

identifying data deleted to
prevent clearing unwarranted
invasion of personal privacy

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

PUBLIC COPY

D2

[Redacted]

Date: **JAN 06 2012** Office: CALIFORNIA SERVICE CENTER File: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on February 11, 2011. The petitioner indicated on the Form I-129 petition that it is a for-profit enterprise engaged in real estate management and retail with 2 employees and a gross annual income of approximately \$489,000.

Seeking to employ the beneficiary in what it designates as a contracts and business operations administrator position, the petitioner filed this H-1B petition in an endeavor to classify her 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 August 4, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submits a brief and additional evidence.

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 documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO concurs with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. Accordingly, the appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to offer the beneficiary an adequate wage for the proffered position under the applicable regulations, and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, for these reasons as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.¹

The primary issue before the AAO is whether the position qualifies as a specialty occupation.

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one requiring the following:

- (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 the following:

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that

construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (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. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary’s services, on a part-time basis, in what it designates as a contracts and business operations administrator.

With the Form I-129 petition, the petitioner provided a description of the job duties that the beneficiary would perform in the proffered position. The AAO extracted the following duties from the petitioner’s letter of support:

- Plan, coordinate, and direct overall operational and financial activities related to [REDACTED] and [REDACTED], all owned by the [REDACTED] including residential and commercial rental properties owned by the family;
- Oversee and direct facilities maintenance and operations as well as engage in contract administration, major property and equipment procurement, records management and ensure that contract, insurance requirements and government regulations and safety standards are followed and up to date;
- Conduct competitive analysis to formulate strategies to maximize returns on investments;

- Liaise with management on instituting policies and procedures to meet business requirements;
- Analyze budget to identify budget needs and/or reductions, and may allocate operating budget funds based on business needs.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on March 28, 2011. Specifically, the director requested additional evidence from the petitioner to demonstrate that the proffered position is a specialty occupation. The director requested the petitioner provide additional information, including a more detailed description of the proffered position with specific job duties, the percentage of time to be spent on each duty and the level of responsibility. In addition, the petitioner was asked to provide a clear explanation of the duties to be performed that are more discretionary, demanding, complex, highly advanced, specialized, or sophisticated that exceed industry or normal position standards. The petitioner was also requested to provide documentary evidence to establish that the position meets the statutory and regulatory requirements for H-1B classification to be granted.

The petitioner and counsel responded by providing additional information regarding the job duties of the proffered position. The AAO extracted the following duties from counsel's response to the RFE:

- Oversee the administrative, financial, and complex operational aspects of the combined family businesses and direct commercial property/business operations;
- Oversee and direct timely maintenance [of rental properties] and ensure that there is no lease related violations;
- Ensure that rental operations of these businesses are not hindered and administrative, financial or regulatory issues are addressed and resolved in a timely fashion;
- Continual communication/interaction with General Manager, relating to the commercial properties and contracts;
- Ensure execution of all maintenance programs while assuring the highest levels of customer satisfaction;
- Ensure continuous services to buildings;
- Manage issues with staff of the fish market and mini mart while providing seamless service;
- Develop and administer the budget for the properties and businesses, subject to the approval of the owners;
- Participate in the selection of contract services, vendor negotiation of service agreements;
- Work with staff of [REDACTED] and [REDACTED] to set and attain meaningful performance and development goals;
- Monitor the progress of staff goals to ensure that unsatisfactory performance, disruptions and discontent are kept to a minimum;

- Oversee two professional employees (Bookkeeper/Office Clerk and Purchaser) as well as an Administrative Assistant/Office Clerk;
- Contract administration, major property and equipment procurement;
- Approve and review expenditure made by Purchaser on behalf of rental properties and other businesses for improvements, repairs; maintenance, etc.;
- Provide analysis of current budget and resources to the owners;
- Manage special areas of concern such as funds allocated to address weather and flood related damages;
- Review contracts for services from outside vendors such as heating and air condition, plumbing, cleaning and freight services;
- Records management and compliance with contract, insurance requirements and government regulations and safety standards;
- Oversee vendors who perform safety/fire inspection of the commercial properties, monitor OSHA compliance and work safety.

In connection with the duties of the proffered position, the AAO will first make some preliminary findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

As a matter critically important in its determination of the merits of this appeal, the AAO finds that, as reflected in the tasks listed above, the petitioner describes the proposed duties in terms of generalized and generic functions that do not adequately convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary.

The proffered position is entitled "contracts and business operations administrator," suggesting that one of the primary functions of the position is related to contracts. (Although the director specifically requested the petitioner provide the percentage of time the beneficiary would spend on each job duty, the petitioner failed to submit this information.) The AAO notes the petitioner claims that the beneficiary will be involved in such duties as "contract administration, major property and equipment procurement" and will "review contracts for services from outside vendors such as heating and air condition, plumbing, cleaning and freight services." However, the petitioner does not sufficiently describe the daily duties involved in these tasks or document the type of contracts/agreements generated. The petitioner does not indicate whether these contracts include multiple terms or are one-page documents outlining a specific one-time service. The petitioner does not indicate whether the contracts are generated over the phone, via facsimile, or in person, are for each client, for multiple clients, or whether the contracts are long-term. The petitioner does not explain the necessity for someone to perform "contract administration" now, after the petitioner has been in business for a number of years (since 2005). The petitioner does not provide an adequate description of the specific duties and responsibilities to be performed by the beneficiary as a "contracts and business operations administrator" in relation to the petitioner's particular business interests.

According to the Form I-129, the petitioner has two employees and a gross annual income of approximately \$489,000. In the appeal, counsel claims that "[a]lthough the petitioner reported revenues of \$489,000, the offered position will be serving [redacted] businesses with revenues of over \$2.7M . . . the [redacted] has decided to hire an Administrative Services Manager through the petitioner to provide high-level management and oversight over their various businesses not just to the petitioner." Counsel claims that the beneficiary "will perform complex duties due to the nature, size and organizational complexity of the petitioner and its owners' various business operations." In support of this assertion, the petitioner provided a list of "employees of the [redacted]" There are 13 employees listed (9 full-time and 4 part-time).²

The abstract level of information provided by the petitioner and counsel regarding the proffered position and the duties comprising it is exemplified by the phrase "[o]versee the administrative, financial, and complex operational aspects of the combined family businesses and direct commercial property/business operations." For example, in the response to the RFE, counsel claims that the beneficiary will provide "oversight over [the petitioner's] various businesses." In the same response letter, counsel states that the beneficiary will "indirectly oversee the operations of five businesses." Thus, the beneficiary's level of oversight (direct versus indirect) is unclear. Moreover, as with other position and duty descriptions in this record of proceeding, it fails to communicate (1) the actual work that the beneficiary would perform, (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 of education in a body of highly specialized knowledge in a specific specialty.

Further, the AAO finds, that while providing a litany of generalized functions, the record of proceeding does not convey how such a broad spectrum of duties would actually translate into actual performance requirements with respect to any specific projects to which the beneficiary would be assigned, and how the performance of the duties in the course of such projects would correlate to a need for at least a bachelor's degree in a specific specialty. In short, the evidence submitted does not provide a sufficient basis to discern either the substantive nature, or the associated minimum-level educational requirement, of the services that the beneficiary would actually perform if this petition were approved. For instance, the AAO is unable to determine the daily tasks involved in "ensur[ing] execution of all maintenance programs while assuring the highest levels of customer satisfaction" and "ensur[ing] that rental operations of these businesses are not hindered and administrative, financial or regulatory issues are addressed and resolved in a timely fashion." Without a more meaningful description of the tasks involved in performing the duties, the AAO cannot conclude that the position, based on the descriptions provided, requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation in the United States, as required by the Act.

² It is noted that the employees job titles are the following: cashier (6 employees), administrative assistant/office clerk (1 employee), bookkeeper/officer clerk (1 employee), general manager (1 employee), floor manager (1 employee), assistant floor manager (1 employee), purchaser (1 employee), and warehouse man (1 employee).

The AAO will now address the petitioner's educational requirements for the proffered position. It must be noted that in its letter of support, the petitioner stated that the proffered position requires "at least a Bachelor's degree or its foreign equivalent in Business Administration, Human Resources, Accounting or Finance." The petitioner's claimed entry requirement of at least a bachelor's degree in "Business Administration, Human Resources, Accounting or Finance" for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).³

In this matter, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation.

The AAO will now specifically address the supplementary regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

³ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

The AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

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.

When determining whether the record of proceeding establishes that a particular position meets the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), the AAO will routinely review the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴

The petitioner asserts that the proffered position of contract and business operations administrator falls within the occupational category "Administrative Services Managers" as described in the *Handbook*.⁵ However, as will now be discussed, the occupational category "Administrative Services Managers" does not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The introduction to the "Training, Other Qualifications, and Advancement" section of the chapter on "Administrative Services Managers" in the *Handbook* states the following:

Education and experience requirements for these managers vary widely, depending on the size and complexity of the organization. In small organizations, experience may be the only requirement. In large organizations, however, administrative services managers may need a bachelor's degree and appropriate experience.

Education and training. Specific education and training requirements vary by job responsibility. Office managers in smaller operations or lower-level administrative

⁴ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁵ For this chapter, see Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition, Administrative Services Managers*, on the Internet at <http://www.bls.gov/oco/ocos002.htm> (visited December 30, 2011).

services managers with fewer responsibilities may only need a high school diploma combined with appropriate experience, but an associate degree is increasingly preferred.

In larger companies with multiple locations, equipment, and technologies to coordinate, higher-level administrative services managers need at least a bachelor's degree. Managers of highly complex services, such as contract, insurance, and regulatory compliance, generally need at least a bachelor's degree in business administration, human resources, accounting, or finance. Lower-level managers may also need a bachelor's degree, but related postsecondary technical training may also be substituted for managers of printing, security, communications, or information technology. Those involved in building management should take a drafting class. Regardless of major, courses in office technology, accounting, computer applications, human resources, and business law are highly recommended.

Most facility managers have an undergraduate or graduate degree in engineering, architecture, construction management, business administration, or facility management. Many also have backgrounds in real estate, construction, or interior design, in addition to managerial experience. Whatever the educational background, it must be accompanied by related work experience reflecting managerial and leadership abilities. Many administrative services managers obtained their experience by specializing in one area at first, then augmenting their qualifications by acquiring work experience in other specialties before assuming managerial duties.

Managers of property acquisition and disposal need experience in purchasing and sales, and knowledge of the variety of supplies, machinery, and equipment used by the organization. Managers concerned with supply, inventory, and distribution should be experienced in receiving, warehousing, packaging, shipping, transportation, and related operations. Contract administrators may have worked as contract specialists, cost analysts, or procurement specialists.

The *Handbook* states that office managers in smaller operations or lower-level administrative services managers with fewer responsibilities may only need a high school diploma combined with appropriate experience, although an associate degree is increasingly preferred. When discussing that a bachelor's degree may be an adequate educational credential for low-level managers, the *Handbook* does not state that such degree must be in a specific specialty. It appears that any field of study is acceptable for these positions. The *Handbook* indicates that for managers of highly complex services, generally a bachelor's degree in business administration, human resources, accounting, or finance is acceptable. According to the *Handbook*, most facility managers have an undergraduate or graduate degree in engineering, architecture, construction management, business administration, or facility management.

Despite counsel's assumption to the contrary, the *Handbook* does not indicate that at least a bachelor's degree, or the equivalent, in a specific specialty is normally required for the occupational classification in the United States. Rather, the *Handbook* indicates that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree. Moreover, as previously discussed, USCIS consistently interprets the term "degree" to mean not just any baccalaureate or higher degree, but one in a *specific specialty* that is directly related to the position. An occupation is not a specialty occupation if a bachelor's degree in any field of study, or in a general field of study, is acceptable. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558. Thus, the *Handbook* does not indicate that "Administrative Services Managers" normally require a baccalaureate or higher degree, or its equivalent, in a specific specialty for entry into the occupation.

Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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.

As previously mentioned, the petitioner stated on the Form I-129 that it is a for-profit enterprise engaged in real estate management and retail with 2 employees and a gross annual income of approximately \$489,000.

In determining whether there is 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. at 1102).

As already discussed, the petitioner has not established that its proffered position falls under an occupational classification for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Furthermore, the petitioner has not provided any documentation to indicate that the industry's professional association has made a degree a minimum entry requirement. Moreover, the petitioner did not submit any letters or affidavits to meet this criterion of the regulations.⁶ While the petitioner did submit several job

⁶ Counsel stated in his response to the RFE and in the appeal that [redacted] (no relation to the Petitioner), employs [redacted] as [redacted]; and he holds a bachelor's degree. She can be reached at [telephone number]." The petitioner and counsel failed to

postings, for the reasons discussed below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

In response to the RFE, counsel stated that the "the petitioner is not in a position to provide evidence of the minimum education requirements of similar businesses." Nevertheless, the petitioner provided four job announcements. However, upon review of the documents, the AAO finds that they do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions.

The AAO notes that for the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered).

The petitioner provided the following four job announcements:

- A job posting from an unnamed company for an Operations/General Manager. The category is listed as "Food/Beverage/Hotel." No further information regarding the employer is provided. The job posting is devoid of sufficient information regarding the organization to conduct a legitimate comparison of the business operations. However, based upon the information provided, the posting is for a dissimilar organization (food/beverage/hotel). Moreover, the posting indicates that a four-year degree in business administration or a related field is required. As previously noted, there must be a close correlation between the required specialized studies and the position. The requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation.
- An advertisement from [REDACTED] for an Administrative Manager. The company's website states that [REDACTED] is one of the largest and most respected commercial real estate services and investment companies in the world." Furthermore, the company employs "5,200 professionals in more than 100 company-owned and affiliate offices draw from a unique platform of real estate services, practice groups and investment products to deliver

submit any evidence or documentation to support counsel's statement. 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). 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. Counsel failed to provide any information regarding the general characteristics and nature of the organization, educational requirements for the position, duties of the position, etc. For the above reasons, counsel's statement has no probative value.

comprehensive, integrated solutions to real estate owners, tenants and investors." The advertisement is for an organization whose size and number of employees far exceeds the petitioner's. Further, the advertisement indicates that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*.

- A job posting from HDR for an Administrative/Human Resource Office Manager. The job industry is listed as "Consulting." The company website states that "HDR is a global employee-owned firm providing architecture, engineering, consulting, construction and related services through our various operating companies." The website indicates that the company has more than 7,800 professionals in more than 185 locations. Thus, the advertisement is for a dissimilar organization whose size and number of employees far exceeds the petitioner's. Furthermore, the job posting states that a "Bachelor's degree is preferred." The posting indicates the employer's *preference* for an individual with a degree; however, a degree is not a minimum requirement for the position. It appears that any field of study is acceptable for the position. As previously mentioned, to establish the position as a specialty occupation, a requirement for a baccalaureate or higher degree must be in a specific specialty that is directly related to the position.
- An advertisement from [REDACTED] for a Payroll and Accounting Manager. [REDACTED] is a human resources outsourcing company. Thus, the advertisement is for a dissimilar organization. The advertisement states that a bachelor's degree (four-year college or university) or the equivalent years of experience and payroll related training is required. The advertisement states that a "Bachelor's degree in Accounting, Human Resources, Finance is desired." Thus, the employer requires a candidate to possess a bachelor's degree, but not at least a bachelor's degree or the equivalent in a *specific specialty*.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

Additionally, the AAO finds that the job announcements support the *Handbook's* information on the educational requirements of "Administrative Services Manager." That is, the job announcements indicate that a bachelor's degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. None of the employers require a bachelor's degree or higher in a specific specialty, or the equivalent, for the advertised positions.

It must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from four advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *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 required a bachelor's or higher degree in a specific specialty or its equivalent (for organizations that are similar to the petitioner), it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

In short, the record of proceeding does not establish that a degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied 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 is satisfied if the petitioner shows that the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

In the RFE, the director requested the petitioner provide a description of the duties to be performed by the beneficiary "that are more discretionary, demanding, complex, highly advanced, specialized, or sophisticated – exceeding industry or normal position standards" along with supporting documentation to substantiate the petitioner's claims.

In response to the RFE, the petitioner provided an expanded description of the job duties along with the required skills and knowledge necessary to perform the duties. The petitioner claims that the position requires an individual with aptitude in various matters, including skills and knowledge in accounting, finance, business administration and/or human resources, as well as math aptitude. The petitioner states that the position requires an individual with analytical abilities and skills, as well as [the ability to] effectively coordinate several activities at once, manage deadlines and [exhibit] independent thinking and decision making skills. However, the record of proceeding does not establish that the petitioner's requisite knowledge and skills for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent, rather than from a wide range of unrelated degree programs, from job experience alone, from junior college or community college courses, from training provided by vocational programs or by vendors, or by some combination thereof. Moreover, as reflected in this decision's earlier comments about evidentiary deficiencies, the petitioner's failure to convey the substantive nature of the position and the specific matters upon which the beneficiary would focus also manifests itself as a failure to develop a degree of complexity or

uniqueness as an aspect of the proffered position that would require a person with a bachelor's degree, or the equivalent, in a specific specialty.

Furthermore, the AAO questions the level of complexity, uniqueness and/or specialization of the duties and responsibilities of the position based upon the Labor Condition Application (LCA) submitted with the Form I-129. More specifically, the petitioner claims that the proffered position requires a bachelor's degree and that the beneficiary will provide "high-level management and oversight over [the petitioner's] various businesses," "oversee the complex business operations" and "indirectly oversee the operations of five businesses." Furthermore, the petitioner reports that the beneficiary will directly supervise and manage two professional employees and an administrative assistant/office clerk. Additionally, the petitioner states that contractual workers will indirectly report to the beneficiary in the proffered position. The petitioner and counsel repeatedly claim that the duties of the proffered position are complex, unique and/or specialized. In this regard, however, the AAO notes that the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Administrative Services Manager" at a Level 1 (entry level) wage.

Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁷ Prevailing wage determinations start with an entry level wage (i.e. Level 1) and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁸ The DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

⁷ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁸ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

In the *Prevailing Wage Determination Policy Guidance* issued by the DOL, a Level 1 wage rate is defined as follows:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.⁹

The AAO must question the level of complexity of the duties and responsibilities of the proffered position, the level of independent judgment required and the amount of supervision received as the LCA is certified for a Level 1 entry-level position. By virtue of the related wage level specified therein, the LCA indicates the position is actually a low-level, entry position relative to others within the occupation. Based upon this wage rate, the beneficiary is a beginning level employee who has only a basic understanding of the occupation. She will be expected to perform routine tasks that require limited, if any, exercise of judgment. The beneficiary will work under close supervision, and she will receive specific instructions on required tasks and expected results. Her work will be closely monitored and reviewed for accuracy.

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

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

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, it appears that the petitioner has failed to submit an LCA that corresponds to this petition, that is, specifically,

⁹ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations.

Moreover, the AAO finds substantial reason to doubt the credibility of the petition in the fact that, on the one hand, the petitioner and counsel expressly claim that the beneficiary's will provide "high-level management and oversight over [the petitioner's] various businesses" and "oversee the complex business operations" as well as directly supervise and manage three employees and indirectly manage contractual workers. The petitioner and counsel also claim that the beneficiary will "indirectly oversee the operations of five businesses." On the other hand, the related LCA filed to support the petition is for a Level 1 (entry level) position. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO also finds that, aside from the LCA issue, and as reflected in this decision's earlier discussions of evidentiary deficiencies regarding the proffered position and the duties comprising it, the petitioner has failed to document such complexity or uniqueness in the position that it would necessitate a person with at least a bachelor's degree in a specific specialty. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Likewise, 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).

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

Next, the AAO will consider the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is satisfied if the petitioner establishes that it normally requires a degree or its equivalent in a specific specialty for the position.

The third criterion entails the petitioner demonstrating that it normally requires a bachelor's degree in a specific specialty (or its equivalent) for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.¹⁰

The AAO notes that the petitioner and counsel claim repeatedly that the duties of the proffered position can only be employed by a degreed individual. While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d 384. 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").

In the instant matter, counsel indicated that the petitioner had not previously hired a contracts and business operations administrator. The petitioner did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position. No evidence regarding any current or past recruitment efforts for this position, or any similar positions, was submitted.

In the response to the RFE, the petitioner and counsel claim that "a degree requirement is normal for the performance of the duties of this position in the context of this employer's business." In support of this assertion, the petitioner provided a "list of employees for the Cordero Family

¹⁰ To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Businesses." The list is compiled of 13 employees. Five of the employees possess bachelor's degrees. The documentation indicates that two cashiers have bachelor's degrees in nursing, a purchaser has a bachelor's degree in biology, a bookkeeper/office clerk has a bachelor's degree in education and a general manager has a bachelor's degree in liberal studies.

As previously mentioned, the term "degree" is consistently interpreted to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the position. The employees of the ██████████ Businesses" hold bachelor's degrees in a range of fields that appear to be completely unrelated to their jobs. Furthermore, there is no indication that the positions are similar or related to the proffered position. That is, there is a lack of evidence in the record of proceeding to suggest that the positions of cashier, purchaser, bookkeeper/office clerk and/or general manager are similar to the proffered position of contracts and business operations administrator. The petitioner did not provide the job duties and day-to-day responsibilities of the employees. The petitioner did not indicate the knowledge and skills required for the positions. The record contains no information regarding the complexity of the job duties, independent judgment required or the amount of supervision received. The petitioner also failed to include the educational and experience requirements for the positions. Thus, the petitioner has not established that it normally requires a bachelor's degree in a specific specialty or its equivalent for the proffered position. In fact, based upon the evidence provided, it appears that the petitioner (including the family businesses) *does not normally* require a bachelor's degree in a specific specialty or its equivalent for its positions.

The evidence does not establish a prior history of recruiting and hiring for the proffered position (or similar positions) only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

As already noted, the AAO here incorporates by reference its earlier discussions regarding the abstract, generalized, and generic terms by which the petitioner describes the proposed duties. Furthermore, as previously discussed, the petitioner indicated on the LCA that the position is a Level 1 (entry level) position. This classification signals that the proffered position is a low-level, entry position relative to others within the occupation. As reflected in those discussions, and as evident in the actual terms used in the record, the petitioner has failed to convey the proposed duties with sufficient specificity as to establish the level of relative specialization and complexity required to satisfy this criterion. Further, the AAO finds the record of proceeding does not supplement the duty descriptions with documentary evidence remedying this failure.

As the petitioner failed to establish that the nature of the specific duties is so specialized and complex that their performance would require knowledge usually associated with at least a bachelor's degree, or the equivalent, in specific specialty, the AAO concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the AAO will enter two additional grounds for denial of the petition. Specifically, the petitioner (1) failed to submit a Labor Condition Application (LCA) that corresponds to the petition, and (2) failed to offer the beneficiary an adequate wage for the proffered position under the applicable regulations. Thus, for these reasons as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.

It must be noted that the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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).

As previously noted, the regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit an LCA that corresponds to this petition, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations.

In this case, the petitioner provided an LCA in support of the petition that indicates the occupational classification for the position is "Administrative Services Managers" at a Level 1 (entry level) wage of \$19.81 per hour. The place of employment is listed as [REDACTED]. The prevailing wage source is listed on the LCA as the OFLC Online Data Center.¹¹ The LCA was certified on January 26, 2011 and signed by the petitioner on February 2, 2011. On the Form I-129 petition (pages 5 and 17) and on the letter of support, the petitioner stated that salary for the proffered position would be \$19.74 per hour.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual

¹¹ The Foreign Labor Certification Data Center is the location of the Online Wage Library for prevailing wage determinations, and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatcenter.com/>.

wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n) of the Act, 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.

Thus, the petitioner's offered wage to the beneficiary of \$19.74 per hour is below the prevailing wage level for the occupational classification in the area of intended employment. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. For this reason, and the reasons previously discussed with regard to the LCA submitted to support this petition, the petitioner has failed to file with the Form I-129 petition an LCA that corresponds to it. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved.

The appeal will be dismissed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision.

As an administrative note, the AAO observes that the petitioner was asked to provide the dates of all of the time the beneficiary has spent in the United States in H classification on the Form I-129. The following information was provided:

From: **To:**
04/05/2007 Present

A review of the record indicates that the petitioner provided incorrect information to USCIS regarding the period of time that the beneficiary has been in H-1B status in the United States. Records indicate that the beneficiary was granted a change of status to H-1B status on January 4, 2001. It appears that the beneficiary left the United States in May 2001, obtained an H-1B visa and reentered the United States shortly thereafter. The beneficiary also departed the United States in May 2003, obtained another H-1B visa and reentered the United States in July 2003.

With the H-1B filing, the petitioner provided a Department of Labor cover letter indicating that a Form ETA 9089 was accepted for processing on September 4, 2007 and certified on October 17, 2007. Additionally, the petitioner submitted a USCIS notice that indicates that a Form I-140 (Petition for Alien Worker) was filed on January 28, 2008 and approved on May 17, 2009.

Under certain circumstances, an alien's H-1B nonimmigrant status may be extended if 365 days or more have passed since the filing of a labor certification application or an immigrant petition. *See* §§ 106(a) and (b) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313). In the instant case, it appears that the beneficiary has been in H-1B status since January 4, 2001 and that she reached the maximum period of authorized stay in approximately May 2007 (including recapturing periods of stay when she was outside the United States). Records indicate that her H-1B status was extended in one-year increments

based upon Form I-129 petitions that were filed in April 2007 and April 2008. However, there is no evidence in the record of proceeding to indicate that the beneficiary was eligible for these extensions (based upon a labor certification application or an immigrant petition that had been pending for 365 days or more). Thus, it does not appear that the beneficiary was eligible to extend her H-1B status under §§ 106(a) and (b) of AC21. We recommend that the director review the previously approved H-1B petitions and consider whether initiation of revocation action on the affected petitions is appropriate.

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.