U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 18 2013 OFFICE: CALIFORNIA SERVICE CENTER [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:

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

Thank you,

for Michael T. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a ten-employee medical business[1] established in 2009. In order to employ the beneficiary in what it designates as a research associate 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, concluding that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

At the outset of this decision, and beyond the decision of the director, the AAO finds that the petitioner provided as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the LCA was certified for a wage level below that which is compatible with the level of responsibility the petitioner claimed for the proffered position through its descriptions of its constituent duties.[2] This aspect of the petition undermines the credibility of the petition as a whole and any claim as to the proffered position or the duties comprising it as being particularly complex, unique, and/or specialized.

The AAO will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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[1] The petitioner provided a North American Industry Classification System (NAICS) Code of 621111, "Offices of Physicians (Except Mental Health Specialists)." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "621111 Offices of Physicians (Except Mental Health Specialists)," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed Jun. 11, 2013).

[2] The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this aspect of the petition.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of*

W-F-, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

In its February 20, 2012 letter of support, the petitioner claimed that the duties of the proffered position would include organizing and establishing research protocols; establishing rules and recommendations for the proper management of chronic pain; analyzing data and presenting his finding to referring physicians; planning and directing studies of medical diagnostics; and investigating the causes, progress, and lifecycles of diseases.

In her April 2, 2012 RFE, the director requested, *inter alia*, a more detailed description of the work to be performed by the beneficiary.

In its June 22, 2012 letter submitted in response to the director's RFE, the petitioner repeated the duties set forth in its previous letter, and added the following duties: summarizing, synthesizing, and

interpreting data; establishing research protocols to study long-term effects of long-term use of pain medications; researching and explaining the latest medical developments to staff members; reviewing patient files; attending seminars and in-service training programs; and reviewing literature.

In her July 27, 2012 decision denying the petition, the director found that the petitioner had failed to establish that the beneficiary would be performing duties similar to those of a medical scientist, as claimed in the LCA, and that the record did not make clear the capacity in which the petitioner would employ the beneficiary. The director found that, consequently, the petitioner failed to establish that its proffer of employment is reasonable, credible, and authentic, and that it would utilize the beneficiary in the capacity of a specialty occupation.

On appeal, counsel contends that the duties outlined by the petitioner in its letters align with those normally performed by medical scientists, as those duties are described in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*). In this regard, the AAO observes that establishing a proffered position as a specialty occupation requires more than a presentation of lists of general duties that conform to general duties that the *Handbook* reports as characteristic of a particular occupational group. Rather, even if the claimed occupational group is one for which the *Handbook* reports a bachelor's degree or higher as the normal minimum entry requirement, the petitioner must also present credible evidence sufficient to establish that the beneficiary would actually be performing the substantive duties that generate that claimed occupational group's educational entry-requirements. As will be evident in this decision, the AAO finds that this record of proceeding lacks such evidence.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has described the duties of the proffered position in exclusively generalized and generic terms that fail to convey substantially specific and substantive details of the actual work that the beneficiary would perform within the petitioner's organization. While the AAO does not dispute that many of the proposed duties are generally described in terms that are similar to those of medical scientists as such duties are described in the *Handbook*, the petitioner has failed to describe the duties that the beneficiary would perform in the context of its own, specific business operations and practices. Absent such information, it is impossible for the AAO to ascertain what the beneficiary would actually be doing if the petition were approved.

Nor is the information from the "Research" portion of the petitioner's website particularly helpful in ascertaining what the beneficiary would actually be doing if this petition were approved. Although the petitioner submitted a printout from this portion of the petitioner's website in response to the director's April 2, 2012 RFE, by the time the AAO attempted to view the website on June 11, 2013 it had been disabled.[3] That being said, the single "research" article contained on the petitioner's

[3] *See* http://www.midwestmedicalpointofcare.com (accessed Jun. 11, 2013). When the AAO visited the petitioner's website, the following message was displayed:

> This website has been disabled. This means the account was canceled or the trial period expired. . . .

website on the date the petitioner printed this submission does not appear to contain any original medical research by the petitioner or any members of its staff. To the contrary, this article appears to be a general summary of widely-available information developed by others, and it does not aid the petitioner in establishing the beneficiary's actual duties if this petition were approved.

Furthermore, the petitioner's website as it existed on the date the petitioner printed the excepts submitted in response to the RFE, as well as the brochure submitted by the petitioner, do not, as a whole, indicate that medical research had developed into an established aspect of the petitioner's business operations when the petition was filed, such that, at the time of the petition's filing, the petitioner had secured definite, non-speculative research for the beneficiary to perform. 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.[4]

Also, the petitioner fails to resolve the issues raised by the director in her decision denying the petition that directly impact upon the matter of the actual duties to be performed by the beneficiary. For example, in her July 27, 2012 decision, the director indicated that the petitioner had failed to demonstrate the existence of facilities and personnel such as a health department and laboratory assistants. However, counsel does not address this issue on appeal. The director also noted that the record lacked evidence of contracts with the contractors referenced by the petitioner. Again,

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[4] The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (Jun. 4, 1998).

While the petitioner's website as it existed on the date it printed the excerpt submitted into the record listed three ongoing "Resaerch [sic] Projects," the record lacks meaningful information regarding these projects that would enable the AAO to ascertain what role the beneficiary would play in the projects' performance. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

counsel does not address this issue on appeal. Absent evidence of adequate facilities and support staff to perform the types of research studies listed by the petitioner, the petitioner has not demonstrated that it is capable of employing the beneficiary in such a capacity. For this additional reason, the petitioner has failed to establish the actual duties that the beneficiary would perform if this petition were approved, and the petitioner's failure to substantiate those duties, as requested, materially undermines the credibility of the petition.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, and to establish that the petitioner had, at the time of the petition's filing, yet alone even by the time of the appeal, secured actual medical research projects for the beneficiary, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

Also, aside from the earlier-discussed non-probative generalized level of the information provided about the proffered position and its duties, the petitioner's claims regarding "the complexity of the job duties and the responsibilities of the petition" conflict with the wage-level designated in the LCA that the petitioner submitted with the petition. As noted above, the LCA submitted by the petitioner in support of the instant position specifies the occupational classification for the position as "Medical Scientists, Except Epidemiologists," SOC (O*NET/OES) Code 19-1042, at a Level I (entry level) wage. The *Prevailing Wage Determination Policy Guidance*[5] issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

> **Level I** (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 [emphasis in original].

[5] Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed Jun. 11, 2013).

The claims of record regarding the proposed duties' level of complexity and the occupational understanding required to perform them are materially inconsistent with the petitioner's submission of an LCA certified for a Level I, entry-level position. The LCA's wage level (Level I, the lowest of the four that can be designated) is only appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels quoted above, this wage rate is appropriate for positions in which that the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and his work closely monitored and reviewed for accuracy; and will receive 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 petitioner's assertions regarding the proffered position's educational demands and level of responsibilities. 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 U.S. Department of Labor (DOL) has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

> *Certification* means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as 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 the 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 (emphasis added):

> 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.

As previously noted, the conflict between the LCA and the petition adversely affects the merits of the petition, because it materially undermines the credibility of the petition's statements with regard to the nature and level of work that the beneficiary would perform.

Finally, the AAO wishes to once again highlight a discrepancy raised by the director in her July 27, 2012 decision denying the petition which the petitioner has not clarified on appeal, and which undermines the credibility of this petition. On the Form I-129, which the petitioner signed on February 21, 2012, the petitioner claimed to have ten employees. However, the evidence of record directly contradicts this assertion. Specifically, the petitioner reported on its Michigan Wage Detail Report that, during the quarter ending March 31, 2012 it paid wages to five employees. One of these named employees was the beneficiary, who would not have begun his employment with the petitioner as of the date the petitioner filed the Form I-129. As such, the petitioner would have had, at most, four employees on the date its president signed the Form I-129, under penalty of perjury, and claimed to have ten employees. The petitioner has not explained this apparent 150% inflation of its number of employees. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).

Again, 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. at 591-92.

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

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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