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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

[redacted]

Dr

Date: MAY 3 1 2012 Office: CALIFORNIA SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelley
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). 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 August 21, 2009. The petitioner stated that it is a for-profit enterprise, established in 2005, that is engaged in chip design and verification IP products with three employees.

Seeking to employ the beneficiary in what it designates as a computer specialist/programmer analyst position, the petitioner filed this H-1B petition in an endeavor to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, having determined that the petitioner failed to establish that it is a United States employer under the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO agrees with the director's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition. For this additional reason, the petition may not be approved, it is considered as an independent and alternative basis for denial.[1]

In this matter, the petitioner stated on the Form I-129 that it seeks the beneficiary's services as a computer specialist/programmer analyst on a full-time basis at [redacted]. In its letter of support, the petitioner stated that the beneficiary would perform the following duties in the proffered position:

> Beneficiary will be responsible for functional verification of the application specific Integrated Circuits (ASICS). Beneficiary will also be involved in

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

SystemVerilog based Verification IP and design IP, development, verification, testing and debugging for SuperSpeed USB 3.0., PCI express gen 3, AXI, SAS, AHB and SMBus for controller verification related to these protocols. In addition, Beneficiary will be responsible for the design, development, verification, testing, debugging, RTL coding, synthesis and implementation of FPGA. Beneficiary will utilize such tools/languages as Verilog HDL, C, system Verilog, "e", VERA and other scripting languages to create verification environment, functional models and to verify designs, etc.

* * *

The minimum level of education required by our company and by current industry standards, to perform the above tasks with any degree of efficiency and cost-effectiveness, is a Bachelor's degree and relevant experience.

The AAO notes that the petitioner's requirement of a bachelor's degree, without further specification, is inadequate to establish that the proffered position qualifies as a specialty occupation.[2]

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 26, 2009. The director stated that basic information about the proposed employment and employer was missing, incomplete, or conflicted with other information provided in the record. The petitioner was asked to provide probative evidence to substantiate its claimed annual income, current number of employees, and business activities. The director outlined the specific evidence to be submitted.

The petitioner responded by stating that it had acquired rights to a Verification IP ('VIP') family of products and that "[t]here is already some interest in Petitioner's products and Petitioner therefore expects to be able to monetize that interest substantially in the very near future." The further stated the following:

> Petitioner was incorporated in 2005 but it was basically a shell corporation with no business activity. Therefore, there are no quarterly wage reports and no

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[2] The 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 any bachelor's degree without further specification, does not establish the position as a specialty occupation. *Cf. 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. 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. USCIS has consistently stated that, although a general-purpose bachelor's degree 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).

> federal tax returns were filed as yet. However, since there is now interest in the markets for Petitioner's above products, we have now revived the Petitioner company since about August 2009. We will also be filing all tax returns as applicable.

The petitioner described five of its "proprietary VIP product[s]" and indicated that it had "developed" and "created" various aspects of the products. The petitioner submitted several documents in response to the director's RFE, including the following evidence:

- A "Sublease Agreement" dated May 2009 and a "Landlord Consent to Sublease" dated June 2009.

- Photographs that the petitioner claimed were of its premises. The AAO notes that one of the photos is a close-up of the petitioner's name and suite number. However, the location cannot be discerned from the photo. The additional photos are of an office but there is no identifying information to indicate that the office is the petitioner's premises.

- Datasheets regarding the VIP family of products.[3]

As noted, the petitioner submitted datasheets regarding the VIP family of products but did not provide any documentation to substantiate that it acquired, developed and/or created the family of products and that there existed outside "interest" in its products.

The director reviewed the petitioner's response and found that the petitioner had failed to establish that it was actually operating in the United States. The director noted that the petitioner failed to provide requested documentation and that there were discrepancies in the record that called into question the petitioner's ability to document the requirements under the statute and regulations. The director denied the petition on January 8, 2010. Thereafter, the petitioner submitted an appeal of the denial of the H-1B petition.

After reviewing the record, the AAO concurs with the director's decision. For the reasons discussed below, the AAO finds that the petitioner has not provided sufficient evidence to eligibility for the benefit sought under the applicable statutory and regulatory provisions.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

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[3] The AAO, of course, considered these datasheets in its review of the totality of the evidence, but the AAO did not discern in the datasheets any information of significant importance towards establishing the proffered position as a specialty occupation by virtue of relative uniqueness, complexity, and/or specialization. In fact, the AAO notes most of the summaries, charts and diagrams provided in the datasheets is virtually identical to summaries, charts and diagrams found on other companies' websites and is attributed to these other companies.

> subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
>
> (3) Has an Internal Revenue Service Tax identification number.

See also 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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

On the Form I-129, the petitioner stated that it had three employees and a projected annual income of $1 million. The director requested the petitioner submit evidence that it was a viable business as claimed in order to establish that a valid job offer existed for the beneficiary. The

petitioner was asked to provide probative evidence to "substantiate the information concerning annual income, current number of employees, and type of business on the Form I-129." With the RFE, the director notified the petitioner that additional documentation was required to establish that the present petition meets the criteria for H-1B classification.

The regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require evidence to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12).

The AAO observes that the director's RFE was a reasonable request bearing directly on the issue of the validity of the petition. That is, in the context of the record of proceeding as it existed at the time the RFE was issued, the request for additional evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it was material in that it addressed the petitioner's failure to submit documentary evidence substantiating its claims regarding H-1B eligibility.

The petitioner responded by stating that it had been basically a shell corporation since 2005 with no business activity but that it had "revived the Petitioner company since about August 2009." Although on the Form I-129, the petitioner claimed it had $1 million in projected gross annual revenues, the petitioner failed to provide any documentation regarding its gross annual revenues (projected or real) to support its assertion or substantiate how it came to this calculation. Nor did the petitioner submit probative evidence to establish that it had employed personnel to work for the company. Moreover, the petitioner failed to provide sufficient probative documentation to substantiate its claims regarding its business activities. The crux of the failure to establish eligibility for this benefit is that the petitioner has failed to provide substantive, documentary evidence that it is a viable entity (e.g., an enterprise engaged in regular, systematic and continuous operations which produces services or goods) in order to substantiate its claim that that it is a United States employer that has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

The regulation at 8 C.F.R. § 214.2(h)(11)(ii) addresses the grounds for automatic revocation of the approval of a petition and state, in pertinent part, that the "approval of any petition is immediately and automatically revoked if the petitioner goes out of business." It logically flows that a petitioner must be in business for the director to grant the petition. If the petitioner were not in business and the director granted the petition, it would result in the absurd result of the approved petition immediately and automatically being revoked. *See* 8 C.F.R. § 214.2(h)(11)(ii). As such, it was reasonable for the director to request evidence from the petitioner to establish that it was a bona fide business prior to the director adjudicating the H-1B petition.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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). As previously discussed, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

With the RFE, the director put the petitioner on notice that additional evidence was required and the petitioner was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO notes that the petitioner now attempts to submit some of the requested information on appeal.

With regard to the information and evidence that was encompassed in the RFE but only submitted on appeal, the AAO notes that it is outside the scope of this appeal.[4] Evidence requested in an RFE but not included in the petitioner's RFE response will not be considered if later submitted. *See* 8 C.F.R. §§ 103.2(b)(8)(iv) and (b)(11). *See* also *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In this regard, the appeal will be adjudicated based on the record of proceeding before the director. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the

[4] The petitioner submitted the H-1B petition on August 21, 2009. On the Form I-129, the petitioner stated that it was established in 2005, had three employees and projected gross annual revenues of $1 million. With the RFE, the petitioner was asked to provide probative evidence to "substantiate the information concerning annual income, current number of employees, and type of business on the Form I-129." The petitioner failed to submit the requested evidence in response to the RFE.

In the appeal, the petitioner states that "in order to now revive itself properly, it has filed the enclosed tax returns." The petitioner submitted its 2006, 2007 and 2008 tax returns, all of which are dated 02/04/2010. A review of the tax returns shows that the petitioner owed funds to the U.S. government for each of the tax years. Although the petitioner was apparently required to file tax returns for each of the years, no explanation was provided for the delay in submitting the tax returns to the Internal Revenue Service and to USCIS. The AAO observes that the petitioner did not submit its 2009 federal tax return. With the appeal, the petitioner also submitted Form DE-6, Quarterly Wage and Withholding Report, for the fourth quarter (October, November and December) of 2009. The document is not signed and does not indicate that the petitioner employed three people during the fourth quarter of 2009. The petitioner did not provide any additional DE-6 reports (such as the DE-6 report for the third quarter of 2009, which would provide information regarding the number of people employed when the petition was submitted to USCIS) or other probative evidence to substantiate the information that it provided on the Form I-129 petition.

information and documents with the initial petition or in response to the director's request for evidence. *Id.* Accordingly, if the petitioner wishes to submit additional evidence, not supplied with the petition or in response to the RFE, it may file a new petition, with fee, for consideration by USCIS. Under the circumstances, the AAO need not and does not consider the sufficiency of the requested evidence submitted by the petitioner on appeal.

Although requested in the RFE, the petitioner failed to submit evidence that precluded a material line of inquiry. *See* 8 C.F.R. § 103.2(b)(14). The petitioner failed to provide evidence with the petition or in response to the RFE to substantiate the basis for its projected gross annual revenues, confirm that it had any employees, verify its business activities and establish that it was in business. The record contains insufficient evidence to establish that a credible offer of employment existed between the petitioner and the beneficiary. The petitioner failed to establish itself as an "employer" under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(ii)(1) and (2). As discussed, the petitioner failed to establish eligibility for the benefit sought and, accordingly, the AAO finds that the director correctly denied the petition.

Beyond the decision of the director, the AAO will now address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. That is, even if the petitioner had overcome the director's grounds for denying the petition, the petition could still not be approved due to the petitioner's failure to submit an LCA that is certified for the proper wage classification.

The petitioner submitted an LCA in support of the instant petition that designated the proffered position under the SOC (ONET/OES) occupational title of "Computer Specialists, All Other " - SOC (ONET/OES) code 15-1099.99. The petitioner stated in the LCA that the wage level for the proffered position was Level 1 (entry). The prevailing wage source is listed in the LCA as the OES [Occupational Employment Statistics] OFLC Online Data Center.[5] The LCA was certified on August 3, 2009 and signed by the petitioner on August 17, 2009.

Based upon a review of the record of proceeding, the AAO finds the wage level for the proffered position questionable. 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.[6]

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[5] The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at http://www.bls.gov/oes/. The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes 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.flcdatacenter.com/.

[6] 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.

Prevailing wage determinations start with a Level 1 (entry) 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.[7] 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.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."[8] A Level 1 wage rate is describes 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 1 wage should be considered.

The petitioner claims that that the duties of the position are "highly complex and require a significant degree of sophistication in designing, maintaining and implementing them." The AAO notes that this characterization of the position and the claimed duties and responsibilities conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. The wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment, that he would be closely supervised, that his work would be closely monitored and reviewed for accuracy, and that he would receive

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[7] 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.

[8] 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.

specific instructions on required tasks and expected results. This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the assertions by the petitioner regarding the demands and level of responsibilities of the proffered position.

The AAO finds that the claimed level of complexity, independent judgment and understanding is materially inconsistent with the LCA certification for a Level 1 entry-level position. Given that the LCA submitted in support of the petition is for a Level 1 wage, for this reason as well it must therefore be concluded that the LCA does not correspond to the petition.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

> Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H–1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the proffered position, 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. For this reason also, the petition may not be approved.

The petitioner's statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level 1 entry-level position. The AAO finds that, fully considered in the

context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582.

Thus, even if it were determined that the petitioner overcame the director's grounds for denying the petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA that is certified for the proper wage classification.

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

It must be noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, aff'd. 345 F.3d 683.

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. Accordingly, the appeal will be dismissed, and the petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.