualified to work in a specialty occupation position. Accordingly, the appeal will be dismissed, and the visa petition will be 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.