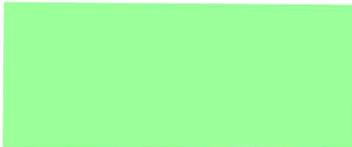


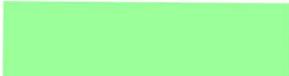
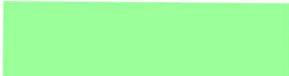


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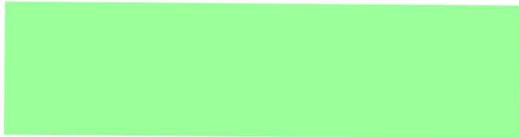


DATE: **JUL 23 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

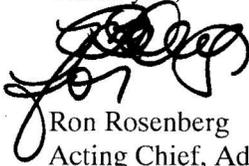


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on May 11, 2012. In the Form I-129 visa petition, the petitioner describes itself as an auto tire import/export and distributor business established in 2007. In order to employ the beneficiary in what it designates as a mechanical engineer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on October 4, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief and previously submitted evidence in support of this assertion.

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as a mechanical engineer to work on a full-time basis. In a support letter dated May 7, 2012, the petitioner stated that the beneficiary will perform the following duties in the proffered position:

- Read and interpret computer-generated reports concerning the tires provided by original manufacturer;
- Research, evaluate products to meet requirements, applying knowledge of engineering principles[;]
- Confer with engineers in the manufacturing field in China to implement operating procedures, and to provide technical information[;]
- Recommend design modifications to eliminate potential malfunction of the tire performance[;]
- Conduct research that tests and analyzes the performance of the tires to be distributed in the U.S.[;]
- Investigate failures and difficulties to diagnose faulty performance of the tires, and to make in [sic] reports[;]
- Develop and test models of alternate designs assess feasibility, operating condition effects, possible new applications and necessity of modification.

In its letter of support accompanying the initial I-129 petition, the petitioner asserted that the minimum educational requirement for the proffered position is a "Bachelor degree or its equivalent in Mechanical Engineering." The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of his Chinese degree and prior work experience. The petitioner provided a copy of the beneficiary's foreign diplomas and a transcript, and an evaluation of the beneficiary's credentials prepared by [REDACTED] which states that the beneficiary's degree "is equivalent to the U.S. degree of Bachelor of Science in Electro-Mechanical Engineering Technology."

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Mechanical Engineers" - SOC (ONET/OES) code 17-2141, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 7, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the request, in addition to other evidence, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary, along with the percentage of time to be spent on each duty, the level of responsibility, hours per week of work, and the minimum education, training, and experience necessary to do the job.

On September 21, 2012, counsel responded to the director's RFE by providing a letter from himself and an affidavit of [REDACTED]¹ Notably, although in the RFE the director requested that the

¹ The AAO reviewed the affidavit in its entirety. However, as discussed below, the letter from Mr. [REDACTED] is not persuasive in establishing the proffered position as qualifying as a specialty occupation position. The term recognized authority means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom. 8 C.F.R. § 214.2(h)(4)(ii). Further, the opinion must include how the writer's conclusions were reached, as well as the basis for the conclusions supported by copies or citations of any research material used. *Id.*

In the instant case, the affidavit does not meet the requirements set out by the regulation at 8 C.F.R. § 214.2(h)(4)(ii). Mr. [REDACTED] does not provide any information regarding his experience giving such opinions. Furthermore, there is no indication that he possesses any specific knowledge of the petitioner's business operations and the proffered position. That is, Mr. [REDACTED] does not demonstrate or assert any knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise.

Mr. [REDACTED] claims that his conclusions are based upon his "personal and professional knowledge." He asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, he does not provide a

petitioner provide a more detailed description of the proffered position, no documentation signed or endorsed by the petitioner was submitted.

The director reviewed the information provided by counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on October 4, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief and copies of previously submitted documents.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for his assertions regarding the educational requirements for the particular position here at issue. Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. There is no evidence that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent. Mr. [REDACTED] does not provide sufficiently substantive and analytical bases for his opinion.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R.

§ 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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 simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

To ascertain the intent of a petitioner USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

In the instant case, the AAO observes that the duties of the proffered position as described by the petitioner in support of the Form I-129 petition have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. The AAO further observes that the description of the duties provided in the letter of support is from the description of "Mechanical Engineers" in the Occupational Information Network (O*NET) OnLine Summary Report. That is, the petitioner has recited, virtually verbatim, duties from this occupational category and attributed them to the proffered position. As previously noted, the petitioner provided the following duties for the proffered position in its support letter:

- Read and interpret computer-generated reports concerning the tires provided by original manufacturer;
- Research, evaluate products to meet requirements, applying knowledge of engineering principles[;]
- Confer with engineers in the manufacturing field in China to implement operating procedures, and to provide technical information[;]
- Recommend design modifications to eliminate potential malfunction of the tire performance[;]
- Conduct research that tests and analyzes the performance of the tires to be distributed in the U.S.[;]
- Investigate failures and difficulties to diagnose faulty performance of the tires, and to make in [sic] reports[;]
- Develop and test models of alternate designs assess feasibility, operating condition effects, possible new applications and necessity of modification.

The O*NET Summary Report for the occupational category 17-2141.00 – Mechanical Engineers states that the following "tasks" are related to this occupation:

- **Read and interpret** blueprints, technical drawings, schematics, or **computer-generated reports.**
- **Research**, design, **evaluate**, install, operate, and maintain mechanical **products**, equipment, systems and processes **to meet requirements, applying knowledge of engineering principles.**
- **Confer with engineers** or other personnel **to implement operating procedures, resolve system malfunctions, or provide technical information.**
- **Recommend design modifications to eliminate** machine or system **malfunctions.**
- **Conduct research that tests or analyzes** the feasibility, design, operation, or **performance** of equipment, components, or systems.

- **Investigate equipment failures and difficulties to diagnose** faulty operation, and to make recommendations to maintenance crew.
- **Develop and test models of alternate designs and processing methods** to assess **feasibility**, operating condition effects, **possible new applications and necessity of modification**.

(Words and phrases appearing in bold face type reflect duties listed in the petitioner's job description.) U.S. Department of Labor, Employment & Training Administration, O*NET OnLine Code Connector, Mechanical Engineers – Code 17-2141 on the Internet at <http://www.onetonline.org/link/summary/17-2141.00> (last visited July 16, 2013).

In the RFE, the director informed the petitioner that the duties that it had initially provided were inadequate to establish that the proffered position is a specialty occupation position, and requested that the petitioner provide a detailed statement regarding the duties and responsibilities of the proffered position. The petitioner failed to provide a statement in response to the RFE. Instead, the petitioner's counsel reiterated the duties initially submitted with the Form I-129 petition, and provided some additional, minimal elaboration.² The AAO observes that counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the slightly revised description of the duties and responsibilities that counsel attributes to the proffered position. The AAO reviewed the information and notes that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes that providing job duties for a proffered position from O*NET is generally not sufficient for establishing H-1B eligibility. That is, while this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval as this type of generic description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. Accordingly, it cannot be relied upon when discussing the duties attached to specific employment. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

² The AAO observes that the additional information regarding the proffered position provided by counsel in response to the RFE in a letter dated September 20, 2012 appears to be copied largely verbatim from the affidavit of Mr. [REDACTED], dated September 18, 2012. As previously noted, Mr. [REDACTED] does not assert any knowledge of the petitioner's business operations or the specific position proffered in the instant petition.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. Moreover, the job descriptions in the record of proceeding fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence.

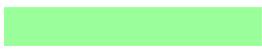
That is, the job duties of the proffered position, as provided by the petitioner, do not convey the substantive nature of the actual work that the beneficiary would perform. Rather, the job description conveys, at best, only generalized functions of the occupational category of "Mechanical Engineers" at a generic level.

Turning to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO finds that in the instant case the petitioner has failed to establish nature of the proffered position and in what capacity the beneficiary will actually be employed. 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 satisfies 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.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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NON-PRECEDENT DECISION

ORDER: The appeal is dismissed.