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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 2 1 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a financing, insurance, and mortgage services company[1] established in 1919. In order to employ the beneficiary in what it designates as a "Risk Manager, Model Validation" position,[2] the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on two grounds. First, the director found that approval of an H-1B petition for the beneficiary is prohibited because the beneficiary: (1) has spent more than six years in L[3] and/or H status and; and (2) has not been physically present outside the United States, beyond brief trips for business or pleasure, for the immediate prior year. The director further determined that the beneficiary is ineligible for an extension of stay under sections 104 or 106 of the American Competitiveness in the Twenty-First Century Act[4] (AC-21) as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act[5] (DOJ-21). Second, the director found that the petitioner's filing of the petition more than six months prior to the requested employment start date of October 12, 2012 precludes approval of the petition.

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 overcome the director's findings with regard to AC-21 as amended by DOJ-21. As such, that portion of the director's decision will be withdrawn. However, the petitioner has not overcome the director's finding

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[1] The petitioner provided a North American Industry Classification System (NAICS) Code of 5223, "Activities Related to Credit Intermediation." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "5223 Activities Related to Credit Intermediation," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed May 14, 2013).

[2] The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 15-2011, the associated Occupational Classification of "Actuaries," and a Level III (experienced) prevailing wage rate.

[3] In the case of an alien in L-1A status, such as the beneficiary, the total amount of allowable time in L status is seven years. *See* 8 C.F.R. § 214.2(l)(12)(i).

[4] American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (2000).

[5] Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

that its filing of the petition more than six months prior to the requested employment start date of October 12, 2012 precludes approval of the petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds two additional aspects which, although not addressed in the director's decision, nevertheless preclude approval of the petition, namely: (1) the petitioner's failure to demonstrate that the proffered position qualifies for classification as a specialty occupation; and (2) the petitioner's failure to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.[6] For these additional two reasons, the petition must also be denied.

In its adjudication of this appeal the AAO will first address the director's two ground for denying this petition. The AAO will then address its own findings, made beyond the decision of the director, that the record of proceeding fails to establish that the proffered position qualifies for classification as a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation.

I. Change of Nonimmigrant Status From L-1A to H-1B

The first issue before the AAO on appeal is whether the beneficiary, having exhausted his maximum seven years of L status, is eligible to change his current L-1A status to H-1B status pursuant to either section 104 or 106 of AC-21, as amended by DOJ-21.

United States Citizenship and Immigration Services (USCIS) records indicate five petitions approved on behalf of the beneficiary under section 101(a)(15)(L) of the Act:

	Petition	*Status*	*Dates of Validity*
1		L-1B	September 1, 2005 – September 1, 2008[7]
2		L-1B	June 18, 2008 – June 18, 2010
3		L-1A	February 1, 2010 – January 31, 2012
4		L-1A	February 1, 2012 – October 11, 2012
5		L-1A	October 12, 2012 – November 1, 2012

USCIS records also indicate further that an immigrant petition for preference status under paragraph 203(b)(3) of the Act by the petitioner on behalf of the beneficiary was approved on June 3, 2011.[8]

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[6] 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 these two additional grounds for denial.

[7] The evidence of record indicates the beneficiary entered the United States for the first time pursuant to this visa petition approval on August 28, 2005.

[8] *See* filed January 5, 2011 and approved June 3, 2011. The beneficiary's priority date is August 11, 2008.

On appeal, counsel argues that the language of the Act, the regulations, and two policy memoranda,[9] as well as legislative history, make "clear that the provisions allowing for extensions of status notwithstanding the normal maximum period of admission were intended by Congress to be interpreted broadly."

The regulation at 8 C.F.R. § 214.2(l)(12)(i) states, in pertinent part, the following:

> An alien who has spent . . . seven years in the United States in a managerial or executive capacity under section 101(a)(15) (L) and/or (H) of the Act may not be readmitted to the United States under section 101(a)(15) (L) or (H) of the Act unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year . . . . In view of this restriction, a new individual petition may not be approved for an alien who has spent the maximum time period in the United States under section 101(a)(15) (L) and/or (H) of the Act[.]

The AAO finds first that section 104(c) of AC-21 as amended by DOJ-21 affords the beneficiary no relief, as argued by counsel.

As amended by DOJ-21, section 104(c) of AC-21 states, in pertinent part, the following:

> Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—
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> (1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and
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> (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs, may apply for, and the Attorney General may grant, an extension of

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[9] Counsel cites, and provides copies of, two policy memoranda issued by USCIS: (1) Memorandum from Michael Aytes, Associate Director, Domestic Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, *Guidance on Determining Periods of Admissions for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional Periods of Admission beyond the H-1B Six Year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year*, HQPRD 70/6.2.8, HQPRD 70/6.2.12, AD 06-29 (December 5, 2006); and (2) Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277*, HQ 70/6.2, AD 08-06 (May 30, 2008).

such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

By its very terms, section 104 of AC-21 applies in cases where a petitioner seeks to extend a beneficiary's current nonimmigrant status. In such a situation, 8 C.F.R. § 214.2(h)(14) mandates further that this "request for a petition extension may be filed only if the validity of the original petition has not expired." In the instant case, the petitioner stated clearly on the Form I-129 that it was filing this request as a petition for new employment and *not* as a continuation of previously approved employment without change with the same employer, i.e., a petition extension. Consequently, the beneficiary does not qualify for an extension of such status beyond the maximum period permitted under section 104(c) of AC-21.

Having made that determination, the AAO turns next to section 106 of AC-21 as amended by DOJ-21. As discussed below, the AAO finds that this section of law does provide relief to the beneficiary.

As amended by section 11030(A)(a) of DOJ-21, section 106(a) of AC-21 states the following:

> (a) EXEMPTION FROM LIMITATION. – The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:
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> (1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).
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> (2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

As amended by section 11030(A)(b) of DOJ-21, section 106(b) of AC-21 states the following:

> (b) EXTENSION OF H-1B WORKER STATUS—The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—
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> (1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

As a preliminary matter, it is noted that the petitioner filed an immigrant petition for preference status under paragraph 203(b)(3) of the Act on behalf of the beneficiary on January 5, 2011. As the instant petition was filed on April 9, 2012, by the time this petition was filed more than 365 days had elapsed from the filing of that immigrant petition. This portion of section 106(a), therefore, is satisfied.

The primary question to be addressed, then, is whether sections 106(a) and/or (b) of AC-21 as amended by DOJ-21 require the beneficiary to be in H-1B status in order to qualify for an extension of stay.

Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

We are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *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).

In examining the statute itself, section 106(b) of AC21 will first be reviewed to determine whether it restricts the eligibility of an alien in L-1A status for an exemption under section 106(a) of AC-21 as amended by DOJ-21. In general, according to the text of section 106(b) of AC-21 as amended by DOJ-21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC-21. On the other hand, the title of section 106(b) of AC21 reads "Extension of H-1B Worker Status." In this situation, where the title uses the word "[s]tatus" and the text uses the word "stay," the text of the statute prevails. The title of a statutory section is not controlling, and where it is contrary to the text of the statute, the text is controlling. *Immig. and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 308-309 (2001).

In addition, even if the title and text of a statute were given even weight, in evaluating the overall purpose of sections 106(a) and (b) of AC-21 as amended by DOJ-21, section 106(a) states that the limitation contained in section 214(g)(4) of the Act shall not apply to an alien previously granted an

H-1B visa or H-1B status where 365 days or more have passed since the filing of either a labor certification application or an employment-based immigrant petition. In referring to this section of the Act, section 106(a) specifically states that "the [six-year] limitation . . . with respect to the duration of authorized stay shall not apply" to the alien. Thus, based on the use of the phrase "duration of authorized stay" in section 106(a) in interpreting "authorized admission" in section 214(g)(4) of the Act, it would appear on its face that Congress intended the phrase "extend the stay" in section 106(b) to mean "extension of stay" and not "petition extension" or extension of status. In other words, as section 214(g)(4) of the Act only limits the admission period or *stay* of the alien in H-1B status, not directly the classification period itself, sections 106(a) and (b) must thereby lift the restriction on the alien's stay in H-1B status for these sections of AC21 to have any effect. *See also* 56 Fed. Reg. 31553, 31557 (Jul. 11, 1991) (interpreting Public Law 101-649 as limiting the "period of stay" for H-1B aliens to six years).

Moreover, the H-1B regulations as they existed prior to AC-21 clearly distinguished an H-1B "petition extension" from an "extension of stay" request. 8 C.F.R. § 214.2(h)(15)(i) (2000).[10] The regulations also equated the word "status" to the word "classification" and not to the period of authorized stay in the United States. *See* 8 C.F.R. § 248.3(b) (2000); *see also* 8 C.F.R. §§ 214.1(c)(2), 245.2(a)(4)(ii)(C), and 103.6(c)(2) (2000). If Congress wanted to change these regulations and have the word stay mean status or to create some other medium, it could have done so through AC-21 or later in 2002 when it amended section 106 of AC-21 via DOJ-21. As Congress chose not to redefine the term "stay" in passing AC-21 or in revisiting this law and as the pertinent congressional record related to AC-21 fails to provide any guidance as to its meaning in H-1B extension cases, it thereby follows that use of the word stay by the prior and current regulations comports with Congressional intent. It is presumed that Congress is aware of USCIS regulations at the time it passes a law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

Based on this reasoning, the AAO concludes that section 106(b) of AC-21 as amended by DOJ-21 deals strictly with an alien's extension of stay in the United States in H-1B status, not with an extension of the H-1B petition. In other words, based on the plain language of the text of section 106(b) of AC-21 as amended by DOJ-21, there is no requirement that the alien be in H-1B status to qualify for an extension of stay under this provision. Consequently, provided that: (1) the beneficiary qualified for an exemption under section 106(a) of AC-21 amended by DOJ-21; (2) was physically present in the United States in a nonimmigrant status at the time of filing;[11] and (3) a

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[10] An "extension of stay" must be distinguished from an extension of H-1B status, which occurs through a "petition extension." Although those seeking H-1B status are currently permitted to file one form to request a petition extension, extension of stay, and change of status, they are still separate determinations. *See* 56 Fed. Reg. 61201, 61204 (Dec. 2, 1991). In addition, 8 C.F.R. § 214.2(h)(15)(i) specifically states that, "[e]ven though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each." Thus, 8 C.F.R. § 214.1(c) relates solely to extension of stay requests, 8 C.F.R. § 214.2(h)(14) deals only with H-1B petition extensions, and 8 C.F.R. § 248.3(a) addresses change of status requests to H-1B classification.

[11] While 8 C.F.R. § 214.2(h)(14) states that a "petition extension" must be filed prior to the expiration of "the original [H-1B] petition," 8 C.F.R. § 214.2(h)(15)(i) only requires that the beneficiary "be physically present

labor certification, immigrant petition, immigrant visa application, or adjustment of status application filed on his or her behalf was still pending, an alien would then be eligible for a one-year extension of stay under section 106(b) of AC-21 as amended by DOJ-21.

This conclusion regarding section 106(b) of AC-21 as amended by DOJ-21 does not in itself, however, mean an alien not in H-1B status at the time of filing is eligible for an exemption under section 106(a) of AC-21 as amended by DOJ-21. To determine this, section 106(a) must also be examined. Under the plain language of section 106(a) of AC-21, as amended, it is clear that the six-year limit imposed by section 214(g)(4) of the Act "shall not apply to *any* nonimmigrant alien previously issued a[n H-1B] visa or otherwise provided [H-1B] nonimmigrant status" as long as the required 365 days have passed since a labor certification or immigrant petition had been filed. Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added). Congress specifically states that "any nonimmigrant alien" would be eligible for the exemption, provided the other requirements were met. If Congress had meant section 106(a) of AC21 to apply exclusively to those aliens currently in H-1B status, they could have used the article "a" instead of "any" and used the words "currently in" instead of "provided."

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in the United States at the time of the filing of the extension of stay," and not that the beneficiary be in valid H-1B status at the time it is filed. The additional requirement of 8 C.F.R. § 214.1(c)(4) that the alien, with certain exceptions, must "maintain the previously accorded status" has previously been interpreted by USCIS as meaning the same prior status. However, 8 C.F.R. § 248.1(b), regarding general eligibility for change of status, states in part that "a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed." In the change of status context, "previously accorded status" means the status previously held by the alien and not the same prior status. As the phrase "previously accorded status" is not defined in the regulations and as its use in 8 C.F.R. § 214.1(c)(4) is not distinguished from its use in 8 C.F.R. § 248.1(b), it shall be interpreted as having the same meaning – the status previously held by the alien, not the same prior status held by the alien.

In addition, if the same meaning of "previously accorded status" as it is used in 8 C.F.R. § 248.1(b) were not applied to 8 C.F.R. § 214.1(c)(4), it would create the situation where an alien could change status and be approved for a specific classification but be unable to extend his or her stay. As an example, an employer files an initial I-129 requesting H-1B classification, change of status, and extension of stay on behalf of an alien in B-2 visitor status whose authorized stay is about to expire but who has not previously spent time in the United States in H or L status. If otherwise qualified and if "previously accorded status" in 8 C.F.R. § 214.1(c)(4) meant the same prior status, USCIS would be permitted to grant the H-1B petition approval and change of status but be prohibited from granting the extension of stay request, solely because the alien was not in H-1B status at the time the petition was filed, even though the alien had never held H-1B status at any time in the past. Not only is this result contrary to current and past practices, it would be contrary to logic and the intent of the relevant sections of the Act.

Moreover, 8 C.F.R. § 214.1(c)(3) – classes ineligible for extension of stay – does not list H-1B classification as being an ineligible class. Instead, the limitation on extensions of stay in H-1B status are addressed solely by 8 C.F.R. § 214.2(h)(13)(iii), which is based on section 214(g)(4) of the Act. Additionally, 8 C.F.R. § 248.2 – classes ineligible for change of status – only prohibits certain classes from changing to H-1B classification, not all classes.

As section 106(a) plainly reads, there is no requirement that a nonimmigrant alien be in H-1B status at the time the exemption to the six-year limit is sought; it requires only that the alien had been issued an H-1B visa or had otherwise been in H-1B status at some point in the past. As the statutory language is clear, there is no need to consider the legislative history of the applicable law or the related floor statements. Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *Immig. and Naturalization Serv. v. Phinpathya*, 464 U.S. 183.

Therefore, until and unless regulations to the contrary are issued on this subject, section 106(a) of AC-21 as amended by DOJ-21 shall be interpreted by USCIS as applying to aliens presently in the United States in any nonimmigrant classification. In the instant matter, as the beneficiary has established eligibility for an exemption under section 106(a) of AC-21 as amended by DOJ-21, he is exempt from the limitation in section 214(g)(4) of the Act and is thereby eligible for an extension of stay under section 106(b) of AC-21, and that portion of the director's decision finding otherwise is hereby withdrawn.

II. Filing Date of the Petition

The petitioner filed the instant petition on April 2, 2012. However, the petitioner specified an employment start-date on the Form I-129 of October 12, 2012, more than six months later.

The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) specifically states, in pertinent part, the following:

> The petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services or training[.]

On appeal, counsel claims that the petitioner's provision of an employment start-date of October 12, 2012 was a typographical error. To support that claim, counsel points to the fact that the LCA submitted in support of the petition was certified for the period from August 14, 2012 through August 13, 2015.

However, the petitioner clearly specified of an employment start-date of October 12, 2012 on the Form I-129, more than six months after the petition was filed. The director was not required to address this issue in an RFE, as it constituted evidence of ineligibility, and the regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record."

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

III. Specialty Occupation

The AAO will now address its finding, made beyond the decision of the director, that the proffered position is not a specialty occupation. 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;
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> *(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;
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> *(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 March 9, 2012 letter of support, the petitioner stated that the duties of the proffered position would include the following:

- Providing project and staffing leadership during project planning, execution, reporting, and follow-up on any action plans;
- Overseeing the validation of model performance and controls, including establishing model validation scope, assessing validation results, and directing communications with stakeholders;
- Providing leadership, feedback, mentoring, and work oversight for a team of analysts;
- Designing the petitioner's model validation and control testing framework, including annual validation plans, model inventory, and model risk rating;

- Managing the petitioner's model inventory to ensure it is complete, accurate, and consistent with the intent of the petitioner's Model Validation Policy; and

- Developing and maintaining effective partnerships with the model developers, model owners, business-level risk management teams, and auditors (both internal and external).

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.[12] The duties proposed for the beneficiary generally align with those of actuaries as described in the *Handbook*.

In pertinent part, the *Handbook* states the following with regard to this occupational classification:

> Actuaries analyze the financial costs of risk and uncertainty. They use mathematics, statistics, and financial theory to assess the risk that an event will occur and help businesses and clients develop policies that minimize the cost of that risk. Actuaries' work is essential to the insurance industry. . . .
>
> Actuaries typically do the following:
>
> - Compile statistical data and other pertinent information for further analysis
>
> - Estimate the probability and likely economic cost of an event such as death, sickness, an accident, or a natural disaster
>
> - Design, test, and administer insurance policies, investments, pension plans, and other business strategies to minimize risk and maximize profitability
>
> - Produce charts, tables, and reports that explain their calculations and proposals

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[12] The *Handbook*, which is available in printed form, may also be accessed online at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

- Explain their findings and proposals to company executives, government officials, shareholders, and clients

Most actuarial work is done with computers. Actuaries use database software to compile information. They use advanced statistics and modeling software to forecast the cost and probability of an event.

Actuaries typically work on teams that often include managers and professionals in other fields, such as accounting, underwriting, and finance. For example, some actuaries work with accountants and financial analysts to set the price for security offerings or with market research analysts to forecast demand for new products.

With experience, actuaries are often given supervisory roles. They are responsible for delegating tasks and providing advice to senior management. They also may be called on to testify before public agencies on proposed laws that affect their business, such as a law placing caps on auto insurance prices by states.

Most actuaries work at insurance companies, where they help design policies and determine the premiums that should be charged for each policy. They must ensure that the premiums are profitable, yet competitive with other insurance companies. Actuaries in the insurance industry typically specialize in a specific field of insurance, such as one of the following:

- ***Health insurance.*** Actuaries specializing in this field help develop long-term care and health insurance policies by predicting expected costs of providing care under the terms of an insurance contract. Their predictions are based on numerous factors, including family history, geographic location, and occupation.

- ***Life insurance.*** Actuaries in this field help develop annuity and life insurance policies for individuals and groups by estimating, on the basis of risk factors such as age, gender, and tobacco use, how long someone is expected to live.

- ***Property and casualty insurance.*** Actuaries in this field help develop insurance policies that insure policyholders against property loss and liability resulting from accidents, natural disasters, fires, and other events. They calculate the expected number of claims resulting from automobile accidents, which varies depending on the insured person's age, sex, driving history, type of car, and other factors.

Some actuaries apply their expertise to financial matters outside of insurance. For example, they develop investment strategies that manage risks and maximize returns for companies or individuals. Some actuaries help companies develop broad policies and strategies that assess risks across all areas of business, a practice known as enterprise risk management.

> ***Pension and retirement benefits actuaries*** design, test, and evaluate company pension plans to determine if the expected funds available in the future will be enough to ensure payment of future benefits. They must report the results of their evaluations to the federal government. Pension actuaries also help businesses develop other types of retirement plans, such as 401Ks, and healthcare plans for retirees. In addition, they provide retirement planning advice to individuals.
>
> ***Consulting actuaries*** provide advice to clients on a contract basis. Many consulting actuaries audit the work of internal actuaries at insurance companies or handle actuarial duties for insurance companies that are not large enough to keep their own actuaries on staff. Other consulting actuaries work for employee benefits firms. These firms design, analyze, and manage employee benefit programs such as employer-sponsored healthcare and retirement plans for companies.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Actuaries," http://www.bls.gov/ooh/ math/actuaries.htm#tab-2 (accessed May 15, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this occupational category:

> Actuaries need a bachelor's degree and must pass a series of exams to become certified professionals. Students must complete coursework in economics, applied statistics, and corporate finance, all which are required for professional certification. . . .
>
> Actuaries must have a strong background in mathematics, statistics, and business. Typically, an actuary has an undergraduate degree in mathematics, statistics, business, or actuarial science.

Id. at http://www.bls.gov/ooh/ math/actuaries.htm#tab-4.

These findings do not indicate that a bachelor's degree in a specific specialty, or the equivalent, is normally required for entry into this occupational category. While the *Handbook* indicates that actuaries "typically" possess a bachelor's degree in mathematics, statistics, business, or actuarial science, it does not state that employers typically *require* such a degrees, so long as candidates possess a bachelor's degree and "a strong background in mathematics, statistics, and business."[13]

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[13] In other words, the AAO does not find a statement that employees in a given industry "typically possess" a bachelor's degree in a given field necessarily indicative of normal employer requirement for such a degree. The AAO does not find the phrases "typical employee possession" and "normal employer requirement" synonymous and/or interchangeable with one another.

Even if there were such a *requirement* for a bachelor's degree in mathematics, statistics, business, or actuarial science, however, such a requirement would still be inadequate for approval of the petition under this criterion. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.[14] Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that actuaries "typically" possess a bachelor's degree, it also states that they typically possess bachelor's degrees from a variety of fields, including mathematics, statistics, business, or actuarial science. In addition to recognizing degrees in disparate fields, the *Handbook* also indicates that a general-purpose business degree would suffice. However, 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 at 147. Therefore, the *Handbook*'s recognition that a general, non-specialty "business" degree is sufficient for entry into this occupational category strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as an actuary does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

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[14] Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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.

In determining whether there is such 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor does the petitioner submit any other evidence to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. Rather, the AAO finds that the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic actuarial work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed 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*).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 the performance requirements of the proffered position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

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 at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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").

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 at 387. 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 a 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 proposed 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.

The record contains no evidence regarding any prior individuals employed by the petitioner in this position, other than the beneficiary. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

As the evidence in the record of proceeding does not establish a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which requires the petitioner to establish that the nature of the proffered position's 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 in the specialty.

The AAO also finds that the record of proceeding contains no evidence that establishes the nature of the proposed duties as being so specialized and complex. Rather, to the extent that the nature of those duties is developed in the record, the AAO finds that the petitioner has not distinguished the nature of the proposed duties from the nature of actuarial duties not so specialized and complex that its performance would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

Accordingly, as the evidence in the record of proceeding fails to establish that the nature of the proposed duties meets this criterion's specialization and complexity threshold, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation.

Accordingly, the petition must also be denied on this basis. Thus, even if it were determined that the petitioner had overcome both of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

IV. Beneficiary's Qualifications to Perform the Duties of a Specialty Occupation

Finally, as noted at the outset of this discussion, the AAO also finds, beyond the decision of the director, that the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. Thus, even if the petitioner had overcome the director's two bases for denying the petition, which it did not, the petition still could not be approved because the petitioner has not demonstrated the beneficiary's qualifications to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C) (i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

> (*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (*3*) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> (*4*) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states the following:

> General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As the beneficiary did not earn a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*). As he does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*), either. As the petitioner has not demonstrated that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*3*), either. Accordingly, 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) remains as the only avenue for the petitioner to demonstrate the beneficiary's qualifications to perform the duties of the proffered position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) requires a demonstration that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) is determined by at least one of the following:

> (*1*) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (*2*) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (*3*) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;[15]
>
> (*4*) Evidence of certification or registration from a nationally-recognized

[15] The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record contains two evaluations of the beneficiary's academics and work experience. The first evaluation, dated November 1, 2010, was prepared by an evaluator employed by the . According to Ms. the beneficiary's foreign education and work experience are equivalent to a bachelor's degree in actuarial science awarded by a regionally accredited institution of higher education in the United States.

The second evaluation, dated June 20, 2012, was prepared by Dr. a professor of business administration at Nebraska. Dr. also finds the beneficiary's combination of foreign education and work experience equivalent to a U.S. bachelor's degree in actuarial science.

However, neither of these evaluations demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*), as the petitioner has not demonstrated: (1) that either Ms. or Dr. possess the authority to grant college-level credit for training and/or experience in the pertinent specialty pursuant to a program at that college or university for granting such credit; [16] and (2) that either have programs for granting such credit, in the pertinent specialty, based on an individual's training and/or work experience. Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

For all of these reasons, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*).

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[16] Although counsel claims that Dr. possess such authority, he presents no evidence to support that assertion. 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)). 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).

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*), which requires submission of the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). As was the case under 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(*1*) and (*2*), the beneficiary is unqualified under this criterion because he did not earn a baccalaureate or higher degree from an accredited college or university in the United States and does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*4*), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) states the following with regard to USCIS analyzing an alien's qualifications:

> For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:
>
> (*i*) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;[17]
>
> (*ii*) Membership in a recognized foreign or United States association or society in the specialty occupation;
>
> (*iii*) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

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[17] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *See* 8 C.F.R. § 214.2(h)(4)(ii).

(*iv*) Licensure or registration to practice the specialty occupation in a foreign country; or

(*v*) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although the record contains some information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the proffered position; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of her expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*)(*i*)-(*v*).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*)(*i*)-(*v*) and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the petition must also be denied on this basis. Thus, even if it were determined that the petitioner had overcome both of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

V. Conclusion

As set forth above, the AAO disagrees with the director's finding with regard to the beneficiary's change of nonimmigrant status from L-1A to H-1B pursuant to AC-21 as amended by DOJ-21, and that portion of the director's decision is withdrawn. However, the petitioner has not overcome the director's finding that its filing of the petition more than six months prior to the requested employment start date of October 12, 2012 precludes approval of the petition. Accordingly, the appeal will be dismissed, and the petition will be denied. Beyond the decision of the director, the AAO finds additionally that the petitioner has also failed to demonstrate: (1) that the proffered position is a specialty occupation; and (2) that the beneficiary is qualified to perform the duties of a specialty occupation.

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.