



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **AUG 21 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
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.

## I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a "Private Nonprofit Armenian Institution." In order to continue to employ the beneficiary in what it designates as a public relations and media specialist position, the petitioner seeks to extend her classification 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, concluding that the petitioner failed to submit a valid Labor Condition Application (LCA) that corresponds to the instant visa petition and which may be used to support it. On appeal, counsel asserts that previous counsel provided ineffective assistance and submits evidence in support of that claim.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied. Beyond the decision of the director, we find multiple additional issues which also independently preclude approval of this petition.<sup>1</sup>

The record of proceeding before us 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 director's request; (4) the director's letter denying the petition; (5) the Form I-290B and supporting documentation; (6) our RFE; and (7) the petitioner's response to our request.

## II. LEGAL, PROCEDURAL, AND FACTUAL BACKGROUND

The primary issue before us on appeal is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS). General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission . . . .

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part:

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<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

In cases where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states the following:

[A] benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed.

The petitioner filed the instant petition on December 8, 2011, and requested a period of authorized employment extending from December 1, 2011 through November 30, 2014. However, it submitted an LCA certified on November 21, 2008 for a period of employment extending from December 1, 2008 through November 30, 2011.

The director issued an RFE on February 12, 2013 and requested, *inter alia*, an LCA to support the petition. In response, the petitioner submitted the LCA upon which it now relies, which was certified on April 22, 2013, more than four months after the petition was filed, and which was certified for a period of employment lasting from April 16, 2013 through April 15, 2016.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Furthermore, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with DOL when submitting the Form I-129.

Accordingly, the LCA must have been certified before the H-1B petition was filed in order for an H-1B petition to be approvable. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). Moreover, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(1). Therefore, the petitioner’s failure to procure a certified LCA prior to filing the H-1B petition precludes its approval, and the director properly denied the petition on that basis on May 28, 2013.



On appeal, present counsel asserts that the petitioner's failure to provide an LCA certified prior to the filing of the petition was the result of ineffective assistance from [REDACTED] the attorney who filed the instant visa petition on behalf of the petitioner. Counsel provided considerable evidence pertinent to various transgressions of: (1) Mr. [REDACTED] (2) [REDACTED] the petitioner's subsequent attorney; and (3) [REDACTED], a paralegal.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).<sup>2</sup>

Further, in the substantive determination pertinent to whether counsel's actions constituted ineffective assistance, USCIS must determine (1) whether competent counsel would have acted differently and (2) whether counsel's performance was so inadequate that it may have affected the outcome of the proceedings. *See Maravilla v. Ashcroft*, 381 F. 3d 855, 858 (9th Cir. 2004).

Counsel does not dispute that the LCA upon which this petition relies was certified after the petition was filed. Nor does he dispute the negative consequences of an LCA certified subsequent to the filing of an H-1B petition. Instead, counsel suggests that these consequences should be waived because the petitioner received ineffective assistance from prior counsel, implying that competent counsel would have filed the visa petition without such flaws.

### III. DISCUSSION

As will be discussed below, we find that the evidence of record does not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

#### A. Ineffective Assistance of Counsel

Again, counsel suggests that the consequences of an LCA certified subsequent to the filing of an H-1B petition should be waived because the petitioner received ineffective assistance from its previous counsel. However, counsel cites no legal authority stating that we should, or even could, excuse the filing of an H-1B petition without an LCA certified prior to the petition's filing, rather than viewing such a visa petition as *void ab initio*. However, as will be explained below, we do not need to reach that aspect of the ineffective assistance issue.

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<sup>2</sup> We notified the petitioner of these requirements in our April 9, 2014 RFE.

As noted above, *Matter of Lozada* requires that any appeal based upon a claim of ineffective assistance contain, *inter alia*, an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard. However, the instant record of proceeding contains no such affidavit from the petitioner.

We acknowledge the June 3, 2014 letter from [REDACTED] chairman of the petitioner's board of trustees and the individual who signed the Form I-129 and LCA on behalf of the petitioner. However, the letter was not attested before a notary under penalty of perjury. Further, Mr. [REDACTED] claims no personal knowledge of the agreement made with previous counsel and states that "the beneficiary was the conduit of most of the communication that took place between us and the attorneys who prepared the paperwork." Mr. [REDACTED] does not indicate that either he or any other official of the petitioning company had any direct contact with counsel whose performance is being impugned. As such, even if Mr. [REDACTED] letter constituted an affidavit, it would not be competent evidence of any agreement between the *petitioner* and counsel whose performance is being impugned. To the contrary, it actually suggests that there was in fact *no* agreement between the petitioner and previous counsel.

Further, *Matter of Lozada* requires that the appeal indicate whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of prior counsel's ethical or legal responsibilities. The record does contain evidence that the *beneficiary* filed a complaint with the California Bar Association. In a declaration submitted in support of her bar complaint, the beneficiary describes the alleged deficient performance of [REDACTED]

However, the affected party in this matter is the petitioner, not the beneficiary. See 8 C.F.R. § 103.3(a)(1)(iii)(B). The beneficiary has no standing. The relevant inquiry is whether the *petitioner* received ineffective assistance. The record of proceeding does not indicate that the petitioner has filed a complaint regarding the assistance it received from prior counsel.

Further, even if the beneficiary's complaint to the California Bar Association were construed to be a statement from "the allegedly aggrieved respondent" we observe that it, like Mr. [REDACTED] statement, was not attested to before a notary under penalty of perjury and could not, therefore, satisfy the *Lozada* affidavit requirement.

As such, the petitioner has not satisfied the requirements of *Matter of Lozada* as described above, and the claim of ineffective assistance of counsel will not be further addressed. We observe that the claim of ineffective assistance of previous counsel is the only argument that present counsel has made against the director's finding that the petitioner did not submit an LCA that could be used to support the instant visa petition. Because we will not consider the claim of ineffective assistance, the appeal must be dismissed and the visa petition denied on the basis originally stated in the director's decision, that is, that, at the time of filing, the petitioner had not obtained a certified

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<sup>3</sup> In her declaration, the beneficiary refers to *herself* as the client of prior counsel.



corresponding LCA in the claimed occupational specialty for the intended work locations and, therefore, as indicated by the director, failed to comply with the applicable filing requirements set forth above.<sup>4</sup>

### B. Specialty Occupation

Even if the petitioner had demonstrated, consistent with the requirements of *Matter of Lozada*, that it had received ineffective assistance from prior counsel, and even if it prevailed upon the issue of whether its failure to provide a corresponding LCA with the visa petition could be excused upon a showing of ineffective assistance of counsel, the petitioner would still be obliged to face the two-pronged test of *Maravilla v. Ashcroft*. The second prong of that test pertains to whether prior counsel's performance was so inadequate that it may have affected the outcome of the proceedings. To satisfy that aspect of *Maravilla* the petitioner must demonstrate that the visa petition was approvable, absent previous counsel's malfeasance. Certain shortcomings of a visa petition clearly may not be remedied by a showing of ineffective assistance of counsel. Some obvious examples would be if the beneficiary were not demonstrated to be qualified for the proffered position, or if the proffered position were not demonstrated to be a specialty occupation position. A showing of ineffective assistance of counsel would not address such defects. We will therefore consider whether the proffered position is a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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<sup>4</sup> While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part:

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

[Italics added]. As 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an H-1B petition to establish eligibility at the time the initial petition was filed.

*Specialty occupation* means an occupation which [(1)] requires 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 [(2)] requires 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, a proposed 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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a



specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In the instant case, the record contains a description of the proffered position, on the petitioner's letterhead, that was submitted with the visa petition. It states that the proffered position requires a master's degree in journalism, public relations, or psychology.

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, a minimum entry requirement of a degree in one of three disparate fields, such as journalism, public relations, and psychology, for instance, would not meet the statutory requirement that the degree be "in the specific specialty." Section 214(i)(1)(B) (emphasis added).

Here, although the evidence submitted indicates that the proffered position requires a master's degree, it also indicates that degrees in a wide array of fields would be acceptable to the petitioner for entry into the proffered position. Accordingly, as the petitioner indicates that working in the proffered position does not normally require a minimum of a bachelor's degree *in a specific specialty* or its equivalent, the evidence does not support the proffered position as being a specialty occupation position. The visa petition will be denied for this additional reason. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

### C. Terms and Conditions of Employment

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment (which, according to the petitioner, is \$48.88 per hour), whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n) of the Act, 8 U.S.C. § 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. By signing the Form I-129 and LCA, the petitioner attests that it will comply with the wage requirements.



The definition of the term "actual wage" is found at 20 C.F.R. § 655.731(a)(1), which states, in pertinent part, the following:

The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. . . .

The prevailing wage is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. The regulation at 20 C.F.R. § 655.731(a)(2) states, in pertinent part, the following:

The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. The employer shall base the prevailing wage on the best information available as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a wage obtained from an OFLC NPC (OES), an independent authoritative source, or other legitimate sources of wage data.

Again, the required wage rate means the rate of pay which is the higher of the actual wage for the specific employment in question or the prevailing wage rate (which, again, is \$48.88 per hour, according to the petitioner). See 20 C.F.R. § 655.715.

The regulation at 20 C.F.R. § 655.731(c) states, in pertinent part, the following:

*Satisfaction of required wage obligation.*

- (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.
- (2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:
  - (i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;
  - (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's

tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. [§] 1, et seq.);

- (iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. [§] 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid except that when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. [§] 433 (i.e., an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.
- (iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.
- (v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

By signing the Form I-129, the petitioner confirms "under penalty of perjury under the laws of the United States of America that this petition and the evidence submitted with it are all true and correct" and that it "agrees to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment." The petitioner attests that it has read and agreed to the labor condition statements at Section H, which include confirming that it will "[p]ay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time." The required wage must be paid to the employee, cash in hand, free and clear, when due. See 20 C.F.R. § 655.731(c)(1).

In his June 3, 2014 letter, Mr. [REDACTED] conceded that "[t]he beneficiary does not receive \$48.88 per hour," and claimed that "both the petitioner and beneficiary were unaware of the wages specified in the LCA prepared by [REDACTED]"



As a preliminary matter, we do not find persuasive Mr. [REDACTED] claim that the petitioner was "unaware of the wages specified in the LCA[.]" Mr. [REDACTED] signed the LCA on April 26, 2013, and neither he nor present counsel argues that his signature is fraudulent. As indicated above, when he signed the LCA, Mr. [REDACTED] attested that he had read and agreed to the four labor condition statements contained at section H of the LCA, which included confirming that the petitioner would pay the beneficiary "at least the local prevailing wage [established in the LCA as \$48.88 per hour] or the employer's actual wage, whichever is higher[.]"

Mr. [REDACTED] thus concedes that the petitioner did not pay the beneficiary at least<sup>5</sup> \$48.88 per hour, and the payroll documents attached to his letter demonstrate further that her actual wage fell far below that figure. The petitioner does not indicate that, upon discovering that it underpaid the beneficiary, it made up the difference between what it paid her and the amount it was actually obligated to pay her. Absent such a showing, we cannot not find that the petitioner has abided by, and intends in the future to abide by, the terms and conditions of H-1B employment as stated in the petition.

For all of these reasons, the evidence of record does not establish that the petitioner will comply with the terms and conditions stated in the petition if this petition were approved, in that it does not establish that the petitioner will pay the beneficiary an adequate salary for her work, as required under the Act.

Beyond the decision of the director, the petition may not be approved for this additional reason. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

#### D. Prior Approvals

We recognize that this is an extension petition. However, that a previous visa petition submitted by the instant petitioner for the instant beneficiary was approved has no bearing on whether the instant visa petition requires a corresponding LCA certified prior to the submission of the visa petition. That prior approval also sheds no light on whether the petitioner has abided by, and intends to abide by, the terms of H-1B employment by paying the full amount of the predominant wage.

Further, as to the specialty occupation issue, that a previous visa petition was approved is not controlling. If the previous nonimmigrant petition was approved based on the same evidence contained in the current record, that approval would constitute error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated,

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<sup>5</sup> Again, the petitioner is required to pay the beneficiary the greater of the local prevailing wage (\$48.88 per hour) or the employer's actual wage. The employer's actual wage for the position has not been established. However, since the petitioner is required to pay the *greater* of the local prevailing wage (\$48.88 per hour) or its actual wage, in this particular case the lowest acceptable wage for the beneficiary would be \$48.88 per hour. Furthermore, the petitioner specifically stated at section F of the LCA that it would pay the beneficiary \$48.88 per hour.

merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

In addition, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the instant nonimmigrant petition on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

#### IV. CONCLUSION AND ORDER

As discussed above, we agree with the director's decision denying this petition and will not disturb it. Beyond the decision of the director, we find additionally that the evidence of record does not establish that the proffered position is a specialty occupation or that the petitioner has, and will, comply with the terms and conditions of the petition.<sup>6</sup>

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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

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<sup>6</sup> Because each of these issues independently precludes approval of this petition, we will not address any of the additional deficiencies we have observed in our review of the record of proceeding.