



U.S. Citizenship
and Immigration
Services

(b)(6)



JUN 16 2015

DATE:

PETITION RECEIPT #: 

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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

I. PROCEDURAL HISTORY

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a three-employee "eCommerce" business established in [REDACTED].¹ In order to employ the beneficiary in what it designates as a full-time "Sales Engineer" position at an annual salary of \$68,120, 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 found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a Request for Evidence (RFE). Thereafter, the petitioner responded to the Director's RFE. The Director denied the petition, finding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation. The petitioner now files this appeal, asserting that the Director's decision was erroneous.

We base our decision upon our 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 Director's RFE; (3) the petitioner's response to the RFE; (4) the Director's letter denying the petition; and (5) the petitioner's appeal and submissions on appeal. We reviewed the record in its entirety before issuing our decision.²

As will be discussed below, we have 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 appeal will be dismissed, and the petition will be denied.

II. THE PROFFERED POSITION

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title 41-9031, Sales Engineers, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

In a letter, dated March 25, 2014, submitted with the petition, the petitioner provided the following description about its business operations and the proffered position:

¹ In the letter of support, dated March 25, 2014, which was submitted with the petition, the petitioner asserted that it has seven employees.

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[The petitioner] is an ambitious online retailer store, building and operating a network of niche market stores to serve the home improvement industry. We specialize in building state of the art niche stores in which customers can find a magnificent variety of niche products. We differentiate ourselves from Brick & Mortar stores and other online retailers by providing detailed and hard to find merchandises.

[The petitioner] started in [redacted] offering a new patent pending product called "[redacted]" which is a vent cover that can be closed or opened using a wireless remote control. Besides [redacted] we proudly cover numerous home improvement niches including air fans, filters, bathroom fixtures, kitchen fixtures, faucets, and lighting options. Our goal is to be the leading online company in the home improvement business by providing the best quality to our dear customers. Which is why we make sure to provide the latest designs of air registers to meet the demand in the market.

Since 2010, [the petitioner] has demonstrated a dramatic increase in on-line visibility and revenue growth. Although we are a relatively small company with 7 employees now, we have big plans to expand our business and hire additional staff. By the end of 2014, our projected gross sales will be over \$1 million.

As a Sales Engineer, [the beneficiary] reports directly to the President and is responsible for online sales of our revolutionary products. His duties include developing product information, presenting technical product information to current and potential customers, identifying new home improvement products which meet our high quality standards, and assisting clients with problem-solving and technical inquiries. Ultimately, [the beneficiary] is responsible for making the sale by educating the customer of the many benefits of our amazing products. As our company grows and adds more sale [sic] staff, [the beneficiary] will lead the sales team to meet our goals. As an eCommerce company, our products are sold through multiple websites and online selling platforms. Consequently, [the beneficiary] is not required to travel to meet with customers as he communicates with them through various electronic methods. The minimum educational requirement for this position is a bachelor's degree in an engineering field or its equivalent.

The petitioner provided additional explanations regarding the proffered position in response to the Director's RFE. In particular, the petitioner stated that the Sales Engineer "is responsible for the selling function of highly technical products" and "has many vital duties within the organization, mainly sourcing (10%), qualifying (15%), and selling complex and technologically-advanced home and building improvement products to both national and international clients (75%)." The petitioner further elaborated upon the duties of the proffered position, as follows:

The duties of the Sales Engineer include the following:

1. Sourcing out suppliers in the marketplace, who supply or manufacture products within the home and building improvement industry, communicating with a sales engineer at the other companies using technical language that both understand.
2. Once suppliers are identified, the Sales Engineer has to evaluate and qualify the products from those suppliers based on the technical details of those products and based on his experience dealing with previous clients' needs.
3. As an ecommerce organization, the Sales Engineer follows through with the online listing team at the company in order to ensure that highly advanced products are listed with the most accurate information in order to facilitate his main duties as Sales Engineer when potential clients first contact the company to request an order.
4. After a client inquires about one of the many home and building products listed online, the Sales Engineer sets up a meeting with them either physically or virtually in order to present to them the features, specifications, operation, and maintenance of those products.

In the same letter, the petitioner reaffirmed that the proffered position requires "a high technical acumen with a minimum of an engineering bachelor's degree." The petitioner further stated that [d]ue to the many technical details that are related to mechanisms, efficiencies, and impact on the homes and buildings, a college degree is important in order to comprehend the complexity of the products and simplify the technicality of the data in order to convey it to clients in a more meaningful way."

III. SPECIALTY OCCUPATION

The issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

A. Legal Framework

To meet its burden of proof in establishing the proffered position as a specialty occupation, 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 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

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), 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.

B. Analysis

We find that the evidence of record does not demonstrate that the proffered position is a sales engineer position. We make this finding primarily based upon the lack of sufficient information and evidence regarding the duties of the proffered position.

According to the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* sub-chapter on "What Sales Engineers Do," "[s]ales engineers sell complex scientific and technological products or services to businesses" and "specialize in technologically and scientifically advanced products."³ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational*

³ We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. All of our references to the *Handbook* are to the 2014 – 2015 edition available online.

Outlook Handbook (Handbook), 2014-15 ed., "Sales Engineers," <http://www.bls.gov/ooh/sales/sales-engineers.htm#tab-2> (last visited June 4, 2015).⁴

Here, there is insufficient evidence in the record to establish that the products the petitioner sells are technologically and scientifically advanced and complex, the selling of which require a technical background equivalent to a baccalaureate degree in engineering. For instance, the petitioner stated that it sells a "new patent pending product called ' [REDACTED] ' which is a [REDACTED] that can be closed or opened using a wireless remote control." However, the petitioner did further elaborate on the technical or scientific features of the "[REDACTED]" and the particular bodies of knowledge required to sell this product. The fact that a product is patent pending, alone, does not establish that the product is also technologically or scientifically advanced and complex such that a baccalaureate degree in engineering is necessary to sell them.

Similarly, the petitioner stated that it also offers "numerous home improvement niches including air fans, filters, bathroom fixtures, kitchen fixtures, faucets, and lighting options." Again, however, the petitioner has not elaborated on the technical or scientific aspects of these home improvement products and the associated knowledge required to sell them. It is not readily apparent that home improvement products such as bathroom and kitchen fixtures can be considered technically or scientifically advanced and complex, even if they are "niche" or "hard to find," as claimed, and that a bachelor's degree in engineering would be required to sell such products. The petitioner also asserts that it sells "building improvement products" but has not further explained or provided examples illuminating the nature of these "building improvement products."

The petitioner also states that "[t]his is not a typical sales position; the requirement of an engineering degree demonstrates that theoretical application of specialized knowledge, i.e. engineering principles, is required for this position." The petitioner makes other claims regarding the "high technical acumen" and engineering knowledge required for this position. However, as mentioned above, the petitioner has not sufficiently explained and documented the factual bases for its assertions. That is, the petitioner has not specifically identified what particular aspects of the petitioner's products are technically or scientifically advanced, what bodies of highly specialized knowledge are associated with these products, which particular courses of study provided such knowledge, and how these courses represent an established curriculum leading to a baccalaureate or higher degree in engineering.⁵ As such, these are conclusory statements that have little to no

⁴ Likewise, the O*NET OnLine Details Report for the occupation "Sales Engineers" states that they "[s]ell business goods or services, the selling of which requires a technical background equivalent to a baccalaureate degree in engineering." O*NET Details Report, 41-9031.00, Sales Engineers, <http://www.onetonline.org/link/details/41-9031.00> (last visited June 4, 2015). O*NET further lists one of the core duties of sales engineers as to "[s]ell products requiring extensive technical expertise and support for installation and use, such as material handling equipment, numerical-control machinery, and computer systems." *Id.*

⁵ A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the

probative value. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner highlights the fact that it is an "online marketplace" or "eCommerce company which does not maintain product inventory," and as such, it "must rely on its Sales Engineer to identify existing products on the market which will meet the customers' needs or can be easily adapted." The petitioner's assertions are unpersuasive. The petitioner has not sufficiently explained the significance of its online sales and lack of inventory, and how these aspects of the petitioner's operations set it apart from other "brick and mortar" home improvement stores. Nor has the petitioner sufficiently explained how the proffered duties of researching, evaluating, and identifying existing products to meet customers' needs distinguish the proffered position from other sales positions which may not necessarily require at least a bachelor's degree in a specific specialty, or its equivalent.⁶

As stated in the *Handbook*, "many of the duties of sales engineers are similar to those of other salespersons." U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook (Handbook)*, 2014-15 ed., "Sales Engineers," <http://www.bls.gov/ooh/sales/sales-engineers.htm#tab-2> (last visited June 4, 2015). Thus, even though the duties of the proffered position may be generally similar to the duties of sales engineers, this similarity is not determinative here. Instead, in assessing whether the proffered position appropriately falls within the sales engineers occupational classification, we primarily consider the technical or scientific nature and complexity of the products being sold by the petitioner. The evidence of record does not contain sufficient information and evidence with respect to the nature of the petitioner's products. There are

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 384. 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 petitioner artificially created a token degree requirement, even if the proffered position did not, in fact, require such a specialty degree or its equivalent. *See id.* at 388.

⁶For example, the *Handbook* describes retail sales workers as including "both those who sell retail merchandise . . . and those who sell spare and replacement parts and equipment Both types of workers help customers find the products they want." U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Retail Sales Workers," <http://www.bls.gov/ooh/sales/retail-sales-workers.htm#tab-2> (last visited June 4, 2015). The *Handbook* further states that retail sales workers "[t]ypically . . . do not need a formal education," although "some employers prefer applicants who have a high school diploma or equivalent, especially those who sell technical products or 'big-ticket' items, such as electronics or cars." *Id.* at <http://www.bls.gov/ooh/sales/retail-sales-workers.htm#tab-4> (last visited June 4, 2015).

no brochures of the petitioner's products, invoices, technical specifications, catalogs, website printouts, etc., in the record corroborating the petitioner's claims that it sells complex scientific and technological products or services.

The record is devoid of substantial documentary evidence as to the specific duties of the proffered position. Given the lack of detail and corroborating evidence, we cannot determine that the proffered position substantially reflects the duties of a sales engineer. We note that the petitioner stated that the beneficiary's "duties include developing product information" and "presenting technical product information"; however, the record is devoid of any product information to be developed and presented.

We also consider the lack of information about the petitioner's customers in finding that the petitioner has not established that the sales engineers occupational classification is appropriate for the proffered position. The *Handbook* specifically states that "[s]ales engineers sell complex scientific and technological products or services to businesses (emphasis added)." *Id.*⁷ In the instant matter, the petitioner has not clarified who its primary customers are (i.e., whether they are individuals or businesses), or where they are located (i.e., whether they are at commercial, industrial, or other business establishments). Without sufficient evidence regarding the nature of the petitioner's products and its customers, we cannot find that the proffered position is a sales engineer position.

Based on the lack of documentary evidence, we have also determined that the petitioner has not distinguished the proffered position from a position that does not qualify as a specialty occupation. There is insufficient basis upon which it can be determined that the petitioner has demonstrated a need for a sales engineer and that the beneficiary will be performing the claimed duties of a sales engineer on a full-time basis. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Furthermore, 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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." Furthermore, there must be sufficient, corroborating evidence in the record that demonstrates not only actual, non-speculative employment for the beneficiary, but also enough details and specificity to establish that the work the beneficiary will perform for the petitioner will more likely than not be

⁷ By the same token, O*NET states that sales engineers "[s]ell business goods or services." O*NET Details Report, 41-9031.00, Sales Engineers, <http://www.onetonline.org/link/details/41-9031.00> (last visited June 4, 2015) (emphasis added). In addition, O*NET lists one of the core duties of sales engineers as to "[v]isit prospective buyers at commercial, industrial, or other establishments." *Id.* (emphasis added).

in a specialty occupation. While the petitioner provided descriptions of the proffered position's claimed duties, there is insufficient evidence in the record that the petitioner, a small three or seven employee firm, requires a full-time sales engineer requiring the "theoretical and practical application of a body of highly specialized knowledge" to perform these claimed duties on a full-time basis. *See* INA § 214(i)(1).

Consequently, we cannot find that the petitioner has adequately established the substantive nature of the proffered position. The 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.

C. Opinion Letter

We will now briefly address why we accord little probative weight to the letter from Dr. [REDACTED] Professor of Civil Engineering, which states that "[the petitioner's] job description clearly indicates that [the beneficiary] will be performing duties and responsibilities of a Sale [sic] Engineer."⁸

Professor [REDACTED] attested that "[a]s a relatively small company which specializes in 'hard to find' building and home improvement products, [the petitioner] will rely heavily on its Sales Engineers." Professor [REDACTED] further attested that "an eCommerce company which does not maintain product inventory, [the petitioner] must rely on its Sales Engineers to identify existing products on the market which will meet the customers' needs or can be easily adapted." Professor [REDACTED] concluded that "[o]nly someone with an engineering background could comprehend which products will meet the technical requirements and/or communicate with customers about options for adapting the products for each customer's particular needs."

However, Professor [REDACTED] did not sufficiently explain the factual bases for his conclusions. Professor [REDACTED] did not elaborate upon the nature and technological complexity of the particular

⁸ Dr. [REDACTED] was the primary engineering advisor for the beneficiary during his undergraduate studies at the [REDACTED]

products being sold by the petitioner, so as to establish that these products require someone with an engineering background. Professor [REDACTED] also did not articulate why the petitioner's specialization in "hard to find' building and home improvement products" or its characteristic as an "eCommerce company which does not maintain product inventory" renders the Sales Engineer occupational classification appropriate for the proffered position. As discussed above, the record contains insufficient corroborating evidence regarding the claims that the petitioner is engaged in such activities and that the beneficiary will perform the claimed duties. As such, Professor [REDACTED]'s letter contains conclusory statements that are not entitled to probative value. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

For these reasons, we conclude that the professor's findings and his ultimate conclusions are of limited evidentiary value in this proceeding. We may, in our 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, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

IV. CONCLUSION

The evidence of record does not establish that the proffered position qualifies as a specialty occupation. Accordingly, the petition will be denied and the appeal dismissed.⁷

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.

ORDER: The appeal is dismissed.

⁷ As this issue precludes approval of the petition, we will not address any of the additional deficiencies we have identified on appeal.