



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUL 03 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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 (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 certified the decision to the Administrative Appeals Office (AAO) for review. The AAO reviewed the proceeding in its entirety and finds that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will be affirmed and the petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on December 12, 2010. In the Form I-129 visa petition, the petitioner describes itself as a business investment and marketing corporation established in 1983. In order to employ the beneficiary in what it designates as a vice president of engineering position, the petitioner seeks to continuously 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).<sup>1</sup>

The director denied the petition on October 24, 2011 finding that the petitioner failed to establish that (1) the proffered position qualifies as a specialty occupation; (2) the beneficiary qualifies for the proffered position; (3) the requisite employee-employer relationship exists between the petitioner and the beneficiary; and (4) the beneficiary maintained H-1B nonimmigrant status at the time of filing.<sup>2</sup>

Subsequently, an appeal was filed, but the AAO rejected the appeal on December 5, 2012, finding that it was not properly filed. Thereafter, counsel for the petitioner filed a motion to reconsider, and the AAO dismissed the motion on February 26, 2013. On May 30, 2013, the director certified the decision dated October 24, 2011 to the AAO for review. Thereafter, counsel for the petitioner submitted a brief, asserting that the director's basis for denial of the petition was erroneous and that the petitioner satisfied all evidentiary requirements.

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<sup>1</sup> In the Form I-129, the petitioner indicated that the beneficiary was in H-1B status and that the petitioner was requesting to extend the stay, not change the nonimmigrant status. However, in denying the instant petition to classify the beneficiary as a specialty occupation worker on October 24, 2011, the director also issued a decision to deny the concurrent request for a change of nonimmigrant status. The AAO notes that on November 22, 2010, prior to filing the instant petition, the beneficiary had filed the Form I-539, Application to Change/Extend Nonimmigrant Status, to change status as a beneficiary of E-2 visa, which was erroneously approved on December 29, 2010 and later revoked on October 24, 2011.

<sup>2</sup> In response to the director's certification, counsel asserts that the director erred in finding that the beneficiary failed to maintain his nonimmigrant status. This issue will not be addressed here since the director's decision to deny the petition is affirmed. Without an approved petition, the separate extension of stay request is moot.

Further, the AAO notes that the director discusses several issues related to the beneficiary under the heading "Remaining Issues," which include the validity of the beneficiary's passport, Ecuadorian government's lawsuit against the beneficiary in Florida circuit court, and the State Department's revocation of the beneficiary's visa. As noted by the director, such issues are not the bases for denying the petition, but "they constituted derogatory information that led to the investigation that revealed that the approval of the petition involved gross error" for the above mentioned reasons. Since such issues are not the bases for denial, the AAO will not further discuss the merits of the issues.



The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to deny (NOID); (3) counsel's response to the NOID with supporting documentation; (4) the director's decision dated October 24, 2011; (5) the Form I-290B and supporting materials; (6) the AAO's decision dated December 5, 2012; (7) the Form I-290B and supporting documentation; (8) the AAO's decision dated February 26, 2013; (9) the director's Notice of Certification; and (10) counsel's brief submitted in response to the director's certification of the decision. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the decision certified to the AAO will be affirmed, and the petition will be denied.

Later in the decision, the AAO will also address additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that it would pay the beneficiary an adequate salary for his work if the petition were granted; (2) failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions; and (3) failed to establish eligibility for an extension. Thus, the petition cannot be approved for these reasons as well, with each ground considered as an independent and alternative basis for denial.

## I. FACTUAL AND PROCEDURAL HISTORY

The petitioner stated in the Form I-129 that it seeks the beneficiary's services as a vice president of engineering on a full-time basis at the rate of pay of \$180,000 per year. The petitioner also stated that the beneficiary "has already been classified on five (5) separate occasions as a distinguished and accomplished specialist by [USCIS] pursuant to §101(a)(15)(H)(1)(B) of the Immigration and Nationality Act."<sup>3</sup>

In a letter dated December 9, 2010, the petitioner stated that "the proffered position is classified as an occupation which requires a bachelor's degree" and that "as the job duties enumerated below make clear, the position of Vice President of Engineering clearly falls within the definition of a specialty occupation as established by INA § 101(a)(15)(H)(1)(B), 8 CFR § 214.2(h)(i)(1), and 8 CFR § 214.2(h)(4)(ii)(e)." The petitioner provided the following description of the duties of the proffered position:

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<sup>3</sup> As a preliminary note, prior to April 1, 1992, the H-1B category applied to persons of "distinguished merit and ability." The standard of "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions or who is prominent in his or her field." On October 1, 1991, the *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description; however, the implementation of this change was delayed until April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 12, 1991, restored the standard of "distinguished merit and ability" to the H-1B category, but only as the qualifying standard for fashion models.

As the [v]ice [p]resident of [e]ngineering, [the beneficiary] will continue to be responsible for directing and analyzing the operations by which performance evaluations of our company and its staff are implemented. He will continue to determine areas of cost reduction and program improvements. He will direct, manage and coordinate the engineering operational and development activities of our technology and real estate project developments.

[The beneficiary] will continue to use his specialty knowledge in the very complex implementation of sophisticated business activities. He will continue to plan procedures, establish responsibilities, and coordinate engineering functions among the company's departments. [The beneficiary] will continue to utilize his detailed knowledge to review statements and activities reports to ensure that the company's multi-million dollar investment objectives are achieved. He will review activities, costs, operations and forecast data to determine our progress in meeting projected goals and objectives.

In addition, [the beneficiary] will continue to manage and supervise staff engaged in preparing agreements and performing other activities necessary for the efficient management of [the petitioner]'s holdings. [The beneficiary] will direct and coordinate operations to ensure that [the petitioner]'s revenue targets are met.

The AAO observes that while the petitioner claimed that "the proffered position is classified as an occupation which requires a bachelor's degree," the petitioner did not state that the proffered position has any particular academic requirements (or any other requirements). Instead, the petitioner stated, in part:

8 C.F.R. § 214.2(h)(4)(iii)(C)(1) qualifies aliens to perform services in a specialty occupation when they "Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university[.]" As the enclosed bachelor's degree and transcripts make clear, [the beneficiary] received a Bachelor of Science degree in Textile Engineering from the Philadelphia College of Textile and Science (**See Enclosed Exhibits 3 and 4**) (emphasis in the original). [The beneficiary] has a vast amount of specialty knowledge that has made him an excellent candidate for this H-1B specialty classification.

The AAO finds that the petitioner does not claim that the position requires both 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, or its equivalent, as the minimum for entry into the occupation, as required by the Act. *See* section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) (defining the term specialty occupation as requiring the satisfaction of both of these criteria). Instead, the petitioner emphasizes that the beneficiary has a Bachelor's degree in Textile Engineering, which qualifies him to perform services in a specialty occupation. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a



body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Industrial Engineers" – SOC (ONET/OES Code) 17-2112, at a Level IV (fully competent) wage of \$74,256 per year. The petitioner attested that the beneficiary will be paid \$180,000 per year.

On April 22, 2011, the director issued a NOID stating that the United Citizenship and Immigration Services (USCIS) has determined that the petitioner and the beneficiary have engaged in activities in violation of the immigration laws of the United States. In preface to the discussion of the bases for the NOID, the director provided some background information regarding the petitioner and the beneficiary.

Regarding the beneficiary, the director found a lawsuit pending against the beneficiary and his brother in the [REDACTED] Florida, filed by the government of Ecuador, the beneficiary's claimed nationality. The lawsuit alleged the beneficiary and his brother of embezzlement as former administrators of [REDACTED] which collapsed in July 2001. Subsequently, the government of Ecuador had requested that the United States extradite the beneficiary and his brother, [REDACTED]. On September 2, 2003, the Department of State revoked any and all visas issued to or held by the beneficiary. On February 18, 2008, the government of Ecuador issued a Presidential Degree (No. 914) to prohibit the issuance of Ecuadorian passports to fugitives of justice. USCIS was informed by the Ecuadorian consulate that the beneficiary has exhausted all legal procedures in Ecuador to obtain his passport.

Regarding the petitioner, the director found that the beneficiary has 33.33% of the ownership in the petitioning company. Further, the director noted that in the letter filed with the first Form I-129 (SRC 02 058 53185), the petitioner "indicated that it was first established in 1983 to operate a Spanish language cable television station," and "over the last 18 years it has evolved into a multi-million dollar entity engaged in a vast array of new business ventures including a new technology and communications developments and services, a textile import and export operations, and real estate investments." However, the director found that the public records do not support the petitioner's claims regarding its business activities.

For example, the director noted that in the petitioner's 2003 U.S. Corporation Income Tax Return, discovered as a result of an investigation, most of the companies listed as affiliates are no longer active or doing business. The director also noted that the United States Customs and Border Protection (CBP) searched its databases and could not locate any import and export activities records for the petitioner and the affiliate companies during the H-1B validity period. The director further found that the petitioner filed a Form I-129 for the beneficiary on August 8, 2003 (SRC 03 220 52899), to seek a change in the beneficiary's approved employment as a director of textile technology engineering operations to vice president of engineering, where the job description more closely resembled the duties of a property manager. Moreover, the petitioner subsequently filed additional H-1B petitions requesting extensions in the same position, including the instant petition.



In addition, the director noted that a search by the Florida Department of Revenue indicated that no wages were paid to the beneficiary by the petitioner until November 1, 2003; instead, the beneficiary was paid by [REDACTED] a company for which the beneficiary was not authorized to work. The director also listed previous petitions filed by the petitioner for the beneficiary and noted inconsistencies regarding the job title and description of its business.

The director then identified the following grounds for the NOID: (1) the position offered is not a specialty occupation; (2) the beneficiary is not qualified for the position; and (3) the petitioner failed to establish that it would have and maintain the requisite employer-employee relationship with the beneficiary. The director listed the previously approved petitions and found material changes in the job description of the proffered position in the previously approved petitions. He also noted that in the current petition, "the petitioner describes vague engineering duties with no indication of what those duties entail." The director stated that "since the petitioner specifically states that the duties in the present petitions are the same as those previously adjudicated, then USCIS can only determine the position is that of a property manager, because that is what the petitioner claimed in the second petition, [REDACTED]" filed to change previously authorized employment from the director of textile technology engineering operations to vice president of engineering.

The director noted that while "engineering is included in the title of vice president of engineering, there was no mention of engineering duties in the position description provided with the petition;" instead, it was concluded that "proposed duties more closely reflect the duties of a Property, Real Estate, and Community Association Managers" in the Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*. The director found that the position of Property, Real Estate, and Community Association Managers is not a specialty occupation.

Further, the director found that the beneficiary is not qualified for the position because his degree is in the unrelated field of textile engineering. Moreover, while the record contained an evaluation that claimed that the beneficiary has the equivalent of a Bachelor of Textile Engineering and a second major in Engineering Management based on education, training, and work experience, the director noted that foreign education credential evaluators may only evaluate an individual's foreign educational credentials, not training or work experience.

In addition, the director indicated that the petitioner failed to establish that it would have and maintain the requisite employer-employee relationship with the beneficiary. The director noted that in the totality of circumstances, provided the beneficiary is one-third owner of the company along with two of his brothers, one of whom, is also a fugitive of justice from Ecuador for alleged embezzlement, "it is not reasonable to believe that the petitioner could or would fire the beneficiary since to do so would result in the loss of the beneficiary's nonimmigrant status and his forced return to Ecuador to face criminal prosecution for embezzlement." The director found that the evidence is insufficient to establish that there is a separation between the beneficiary and the petitioning entity. The director concluded that "in the absence of itemized records from the Social Security Administration showing all of the beneficiary's earnings and employers, copies of state quarterly wage reports for the beneficiary's previous petition's duration of validity, and evidence to establish that the petitioner meets any combination of the relevant factors discussed in the NOID, the

petitioner has not established that a bona fide employer-employee relationship has existed and will continue to exist."

Counsel for the petitioner responded by providing a rebuttal to the director's conclusions. Counsel claimed that the proffered position is a specialty occupation. Counsel asserted that the title of the proffered position, vice president of engineering, and the occupational code used in the LCA which corresponds to SOC (ONET/OES) code 17-2112.00, "Industrial Engineers," indicated that the beneficiary would be working as a managing engineer. Counsel further claimed that the tasks of an industrial engineer combined with the Occupational Information Network (O\*NET)'s description of "Chief Executives" "provide an almost perfect match to the description of [the beneficiary's] job in the petition." Further, counsel asserted that the beneficiary "never acted as a building manager"; "[r]ather, he was the engineer who managed the real estate portfolio for the real estate division of a multi-million dollar holding company."

Moreover, counsel also stated that the beneficiary's education and work experience qualify him for the proffered position and submitted letters from (1) Dr. [REDACTED] Ph.D., Associate Professor in the Department of Industrial and Systems Engineering at [REDACTED] stating that the beneficiary has "the theoretical knowledge and practical experience associated with the fundamental undergraduate coursework in Industrial Engineering"; and (2) Dr. [REDACTED] Professor of Mechanical & Industrial Engineering at [REDACTED] stating that based on the beneficiary's past work experience, the beneficiary qualified for the proffered position as a director of textiles technology engineering operations and vice president of engineering. In addition, counsel asserted that the petitioner has established an employer-employee relationship with the beneficiary. Specifically, counsel claimed that the petitioner "has twice placed the beneficiary on leave" in response to immigration issues; that the beneficiary regularly worked with the company's most sensitive financial and technological data and information"; that the petitioner provides an office, a computer, an assistant, and all other resources; and that the petitioner therefore has control over the beneficiary's work.

The director denied the petition on October 24, 2011. Subsequently, an appeal was filed, but the AAO rejected the appeal on December 5, 2012, finding that it was not properly filed. Specifically, the AAO observed that the appeal was filed with a Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28) filed for and signed by the beneficiary, who was not a recognized party in that administrative proceeding. The AAO noted that USCIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a petition and that the beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). In the rejection, the AAO noted that, while the beneficiary was listed as one of the petitioner's corporate officers according to information provided on the website of the Florida Department of State Division of Corporations available at <http://ccfcorp.dos.state.fl.us/corinam.html> (last visited June 11, 2014), there was no evidence in the record that the beneficiary was legally authorized to sign as a representative on behalf of the petitioner with regard to the appeal before the AAO. In addition, the AAO specifically noted that the Form G-28 submitted by counsel clearly limited his representation/appearance to the beneficiary, and nowhere on the form did it indicate that the beneficiary was acting on behalf of the petitioner.



Thereafter, counsel for the petitioner filed a motion to reconsider stating that the AAO did not comply with the regulations at 8 C.F.R. § 103.3(a)(2)(v)(A)(2) by failing to give notice of the improper Form G-28. The AAO dismissed the motion on February 26, 2013 on several grounds. The AAO found that the motion was not properly filed by the affected party because the petitioner was not a party to the rejected appeal. The regulations at 8 C.F.R. § 103.5(a)(1)(i) provides that "when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision." The AAO also found that the petitioner did not have legal standing in the motion because the motion was based on a rejected appeal, which was improperly filed by the beneficiary and his counsel.

Further, the AAO found that it did not have jurisdiction because the AAO is not the last official who made the decision being appealed. The regulations at 8 C.F.R. § 103.5(a)(1)(ii) states that the "official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." The AAO found that "the latest decision in the proceeding" in this matter was the director's decision dated October 24, 2011, since the appeal was rejected without considering the merits of the appeal. Therefore, the AAO did not have jurisdiction since it is not "the official who made the latest decision in the proceeding."

However, even assuming *arguendo* that the motion was filed by the affected party and that the AAO had jurisdiction, the AAO found that it did not err in rejecting the appeal. Specifically, the AAO found that the regulations at 8 C.F.R. § 103.3(a)(2)(v)(A)(2) applies to a situation where the appeal was filed without the Form G-28. In this case, the appeal was filed with the Form G-28, but by a party not entitled to file it; therefore, the AAO was not required to request the Form G-28 pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(2). AAO dismissed the motion on February 26, 2013. On May 30, 2013, the director certified the decision dated October 24, 2011 to the AAO for review.

## II. LAW AND ANALYSIS

Upon a complete review of the record of proceeding, the AAO will first discuss some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.<sup>4</sup>

### A. Specialty Occupation

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently

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<sup>4</sup> The AAO conducts review of the service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).



require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

### **1. No Bona Fide Offer of Employment**

The AAO reviewed the record of proceeding in its entirety, including the documentation submitted with the petition, in response to the NOIR, and in support of the certification, as well as the information in the record obtained as a result of the investigation. The AAO notes that the record of proceeding contains material discrepancies regarding the proffered position, and the petitioner has not sufficiently resolved these inconsistencies. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* As will be discussed, the petitioner has not met its burden of proof in this regard.

#### **a. Inconsistencies Regarding Its Business Operations**

Specifically, the AAO finds that the petitioner failed to establish that a credible offer of employment exists for the beneficiary by providing inconsistent information regarding its business operations and job description. On the Form I-129 petition, the petitioner stated that it is a business investment and marketing corporation. In the support letter filed with the Form I-129, the petitioner indicated that it was established in 1983 and has over two million dollars of gross annual revenue. The petitioner stated that it "oversees the management, marketing, and operations of an array of business ventures in technology, communications, data transmission, telecommunications in telemetry, and radio communications as well as millions of dollars in investments for real estate and condo conversion projects throughout South Florida." The petitioner claimed that it is a "full-service business conglomerate that handles a variety of entities and employs a complete staff of professionals who oversee [its] multi-million dollar operations and vast array of business ventures."

Further, the petitioner designated its operations under the North American Industry Classification System (NAICS) code 531390-Other Activities Related to Real Estate.<sup>5</sup> The NAICS website describes this industry as follows:

This industry comprises establishments primarily engaged in performing real estate related services (except lessors of real estate, offices of real estate agents and brokers, real estate property managers, and offices of real estate appraisers).

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 531390 – Other Activities Related to Real Estate, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed June 11, 2014).

The AAO notes that the petitioner has filed a total of six H-1B petitions including this petition beginning in 2001 for the beneficiary. However, the record of proceeding indicates that the petitioner provided inconsistent descriptions of its business. The following table summarizes the description of the petitioner's business since 2001:

Receipt number	Validity dates	Type of business and NAICS code on the Form I-129	Business described in the support letter
	12/19/2001 to 12/15/2004	Textile import and export  8742 (invalid code)	"our corporation has evolved into a multi million dollar entity that has spread its profits into a vast array of new business[sic] ventures, new technology and communications developments and services, a textile import and export operations, and real estate investments."  "our corporation is becoming a leader in textile operations."  "we are currently expanding our textile division into one of our premium divisions."  "we are investing millions of dollars into this division to make it

<sup>5</sup> According to the Department of Commerce, U.S. Census Bureau, the North American Industry Classification System is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy, and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed June 11, 2014).

			one of the premier textile operations in the United States."
	08/20/2003 to 07/31/2006	Real estate holdings and management  531310 (not found, but 53131 is described as real estate property managers) <sup>6</sup>	"conglomerate with many different business interests."  "Today, [the petitioner]'s primary business is real estate holdings and real estate management."  "It holds over \$5.0 million in residential properties in Miami- Da[d]e County, Florida."
	08/01/2006 to 12/18/2008	Investment management corporation  8742 (invalid)	"oversees the management, marketing and operations of a vast array of business ventures, in technology, communications, data transmission, telecommunications in telemetry and radio communications as well as millions of dollars in investments for real estate and condo conversion projects throughout South Florida."  "full service business conglomerate that handles a variety of entities and employs a complete staff of professionals who oversee our multi million dollar operations and our vast array of business ventures."
	07/01/2008 to 12/18/2009	Real estate holding and management  8742 (invalid)	Same as [REDACTED]
	12/18/2009 to 12/17/2010	Business investment marketing corporation	Same as [REDACTED]

<sup>6</sup> This industry comprises of establishments primarily engaged in managing real property for others. Management includes ensuring that various activities associated with the overall operation of the property are performed, such as collecting rents, and overseeing other services (e.g., maintenance, security, trash removal). See U.S. Dep't of Commerce, U.S Census Bureau, 1997 NAICS Definition, 53131 – Real Estate Property Managers, on the Internet at [http://www.census.gov/eos/www/naics/reference\\_files\\_tools/1997/sec53.htm](http://www.census.gov/eos/www/naics/reference_files_tools/1997/sec53.htm) (last viewed on June 11, 2014).



		531390 other activities related to real estate	
	Denied	Business investment marketing corporation	Same as
		531390 other activities related to real estate	

Further, on the Form I-129 filed on December 13, 2001, the petitioner described itself as a textile import and export business. In the letter filed with the Form I-129, the petitioner indicated that "it was first established to operate a Spanish [l]anguage cable [t]elevision [s]tation," but "has evolved into a multi[-]million dollar entity that has spread its profits into a vast array of new business ventures, new technology and communications developments and services, a textile import and export operations, and real estate investments." The petitioner further indicated that "it is becoming a leader in textile operations," and that it is "currently expanding our textile division into one of our premium divisions." However, twenty months later, on the Form I-129 filed on August 8, 2003, the petitioner described itself as a real estate holdings and management business. In the letter filed with the Form I-129, the petitioner indicated that its "primary business is real estate holdings and [a] real estate management" and that it "holds over \$5.0 million in residential properties in Miami-Dade County, Florida."

Then in 2006, the petitioner described itself as an "investment management corporation" on the Form I-129. The petitioner further stated that it "oversees the management, marketing and operations of a vast array of business ventures, in technology, communications, data transmission, telecommunications in telemetry and radio communications as well as millions of dollars in investments for real estate and condo conversion projects throughout South Florida" Then in 2008, the petitioner again changed the type of its business to "real estate holding and management" on the Form I-129, but provided the same description for its business in its support letter. Subsequently in 2009 and also in the instant petition, the petitioner changed its designation on the Form I-129 again to state that it is a "business investment marketing corporation," but provided the same description for its support letter as the previous petitions.

The petitioner also provided inconsistent NAICS codes throughout the proceeding. As mentioned, NAICS is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy, and each establishment is classified to an industry according to the primary business activity taking place there. It is noted that in 2001, the petitioner provided an invalid NAICS code 8742 on the Form I-129, which did not provide any information regarding the petitioner's primary business. In 2003, the petitioner listed a NAICS code of 531310 on the Form I-129, which was also not found, but a NAICS code of 53131 corresponded to "real estate property managers."

In 2006 and 2008, the petitioner again provided 8742 as its NAICS code. As mentioned previously, in 2006, the petitioner described its business as an "investment management corporation, and then in 2008 it designated itself as a "real estate holding and management" firm. Furthermore, while there is no evidence that these two descriptions are the same business activity, the petitioner used

the same invalid code to describe its primary business. In 2009 and also in this petition, the petitioner designated its business under the NAICS code of 531390, which corresponds to "other activities related to real estate" that is "primarily engaged in performing real estate related services," but it does not include "lessors of real estate, offices of real estate agents and brokers, real estate property managers, and offices of real estate appraisers." In other words, the petitioner used a NAICS code that does not provide useful information on what the petitioner's primary business activity is.

Further, while the petitioner claimed that it was established in 1983 and although it has filed a total of six H-1B petitions beginning in 2001, the record contains very few documents evidencing its business operations. The record of proceeding does contain: (1) a document entitled [REDACTED]; and (2) a copy of the petitioner's 2003 Corporation Income Tax Return. The AAO finds, however, that both documents are not sufficient, probative evidence to establish the nature of the petitioner's business.

For example, the document entitled "Future Plans" is undated, unsigned, and is not sufficiently detailed to offer insight into the petitioner's current business ventures. On page 1, it states that the petitioner has \$15 million of funds to invest as a result of the sale of the convenience store investment. The document states that the "current plans are to invest these funds in the U.S." in communications and related new technology, textile industry import and export, and import and export and related financing." Page 2 is entitled "Budgeted Revenues – Future Plans" and forecasts revenue for import and export of textiles and debt swaps for the next 4 years. Since the document is undated and unsigned, it is unclear when it was executed and who authored the document. Further, this document is not substantiated with documentary evidence to support the claims made therein.

Moreover, while the petitioner claims that it was established in 1983, more than twenty-seven years prior to filing this petition in 2010, the petitioner only submitted one copy of the corporation tax return from 2003. Further, it is noted that this particular tax return was obtained by the government during an investigation and was provided to the petitioner as an exhibit in the NOID.

In the NOID, the petitioner was notified that "a search of public records indicates that most of the 19 companies listed as affiliates are no longer active or doing business." On certification, counsel responded that the "fact that a company has inactive affiliates has nothing to do with whether the company is operating and has assets." Counsel asserted that "the record shows the company has significant assets" and Mr. [REDACTED] affidavit "demonstrates that the company is conducting real estate operations."

The AAO finds that, while the 2003 corporation income tax return establishes that the company likely has assets, it does not establish the nature of its business. In Schedule K, the petitioner indicated its business activity code as 523900, which is described as "other financial investment activities (including portfolio management and investment advice)" under "Securities, Commodity



Contracts, and Other Financial Investments and Related Activities."<sup>7</sup> The AAO notes that this code is inconsistent with the information provided in the Form I-129 for SRC 03 220 52899, in which the petitioner indicated that it is a real estate holdings and management company with NAICS code 531310, which was not found but for which the AAO found a similar code (53131) that corresponds to real estate property managers. Further, while this tax return indicated that the petitioner's total assets are estimated at \$26 million, the petitioner reports in Schedule L that out of \$26 million, \$12 million is cash, \$3.4 million is in buildings and other depreciable assets, and \$8.6 million is in "other investments." The "other investments" appear to consist of investments in life insurance, securities and properties, but the details about these investments are not provided. Therefore, it appears that most of its assets are in form of cash or other investments, and there is not sufficient information provided to substantiate that the petitioner is an active company that has a position for the beneficiary requiring the duties described in this petition.

Again, counsel also relies on a sworn affidavit dated May 20, 2011, provided by Mr. [REDACTED], a manager for the petitioning entity to state that the company is conducting real estate operations. Mr. [REDACTED] stated that he has been working as a manager for the petitioner since 2003 and stated that he has "personal knowledge" of the beneficiary's employment at the company, "as a result of [his] daily activities and obligations at the company and [his] familiarity with the company's records." In the affidavit, Mr. [REDACTED] stated the following regarding the petitioner's business:

After receiving a visa, [the beneficiary] began working to develop [the petitioner's] textile business. At first, [the beneficiary] investigated the potential U.S. markets to determine what products the company could produce. Next, [the beneficiary] investigated whether the company should build factories for production, or lease space. Next, [the beneficiary] worked on the systems that would be necessary to produce materials including quality control, design standards, production schedules, and specifications. Finally, [the beneficiary] considered whether the planned business made economic sense.

\* \* \*

Ultimately, economic conditions did not warrant initiating full scale textile production in the United States. In fact, at the time, the competitors were largely leaving the United States to produce abroad. At the same time, the company's real estate business was growing and becoming more complex.

As a result, [the beneficiary] and the company determined that it would be more appropriate to have [the beneficiary] concentrate his efforts on the company's real estate holdings.

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<sup>7</sup> Internal Revenue Manual indicates that the industry code should indicate the type of business activity from which the corporation received its income. For more information, see <http://www.irs.gov/instructions/i1065/ar03.html> (last viewed on June 11, 2014).

As time progressed, [the petitioner] grew its technology and real estate businesses, and for a number of strategic and economic reasons withdrew from the textiles business. Currently, the company oversees the management, marketing, and operations of an array of business ventures in technology, communications, data transmission, telecommunications in telemetry, and radio communications as well as millions of dollars in investments for real estate and condo conversion projects throughout South Florida.

The AAO finds that Mr. [REDACTED] affidavit is not probative because it is not corroborated with independent evidence. While Mr. [REDACTED] claims "personal knowledge" and "familiarity with the company's records," Mr. [REDACTED] does not substantiate his claims with documentary evidence that he based his knowledge on, which is particularly important since he allegedly began his employment with the company in 2003 and some information that he attests occurred prior to commencement of his employment.

Further, while Mr. [REDACTED] makes various claims about the beneficiary's responsibilities and the petitioner's real estate business, the record is devoid of evidence of the petitioner's real estate holdings. For example, Mr. [REDACTED] claims that "the company consolidated its operations to a new multi[-]story office building which the company built and operates in [REDACTED] Florida" and that the beneficiary "has used his engineering skills to develop new businesses and to refine these businesses once they have been initiated." Neither Mr. [REDACTED] nor counsel provide evidence of a "new multi[-] office building which the company built and operates in [REDACTED] Florida" or new businesses that the beneficiary allegedly has developed. The AAO notes that the 2003 corporation income tax return lists some addresses and names that resemble real estate properties as affiliates or long term capital gain assets. However, the tax return is from 2003 (almost eight (8) years prior to filing the affidavit), and neither counsel nor the petitioner provided additional evidence to supplement the record. The AAO notes that 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)). Therefore, the affidavit cannot be considered as probative evidence.

Consequently, the AAO also finds that the petitioner has not established that there is a bona fide position. The chart below summarizes the petitioner's descriptions of the beneficiary's job duties since 2001:

Receipt Number	Position and LCA code	Duties
[REDACTED]	Director of textile technology engineering operations/	This position of [D]irector of [T]extile [T]echnology [E]ngineering [O]perations for our corporation does in fact fulfill all of the criteria for a specialist classification. The position is very specialized and in this capacity [the beneficiary] will be responsible for approving new textile



	012 industrial engineering occupations	<p>fabric engineering technology systems, textile products and textile quality engineering designs. He will also set up the quality control system of all import and export of raw textile material and finished textile products for our corporation.</p> <p>This position requires that the individual have the responsibilities of analyzing the engineering specifications of production for physical characteristics of our textile goods. He will formulate and maintain the engineering methodologies for our technology objectives for knit fabrics, yarn fabrics, woven fabrics, cotton fabrics, dyed fabrics, raw textile, and finished textile designs.</p> <p>[The beneficiary] will utilize his detailed knowledge of specialized textile engineering procedures to design textile data analysis formulations for our corporation. He will identify and implement the cost benefit analysis of textile designs in conjunction with the quality of the standards required for each type of textile fabrics and materials.</p> <p>This is a complex high-level specialized position within our field and industry. [The beneficiary] will be responsible for designing and implementing the textile engineering development programs that are used to maximize our productivity strategies targeted to our customers' demands. He will study research results in order to identify and capitalize the most cost effective means of producing the best varied needs of our design coordination schedules, production needs, and standards for the textile designs.</p>
	Vice president of engineering/ 189 miscellaneous managers and officials	<p>In this position, the [v]ice [p]resident will formulate policies and direct the operations of the real estate interests of the company. He will authorize maintenance of properties not under control of the operating department, such as individual residential units. The [v]ice [p]resident of [e]ngineering will determine maintenance schedules of common areas.</p> <p>In addition, the [v]ice [p]resident of [e]ngineering will manage and supervise staff engaged in preparing lease agreements, recording rentals receipts, and performing other activities necessary to the efficient management of [the petitioner]'s real estate holdings.</p> <p>Furthermore, he will be in charge of the physical plant of these building[s] and will supervise apartment managers who</p>

		collect rent, make minor repairs and perform daily maintenance. The [v]ice [p]resident of [e]ngineering will also hire outside contractors for larger projects and will be in charge of the bidding process.
	Vice president of engineering/ 012 industrial engineering occupations	<p>The position is very specialized and [the beneficiary] has already been classified under the H-1B capacity for this same position. As such we are requesting the extension and [the beneficiary] will continue to be responsible for formulating policies and business strategies for our products and interests of the company. As the [v]ice [p]resident of [e]ngineering, he will be responsible for directing and analyzing the operations that are used to evaluate the performance of our company and the staff. He will continue to determine areas of cost reduction and program improvements. He will direct, manage and coordinate the engineering operational and development activities of our technology engineering and real estate project developments.</p> <p>[The beneficiary] will continue in this position to use his specialty knowledge in a very complex implementation of sophisticated business activities to plan procedures, establish responsibilities, and coordinate engineering functions among the company's departments. [The beneficiary] will continue to utilize his detailed knowledge to review statements and engineering activity reports to ensure that the company's objectives are achieved in the multi million dollar investments. He will review analyses of activities, costs, operations and forecast data to determine progress in meeting our projected goals and objectives.</p> <p>In addition [the beneficiary] will continue to manage and supervise staff engaged in preparing agreements and performing other activities necessary for the efficient management of [the petitioner]'s holdings. [The beneficiary] will direct and coordinate operations to ensure that [the petitioner] meets its revenue targets and to ensure that our goals are met.</p>
	Vice president of engineering/ 012 industrial engineering occupations	[The same description provided above for ]
	Vice president of engineering/	[The same description provided above for ]



	17-2112 industrial engineer	
	Vice president of engineering/ 17-2112 Industrial	[The same description provided above for ]

First, counsel, through Mr. [REDACTED] provided inconsistent statements about the petitioner's textile operations in the previous petition. On one hand, Mr. [REDACTED] stated that the beneficiary investigated the U.S. markets for potential production in the United States and ultimately decided that the U.S. market was not suitable for production. He also stated that the beneficiary established the "quality control system of all import and export of raw textile material and finished textile products" and "designed and implemented the engineering development programs to maximize productivity strategies." The petitioner was also notified in the NOID that the CBP searched its database for any import or export activities for the petitioner and its affiliated companies and could not locate any records between December 19, 2001 to December 15, 2004.<sup>8</sup>

Counsel asserted that the fact that no record could be found is not relevant, because "the petitioner left that business years ago and this fact is clear from the petitions the company filed." However, even if the petitioner had left that business years ago and no public record could be located, the petitioner should have been able to substantiate the existence of its past operations with internal documents. Further, the fact that the petitioner provided inaccurate information about its operations in the United States and the beneficiary's duties in order to obtain the H-1B nonimmigrant classification for the beneficiary is relevant. When the petitioner signs the petition, it is certifying, under penalty of perjury that the petition and the evidence submitted with it are true and correct. As previously noted, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

#### **b. Job Duties Changed**

Second, the AAO notes that the petitioner made material changes to the job duties. As noted, the petitioner filed a new Form I-129 on August 8, 2003 to request changes in the proffered position from the director of textile technology engineering operations to vice president of engineering. In the letter dated July 25, 2003, the petitioner stated that "[t]oday, [the petitioner]'s primary business is real estate holdings and a real estate management." Further, the petitioner indicated that the beneficiary "will formulate policies and direct the operations of the real estate interests of the

<sup>8</sup> The AAO also notes that during this time the beneficiary was paid by [REDACTED] instead of the petitioner. In the NOIR, the director noted that "the records indicate that the beneficiary did not work for the petitioner for all of 2001, 2002, and until the fourth quarter of 2003, since no record of wages paid to the beneficiary by the petitioner could be found with the Florida Department of Revenue." Instead, the search by the Florida Department of Revenue found that the beneficiary was paid by the [REDACTED] a company for which the beneficiary was not authorized to work.

company." The petitioner titled the position as "vice president of engineering" but the duties did not include any specific engineering duties. For example, the duties include "authorize maintenance of properties not under control of the operating department," "manage and supervise staff engaged in preparing lease agreements, recording rental receipts, and other activities," "be in charge of the physical plant of these buildings and supervise apartment managers," and "hire outside contractors for large projects."

On certification, counsel contends that the job description provided in [REDACTED] "sets out industrial engineering tasks that qualify as a specialty occupation." Without specifying which tasks in the job description are similar to duties of an industrial engineer, counsel asserted that in "both the 2003 and current position, [the petitioner] describes a managing industrial engineer who analyzes the real estate products and services that the company provides, determines whether these units are functioning properly and efficiently, and then formulates plans to expand the business." Counsel based his conclusions on the affidavit from Mr. [REDACTED] in which Mr. [REDACTED] also stated the following:

In this regard, [the petitioner] regularly reviewed the general business and economic environment to determine whether the company's current real estate investments were suited to the market, and how the company could change its investments and services to maximize performance. In addition, [the beneficiary] reviewed, amended, and developed systems and procedures at the company. These systems and procedures ensured that the company received current and accurate information about how well its products and services are performing.

[The beneficiary] collected this information by inspecting the properties, reviewing data, and by communicating with various employees at all levels of the company. With this information in hand, [the beneficiary] communicated his findings to his colleagues in management, and together, they determined the best strategies and practices for the company. [The beneficiary] then managed the implementation of these decisions by communicating them to the company and its employees.

[The] beneficiary never acted as a building manager. Rather, he was the engineer who managed the real estate portfolio for the real estate division of a multi-million dollar holding company. The company specifically elected to hire the beneficiary because he is a hands on engineering professional to use his knowledge of applied industrial engineering as part of a total property management strategy (i.e. the company wanted a person who could understand how to make the business run more efficiently and how to run the physical properties themselves.)

As discussed above, Mr. [REDACTED] affidavit is not substantiated with evidence and is therefore not probative. Again, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).



Furthermore, the AAO finds that Mr. [REDACTED] substantially changed the job description in his affidavit from what was described in the letter dated July 25, 2003 filed with Form I-129 ([REDACTED]).

The AAO notes that a petitioner or counsel may not offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner and counsel must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by Mr. [REDACTED] did not clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description. Therefore, Mr. [REDACTED] affidavit is not probative for this additional reason.

Moreover, the petitioner made material changes in the job description in the subsequent petition [REDACTED]. While the petitioner indicated on the Form I-129 in Part 2, that the request is "continuation of previously approved employment without change with the same employer" and also indicated in the letter filed with the Form I-129 that the beneficiary "has already been classified under the H-1B capacity for this same position," the AAO notes that the job description changed significantly. New duties included "directing and analyzing the operations that are used to evaluate the performance of our company and the staff," "determine areas of cost reduction and program improvements," and "direct, manage and coordinate the engineering operational development activities of our technology engineering and real estate project developments." In addition, the beneficiary "will continue...to use his specialty knowledge in a very complex implementation of sophisticated business activities to plan procedures, establish responsibilities, and coordinate engineering functions among the company's departments," "review statements and engineering activity reports to ensure that the company's objectives are achieved in the multi[-]million dollar investments," and "will direct and coordinate operations to ensure that [the petitioner] meets its revenue targets and to ensure that [their] goals are met." While a petitioner is permitted to file a new petition in order to amend a prior petition (to include a change in a beneficiary's job duties), it must nevertheless make this intent clear on the Form I-129. What is not permitted is for a petitioner to claim to USCIS that a beneficiary's employment would continue without change and then make significant and material changes to a beneficiary's job duties, as occurred in this case.

In addition, counsel in asserting that the proffered position is an industrial engineer position, also asserted that the 2010-2011 edition of the *Handbook* states that "many industrial engineers move into management positions because the work is closely related to the work of managers." Consequently, counsel claims that the O\*NET's description of Chief Executives is also relevant. Counsel asserts "[i]n fact, when combined with the tasks of industrial engineer, the tasks associated with [the proffered position] provide an almost perfect match to the description of [the beneficiary]'s job in the petition." Further, counsel also claims that according to the O\*NET, "most of these occupations require graduate school" and "this factor reveals that [the beneficiary] will be performing the specialty occupation of managing industrial engineer and the specialty occupation of business specialties." As will be discussed *infra*, however, the *Handbook* does not support the conclusion that chief executive positions are by default specialty occupations. Further, as previously noted, a petitioner may not offer a new position to the beneficiary, or materially change a

position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. Instead, a petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 249.

Even after materially changing the job description, the AAO notes that the position is still described in general and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness, and/or specialization of the proffered position or its duties. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work and associated educational requirements into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Specifically, the petitioner states that the beneficiary "will continue to be responsible for directing and analyzing the operations by which performance evaluations of our company and its staff are implemented," "determine areas of cost reduction and program improvements," "will direct, manage and coordinate the engineering operational and development activities of our technology and real estate project developments," and will "continue to plan procedures, establish responsibilities, and coordinate engineering functions among the company's departments." Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. For example, it is not clear what theoretical knowledge and practical application of a body of highly specialized knowledge and attainment of a bachelor's degree in the specific degree would be required to "plan procedures, establish responsibilities, and coordinate engineering functions," when the petitioner indicated on the Form I-129 that it has 9 employees. To the extent that they are described by the petitioner, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position.

In the instant case, the petitioner has provided insufficient probative documentation to substantiate its assertions regarding its business activities in connection with the claimed duties the beneficiary will perform. That is, there is a lack of substantive, documentary evidence to substantiate its claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition. The petitioner has not sufficiently established that it employed and will continue to employ the beneficiary in the capacity specified in the petition. Without further clarification by the petitioner, it appears that the beneficiary was employed in a lesser capacity or serving in a different position and would likely continue to serve in such a capacity under an approved petition. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165. USCIS regulations affirmatively require a



petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1).<sup>9</sup>

Although the petitioner requested the beneficiary be granted H-1B classification for a three-year period, the evidence does not establish that the petitioner would be able to sustain an employee performing the duties of a vice president of engineering as described in this petition. The record also fails to establish that the petition was filed on the basis of employment for the beneficiary as a vice president of engineering that, at the time of the petition's filing, was nonspeculative for the entire period of employment specified in the Form I-129. The petitioner has not established that the beneficiary's overall day-to-day duties, for the entire period requested, required at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation.

A position may be awarded H-1B classification only on the basis of evidence establishing that, at the time of the filing, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding did not contain sufficient evidence to meet the petitioner's burden in this regard. As a petitioner must demonstrate eligibility for the benefit sought at the time of filing, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 249; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

## 2. Does Not Meet the Statutory and Regulatory Requirements

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<sup>9</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

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

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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:

*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 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), 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.

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

Moreover, when determining whether a position is a specialty occupation, USCIS must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may

independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

When determining whether a proffered position qualifies as a specialty occupation, USCIS must determine, *inter alia*, whether the petitioner has (1) provided sufficient evidence to establish that the beneficiary will perform the duties of the proffered position as stated in the petition; and (2) established that, at the time of filing, it had secured non-speculative work for the beneficiary that is in accordance with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

Here, the AAO hereby incorporates its earlier analysis, comments, and findings with regard to the discrepancies in the record, and the lack of evidence substantiating the nature of its business and duties and responsibilities of the position. As described, the AAO finds that the duties do not provide a sufficient factual basis to convey a persuasive basis to discern the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, such that they persuasively support any claim in the record of proceeding that the work that they would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Again, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1).

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and



complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

Nevertheless, for the purpose of providing a comprehensive discussion, the AAO will now address in detail the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>10</sup> As previously discussed, the petitioner asserted that the proffered position was an "Industrial Engineer" position combined with "Chief Executives."

First, the AAO reviewed the chapter of the *Handbook* entitled "Industrial Engineers" including the sections regarding the typical duties and requirements for this occupational category.<sup>11</sup> However, the AAO finds that there is insufficient evidence that the proffered position is an industrial engineer position.

The subchapter of the *Handbook* entitled "What Industrial Engineers Do" states the following about this occupation:

Industrial engineers find ways to eliminate wastefulness in production processes. They devise efficient ways to use workers, machines, materials, information, and energy to make a product or provide a service.

#### **Duties**

Industrial engineers typically do the following:

- Review production schedules, engineering specifications, process flows, and other information to understand methods and activities in manufacturing and services
- Figure out how to manufacture parts or products, or deliver services, with maximum efficiency
- Develop management control systems to make financial planning and cost analysis more efficient
- Enact quality control procedures to resolve production problems or minimize costs
- Work with customers and management to develop standards for design and production

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<sup>10</sup> All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The AAO hereby incorporates into the record of proceeding the chapters of the *Handbook* regarding "Industrial Engineers," "Top Executives," and "Property, Real Estate, and Community Association Managers."

<sup>11</sup> For additional information on the occupational category "Industrial Engineers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Industrial Engineers, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/industrial-engineers.htm#tab-4> (last visited June 11, 2014).

- Design control systems to coordinate activities and production planning to ensure that products meet quality standards
- Confer with clients about product specifications, vendors about purchases, management personnel about manufacturing capabilities, and staff about the status of projects

Industrial engineers apply their skills to many different situations from manufacturing to business administration. For example, they design systems for

- moving heavy parts within manufacturing plants
- getting goods from a company to customers, including finding the most profitable places to locate manufacturing or processing plants
- evaluating how well people do their jobs
- paying workers

Industrial engineers focus on how to get the work done most efficiently, balancing many factors—such as time, number of workers needed, available technology, actions workers need to take, achieving the end product with no errors, workers' safety, environmental concerns, and cost.

To find ways to reduce waste and improve performance, industrial engineers first study product requirements carefully. Then they use mathematical methods and models to design manufacturing and information systems to meet those requirements most efficiently.

Their versatility allows industrial engineers to engage in activities that are useful to a variety of businesses, governments, and nonprofits. For example, industrial engineers engage in supply chain management to help businesses minimize inventory costs, conduct quality assurance activities to help businesses keep their customer bases satisfied, and work in the growing field of project management as industries across the economy seek to control costs and maximize efficiencies.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Industrial Engineers, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/industrial-engineers.htm#tab-2> (last visited June 11, 2014).

The AAO is not persuaded by the petitioner's claim that its proffered position entitled vice president of engineering falls under the occupational category for "Industrial Engineers." As previously noted, the duties for the proffered position have changed significantly over time. For example, in [REDACTED], the beneficiary's duties included "authorize maintenance of properties not under control of the operating department," "determine maintenance schedules of common areas," "manage and supervise staff engaged in preparing lease agreements," and "being in charge of the physical plant of these buildings," which does not include any engineering duties. However, in [REDACTED] and subsequent petitions including this petition, the petitioner added new duties such as "directing and analyzing the operations that are used to evaluate the performance of our



company and the staff," "determine areas of cost reduction and program improvements," "direct, manage and coordinate the engineering operational development activities of our technology engineering and real estate project developments" and more, that resemble the job description for industrial engineers.

On certification, counsel claimed that the "current job description is same as the 2003 position with some additional responsibilities (which is to be expected in a growing company)." Further, counsel states that the *Handbook's* description of "Industrial Engineers" "provides further proof that [the beneficiary] was engaged and will be engaged in a standard industrial engineering capacity." However, the AAO finds that counsel failed to provide probative documentary evidence to substantiate its claim that the beneficiary will primarily, or substantially, perform the same or similar duties, tasks and/or work activities that characterize the occupation of industrial engineers. Instead, counsel relies on a non-specific, generic job description to assert that the proffered position is an industrial engineer position.

Counsel also asserted that "when combined with the tasks of industrial engineer, the tasks associated with Vice President<sup>12</sup> provide almost perfect match to the description of [the beneficiary]'s job in the petition." The AAO reviewed the chapter of the *Handbook* entitled "Top Executives" including the sections regarding the typical duties and requirements for these occupational categories. However, the *Handbook* does not indicate that "Top Executives" comprise occupational groups for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Top Executive" states the following about this occupation:

Although education and training requirements vary widely by position and industry, many top executives have at least a bachelor's degree and a considerable amount of work experience.

### **Education**

Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts. Top executives of large corporations often have a master of business administration (MBA). College presidents and school superintendents typically have a doctoral degree in the field in which they originally taught or in education administration.

### **Work Experience in a Related Occupation**

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<sup>12</sup> The O\*NET's description of job duties for 11-1011.00 Chief Executives also includes the job title, Vice President.

Many top executives advance within their own firm, moving up from lower level managerial or supervisory positions. However, other companies may prefer to hire qualified candidates from outside their organization. Top executives that are promoted from lower level positions may be able to substitute experience for education to move up in the company. For example, in industries such as retail trade or transportation, workers without a college degree may work their way up to higher levels within the company to become executives or general managers.

Chief executives typically need extensive managerial experience. Executives are also expected to have experience in the organization's area of specialty. Most general and operations managers hired from outside an organization need lower level supervisory or management experience in a related field.

Some general managers advance to higher level managerial or executive positions. Company training programs, executive development programs, and certification can often benefit managers or executives hoping to advance. Chief executive officers often become a member of the board of directors.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Top Executives, on the Internet at <http://www.bls.gov/ooh/management/top-executives.htm#tab-4> (last visited June 11, 2014).

The *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Specifically, the *Handbook* indicates that top executives who are promoted from lower level positions may be able to substitute experience for education. More importantly, however, the *Handbook* does not indicate that a degree in a *specific specialty*, or its equivalent, is normally the minimum requirement for entry into these positions. Instead, the *Handbook* only states that many top executives have a degree in business administration or in an area related to their field of work. Although a general-purpose bachelor's degree, such as a degree in business or business administration, may be a legitimate prerequisite for a particular position, the acceptance of 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, even though the *Handbook* does not state that a general, non-specialty degree in business/business administration is required for a top executive position, its recognition that many top executives have such a degree implies that it is sufficient for entry into the occupation and thereby strongly suggests that a bachelor's degree *in a specific specialty* is not a standard, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a top executive 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.

In the decision, the director noted the job description included with the petitioner's prior petition with receipt number [REDACTED] was for a property manager. The director found that "other than the title and the claim that the position requires extensive knowledge of engineering management, there are no other engineering references in the description of duties." As noted by



the director, the "Property, Real Estate, and Community Association Managers occupation" is not one that requires a bachelor's degree in a specific specialty as a normal, minimum for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become a Property, Real Estate, and Community Association Managers" states the following about this occupational category:

Although many employers prefer to hire college graduates, a high school diploma or equivalent is enough for some jobs. Some managers receive vocational training. Other managers must have a real estate license.

### **Education**

Many employers prefer to hire college graduates for property management positions, particularly for offsite positions dealing with a property's finances or contract management. Employers also prefer to hire college graduates to manage residential and commercial properties. A bachelor's or master's degree in business administration, accounting, finance, real estate, or public administration is preferred for commercial management positions. Managers of commercial properties and those dealing with a property's finances and contract management increasingly are finding that they need a bachelor's or master's degree in business administration, accounting, finance, or real estate management, especially if they do not have much practical experience.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Property, Real Estate, and Community Association Managers, on the Internet at <http://www.bls.gov/ooh/management/property-real-estate-and-community-association-managers.htm#tab-4> (last visited June 11, 2014).

The AAO notes that the *Handbook* does not report that "Property, Real Estate, and Community Association Managers" comprise an occupational group for which the standard, minimum requirement for entry is at least a bachelor's degree in a specific specialty for entry. The *Handbook* explains that, although many employers prefer to hire college graduates, a high school diploma or equivalent is enough for some jobs. The *Handbook* continues by stating that many employers prefer to hire college graduates for property management positions, particularly offsite positions dealing with finances or contract management. Employers also prefer college graduates to manage commercial properties. The *Handbook* does not indicate, however, that at least a baccalaureate degree in a specific specialty (or its equivalent), is normally the minimum requirement for entry into the occupation.

Further, the *Handbook* indicates that a bachelor's or master's degree in business administration, accounting, finance, real estate, or public administration is preferred for these positions. 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.<sup>13</sup> Section 214(i)(1)(B) of the Act (emphasis added).

Further, 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. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation (as a preferred degree) strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a "Property, Real Estate, and Community Association Manager" 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.

Upon review of the record, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that the standard, minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that this particular position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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<sup>13</sup> 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.



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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the AAO finds that the petitioner has submitted insufficient documentary evidence to establish that the proffered position is an industrial engineer position. Further, the record has not established chief executive (vice president) or property manager positions as being occupations that normally require at least a bachelor's degree in a specific specialty for entry into the positions. Therefore, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from professional associations 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.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the proffered position is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the petitioner stated:

8 C.F.R. § 214.2(h)(4)(iii)(C)(1) qualifies aliens to perform services in a specialty occupation when they "Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university[.]" As the enclosed bachelor's degree and transcripts make clear, [the beneficiary] received a Bachelor of Science degree in Textile Engineering from the [REDACTED] (See Enclosed Exhibits 3 and 4) (emphasis in the original). [The beneficiary] has a vast amount of specialty knowledge that has made him an excellent candidate for this H-1B specialty classification.

The AAO notes that to demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. The AAO observes that the petitioner has indicated that the beneficiary "has over thirty years of professional experience in the engineering management field"

and "a vast amount of specialty knowledge that has made him an excellent candidate." However, the test to establish a position as a specialty occupation is not the skill set or education of the beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. That is, the petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").



The petitioner stated in the Form I-129 petition that it has 9 employees and that it was established in 1983 (approximately 27 years prior to the H-1B submission). However, the petitioner did not submit any information regarding its employees.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Upon review of the record of proceeding and for the reasons discussed above, the AAO finds that the petitioner has submitted inadequate probative evidence with regard to the duties of the proffered position to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

## **B. The Beneficiary's Qualification**

As previously discussed, the petitioner asserted that the proffered position was an industrial engineer position combined with a chief executive position. However, the AAO found that the petitioner has submitted insufficient documentary evidence to establish that the proffered position is an industrial engineer position. Further, the AAO found that the record of proceeding does not establish that either chief executive (vice president) or property manager positions are occupations for which a bachelor's or higher degree in a specific specialty, or its equivalent, is a standard, minimum entry requirement. Therefore, the petitioner failed to establish that the proffered position is a specialty occupation position. The AAO notes that a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, and the AAO need not and will not address the beneficiary's qualifications further.

However, assuming *arguendo*, that the proffered position was an industrial engineer position, the AAO finds that there is insufficient evidence in the record to establish that the beneficiary would qualify to perform its duties.

The *Handbook* provides the following information in the subsection entitled "How to Become an Industrial Engineer" for this occupational category:

Industrial engineers must have a bachelor's degree. Employers also value experience, so cooperative education engineering programs at universities are also valuable.

### Education

Industrial engineers need a bachelor's degree, typically in industrial engineering. However, many industrial engineers have degrees in mechanical engineering, manufacturing engineering, industrial engineering technology, or general engineering. Students interested in studying industrial engineering should take high school courses in mathematics, such as algebra, trigonometry, and calculus; computer science; and sciences such as chemistry and physics.

Bachelor's degree programs include lectures in classrooms and practice in laboratories. Courses include statistics, production systems planning, and manufacturing systems design, among others. Many colleges and universities offer cooperative education programs in which students gain practical experience while completing their education.

A few colleges and universities offer 5-year degree programs in industrial engineering that lead to a bachelor's and master's degree upon completion, and several more offer similar programs in mechanical engineering. A graduate degree allows an engineer to work as a professor at a college or university or to engage in research and development. Some 5-year or even 6-year cooperative education plans combine classroom study with practical work, permitting students to gain experience and to finance part of their education.

Programs in industrial engineering are accredited by ABET.

*Handbook*, 2014-15 ed., Industrial Engineers, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/industrial-engineers.htm#tab-2> (last visited June 11, 2014).

According to the *Handbook*, the industrial engineers must have a bachelor's degree in industrial engineering. In this case, the beneficiary received a Bachelor of Science in Textile Engineering from [REDACTED] on June 7, 1964. The record does not contain evidence that the beneficiary's textile engineering degree is equivalent to a degree in industrial engineering or is otherwise directly related to the proffered position's duties. Therefore, even if the proffered position was an industrial engineering position, which it is not, the beneficiary would not qualify for the position since the beneficiary does not have the requisite degree in industrial engineering, or its equivalent.



The AAO notes that the record of proceeding contains two evaluations of the beneficiary's academic credentials and work experience by the following individuals: (1) [REDACTED], Ph.D., a Credential Evaluator at [REDACTED] and (2) [REDACTED], Ph.D., an Associate Professor in the Department of Industrial and Systems Engineering at [REDACTED]. It is noted that the evaluations offer two different conclusions regarding the beneficiary's qualifications. Dr. [REDACTED] concludes that the beneficiary's degree in textile engineering and over 37 years of professional management related work experience in the textile industry are "academically equivalent to a second major in engineering management." On the other hand, Dr. [REDACTED] concluded that the beneficiary "has the employment experience and educational background that is the educational equivalent of a Bachelor's Degree in Industrial Engineering from an accredited university or college in the U.S. through his 34+ years of verified, full-time, progressively more responsible work experience from July 1966 until November 2000 and his B.S. degree in Textile Engineering." Upon review of both evaluations, the AAO finds that the evaluations both fail to establish that the beneficiary qualifies for the proffered position.

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.

The degree referenced by section 214(i)(1)(B) of the Act, 8 U.S.C. § 1184(i)(1)(B), means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

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.

For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

- (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 (PONSIS);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;<sup>14</sup>
- (4) 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;
- (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 petitioner did not submit evidence to satisfy the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(2)-(4). In the present matter, the petitioner relies upon two previously mentioned evaluations of the beneficiary's qualifications. However, upon review of the evaluations, the petitioner has failed to establish that the beneficiary is qualified to serve in a specialty occupation position.

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<sup>14</sup> 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.



Dr. [REDACTED] stated that the beneficiary's "academic studies, combined with the continued learning he acquired through his over 37 years professional work experience as an executive and senior manager in the textile industry are academically equivalent to a second major in engineering management." However, as noted in the NOID, a credential evaluation service's evaluation is limited to education only, not training and/or work experience. Specifically, the evaluator does not claim or provide any documentation to demonstrate that he has the authority to grant college-level credit for *work experience* in the specialty (nor does he indicate that he is an official at an accredited college or university that has a program for granting such credit based on an individual's work experience).

Even if Dr. [REDACTED] had indicated that he was such an official, there is no independent evidence in the record from appropriate officials, such as deans or provosts, to corroborate that, at the time of the evaluation, Dr. [REDACTED] was, in the language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(I), "an official [with] 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." Furthermore, while Dr. [REDACTED] claims to have a Ph.D. degree, the record is devoid of information regarding Dr. [REDACTED] specialty. Thus, Dr. [REDACTED] has not established that he is competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the educational equivalency of the beneficiary's work experience. Accordingly, this evaluation, does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) for competency to render to USCIS an opinion on the educational equivalency of work experience.

The evaluation from Dr. [REDACTED] is accompanied by a letter from Dr. [REDACTED] Ph.D., the Department Head of Industrial and Systems Engineering at [REDACTED]. In the letter, Dr. [REDACTED] states that "this letter is to confirm that [REDACTED] faculty [has] the authority to grant college level credit for training and experience, both in the areas of training and generally in those foundational areas of university education." However, the letter does not specifically state that Dr. [REDACTED] has the authority to grant college-level credit for training and work experience.

Aside from the lack of evidence of Dr. [REDACTED] qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the beneficiary's experience, the AAO finds that the content of the evaluation regarding the beneficiary's experience would merit no weight even if he was qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). Specifically, the evaluation is not supported by probative evidence to support Dr. Carrano's claims regarding the beneficiary's professional experience.

Dr. [REDACTED] indicated that he examined the copies of the beneficiary's diploma and transcript in Textile Engineering from the [REDACTED] and a letter of employment verification from [REDACTED] from July 1966 until November 2000. The AAO finds that the letter from [REDACTED] dated May 7, 2007 by [REDACTED] General Manager, states the following:

Let this letter serve as a confirmation to you that [the beneficiary] was employed with our corporation [REDACTED] as a full time President from July 1966 to November 2000. In this capacity he formulated and established organizational policies and operating procedures for engineering systems organizations. Reviewed the technical engineering problems and procedures of departments. Established engineering operational procedures and goals. Coordinated product assurance program to improve existing engineering products and production. Implemented cost benefit analysis for engineering products. Directed engineering operational procedures and goals. Reviewed technical engineering procedures for the corporation and recommended solutions for the business engineering quality assurance operations.

Upon review of the letter, the AAO finds that it provides insufficient information regarding the beneficiary's work history and duties (i.e., complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties). Additionally, the letter does not indicate whether the beneficiary was employed on a full-time or part-time basis. The letter does not provide information regarding the requirements (if any) for the beneficiary's position. Furthermore, the letter is devoid of information regarding the academic credentials of the beneficiary's peers, supervisors and/or subordinates.

The letter provides an extremely brief description of the beneficiary's responsibilities and, thus, the letter does not present an adequate factual foundation for the evaluator's assertions and conclusions. Thus, the AAO finds the evaluation fails to establish that the beneficiary possesses the equivalent of a bachelor's degree in industrial engineering based upon the information provided regarding his work-related duties and responsibilities.

Further, the AAO notes that Dr. [REDACTED] stated that "the educational and professional background for [the beneficiary] is that of an Industrial Engineer, as defined by the [DOT] and the O\*NET Online." The AAO finds that Dr. [REDACTED] bases his opinion, in part, on non-specific, generic duty descriptions.

In light of the lack of a sufficient factual foundation discussed above, both evaluations are questionable, even if they had been rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Accordingly, the AAO accords no weight to the assessments of the beneficiary's work experience by the evaluators, and no weight to the ultimate conclusion of Dr. [REDACTED] that the beneficiary holds the equivalent of a U.S. bachelor's degree in industrial engineering.

The AAO may, in its discretion, use an evaluation of a person's foreign education as an advisory opinion. However, where an opinion is not in accord with other information or is in any way questionable, the AAO may discount or give less weight to that evaluation. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).



The petitioner has failed to satisfy any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4), and the AAO will next perform an evaluation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination and that, also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of professional recognition.

When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), 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<sup>15</sup>;
- (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;
- (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.

Upon review of the record, the petitioner has not provided the required, corroborating evidence outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Thus, the AAO cannot conclude that the beneficiary's combination of education, training, and/or work experience equates to a U.S. bachelor's or higher degree in industrial engineering based on the current record of proceeding. As such, since evidence was not presented that the beneficiary has at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the proffered position, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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<sup>15</sup> *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. 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner, therefore, has failed to establish that the beneficiary is qualified to perform the duties of an industrial engineer, even if the proffered position was found to be an industrial engineer position.

### C. No Employer-Employee Relationship

Next, the AAO will address the director's determination that the petitioner failed to establish that it had and would continue to have an employer-employee relationship with the beneficiary.

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

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

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

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

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

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner had and would continue to have an employer-employee relationship with the beneficiary. Applying the common-law definition mandated by the Supreme Court of the United States for construing the terms "employee" and "employer-employee relationship" in the absence of a non-circular definition of these terms, the record is not persuasive in establishing that the beneficiary was and would continue to be an "employee" of the petitioner.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-



1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and (2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i) and (2)(C)(vii). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1) and (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor USCIS defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

Within the context of H-1B nonimmigrant petitions, when an alien beneficiary is also a partner, officer, member of a board of directors, or an owner of the corporation, the beneficiary may only be defined as an "employee" having an "employer-employee relationship" with a "United States employer" if he or she is subject to the organization's "control." 8 C.F.R. § 214.2(h)(4)(ii). The Supreme Court decision in *Clackamas* specifically addressed whether a shareholder-director is an employee and stated that six factors are relevant to the inquiry. 538 U.S. at 449-450. According to *Clackamas*, the factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

*Clackamas*, 538 U.S. at 449-450; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1)(d), (EEOC 2006).

Again, this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Clackamas*, 538 U.S. at 450 (citing *Darden*, 503 U.S. at 324).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>16</sup>

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<sup>16</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g.,



Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>17</sup>

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>18</sup>

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*Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

<sup>17</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>18</sup> That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. See, e.g., section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and

In the past, the former INS considered the employment of principal stockholders by petitioning business entities in the context of employment-based classifications. However, these precedent decisions can be distinguished from the present matter.

The decisions in *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm'r 1979) both conclude that corporate entities may file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The AAO does not question the soundness of this particular conclusion and does not take issue with a corporation's ability to file an immigrant or a nonimmigrant visa petition. The cited decisions, however, do not address an H-1B petitioner's burden to establish that an alien beneficiary will be a bona fide "employee" of a "United States employer" or that the two parties will otherwise have an "employer-employee relationship." See *id.*; 8 C.F.R. § 214.2(h)(4)(ii).

Although an H-1B petitioner may file a visa petition for a beneficiary who is its sole or primary owner, this does not necessarily mean that the beneficiary will be a bona fide "employee" employed by a "United States employer" in an "employer-employee relationship." See *Clackamas*, 538 U.S. at 440. Thus, while a corporation that is solely or substantially owned by a beneficiary is not prohibited from filing an H-1B petition on behalf of its alien owner, the petitioner must nevertheless establish that it will have an "employer-employee relationship" with the beneficiary as understood by common-law agency doctrine.

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; see also 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . . ." (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; see also *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 445; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).



Moreover and as detailed above, in addition to the sixteen factors relevant to the broad question of whether a person is an employee, there are six factors to be considered relevant to the narrower question of whether a shareholder-director is an employee. *See Clackamas*, 538 U.S. at 449. These factors include whether the organization can hire or fire the individual; whether and to what extent the organization supervises the individual's work; whether the individual reports to a more senior officer or employee of the organization; and whether the individual shares in the organization's profits, losses, and liabilities. *Id.* at 449-450.

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right* to provide the tools required to complete an assigned project. *See id.* at 323.

In applying the test as outlined in *Clackamas*, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; *cf. Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988) (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it was and would continue to be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." As mentioned above, the beneficiary owns 33.33% interest in the petitioning entity. As noted above, the beneficiary is also listed as an officer of the petitioning entity. The AAO will address the factors addressed in *Clackamas*, to determine whether the beneficiary, who is also a shareholder and officer for the petitioning entity, would be an employee.

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.

In the NOID, the director found that "the evidence in the record is insufficient to establish that there is a separation between the beneficiary and the employing entity." The director found "it is not reasonable to believe that the petitioner could or would fire the beneficiary since to do so would result in the loss of the beneficiary's nonimmigrant status and his forced return to Ecuador to face criminal prosecution for embezzlement." On certification, counsel asserts that the director's statement that the petitioner "would never fire [the beneficiary] because doing so would cause [the beneficiary] to lose his immigration status in the United States, force him to leave the country and expose him to prosecution in Ecuador" is "demonstrably false." Counsel claims that "the company has twice placed [the beneficiary] on leave-both times in response to immigration developments," i.e., (1) when the beneficiary's H-1B visa petition was revoked in May 2005 until the AAO overturned the decision in August 2005; and (2) when the beneficiary was placed on administrative leave because he was not issued an employment authorization document in connection with his status as the dependent of an E-2 treaty trader and his prior H-1B had expired. In support of his assertion, counsel relies on Mr. [REDACTED] affidavit. However, as mentioned, the AAO finds that Mr. [REDACTED] affidavit is not corroborated by documentary evidence in this regard. The petitioner failed to submit documents to establish that the beneficiary was placed on leave during the period mentioned by counsel. As previously noted, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Therefore, the petitioner failed to demonstrate that it can fire the beneficiary.

- Whether and, if so, to what extent the organization supervises the individual's work.

The AAO finds that the petitioner failed to establish that the petitioner supervised the beneficiary. As mentioned, the record contains a copy of the two-page document entitled [REDACTED]. On page 1, it states that the petitioner has \$15 million of funds to invest as a result of the sale of the convenience store investment. The document states that the "current plans are to invest these funds in the U.S." It further states that the petitioner "wishes to be able to closely monitor its investments." And "expects those to be in the following industries," which include "communications and related new technology, textile industry import and export, and import and export and related financing." Under the subtitle "Textile Industry Import & Export," it states "[a]s a result of the particular expertise of [the beneficiary] in the Textile Industry, and specifically his knowledge of the needs of this industry in Ecuador, we expect to generate \$225,000 to [\$]310,000 annual net commission income from this function as detailed in the attached." Page 2 of the future plans document is entitled "Budgeted Revenues –Future Plans," and forecasts revenue for import and export of textiles and debt swaps for the next 4 years. The AAO finds that the document is not reliable as it is neither signed nor dated, and the AAO is unable to determine if the document was generated by an authorized official for the petitioner. Further, even if the document has been authenticated, it does not offer sufficient information. While the document stated that the petitioner "wishes to be able to closely monitor its investment," the document did not indicate the



extent or means of supervision. Further, as mentioned above, the petitioner indicated that the beneficiary's position "involves a substantial amount of autonomy." As such, there is insufficient evidence in the record that the organization supervises and would continue to supervise the beneficiary's work.

- Whether the individual reports to someone higher in the organization.

The AAO finds that the petitioner failed to provide any evidence that the beneficiary reports to someone higher in the organization. In the Form I-129, the petitioner stated that it has nine employees. In the letter dated December 9, 2010, the petitioner claimed that it is "a full service business conglomerate, which handles a variety of entities and employs a complete staff of professionals who oversee the operations." However, the AAO finds that the record is devoid of information about the employees at the petitioning entity and their positions within the company in relation to the beneficiary. Therefore, the petitioner failed to establish that the beneficiary reports to someone higher in the organization.

- Whether and, if so, to what extent the individual is able to influence the organization.

Based on the petitioner's claims, it appears that the beneficiary will have substantial influence over the organization. In the support letter dated December 7, 2010, the petitioner claimed that the beneficiary "will continue to be responsible for directing and analyzing the operations by which performance evaluations of our company and its staff are implemented." The beneficiary will also "continue to determine areas of cost reduction and program improvements." The petitioner added that the beneficiary "will also direct, manage and coordinate the engineering operational and development activities of our technology and real estate project developments." The petitioner does not provide probative evidence demonstrating that the beneficiary will not have significant influence over the organization as an owner and executive of the company.

- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.

The petitioner did not submit an employment agreement or contract or any other document describing the beneficiary's employment relationship with the petitioner.

- Whether the individual shares in the profits, losses, and liabilities of the organization.

The Schedule E of the 2003 Corporation Income Tax Return indicates that the beneficiary received \$169,870 as compensation as an officer. Therefore, it appears that the beneficiary shares in the profits of the organization.

In view of the above, it appears that the beneficiary was a proprietor of this business and was not an "employee" having an "employer-employee relationship" with a "United States employer." Specifically, the AAO finds that it has not been established that the beneficiary will be "controlled"

by the petitioner or that the beneficiary's employment could be terminated. While it appears that the beneficiary may not be the majority owner of the shares of the company, the record lacks evidence regarding its exact ownership, the types of stock issued, voting rights, and/or any proxies sufficient to determine control of the petitioner. In any event, the record is devoid of information regarding to what extent, if any, the petitioner supervised the beneficiary's work or if the beneficiary reported to someone higher in the organization. It appears that the beneficiary was not supervised and that he did not report to anyone in the organization, but he was given "substantial amount of autonomy in the decision[s] of the company." Finally, the AAO also notes that there is no record of employment actions or any employment history for this corporation that would establish that it ultimately controls the work of the beneficiary. Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

On certification, counsel referred to the USCIS memorandum issued by Donald Neufeld, Associate Director for Service Center Operations, to assert that the employer is the entity that had control over the beneficiary. Counsel emphasized "the Neufeld memorandum directs that a petitioner must be able to demonstrate that it has 'right to control' an employee to establish the relationship" and listed some of the factors discussed in the memorandum. For example, counsel stated that, as the Vice President of Engineering, the beneficiary had "access to and regularly worked with the company's most sensitive financial and technological data and information," and that the petitioner "provided and proposed to provide [the beneficiary] with an office, a computer, an assistant, and all of the other resources and information he needs to complete his work for the company." However, counsel relies on Mr. [REDACTED] affidavit to support these claims, which, as previously mentioned is not corroborated and is not probative evidence. Thus, while counsel repeatedly stated that the petitioner had control over the beneficiary, he fails to support his statement with probative documentary evidence.

Upon review of the record of proceeding, it cannot be concluded that the petitioner has established that it qualifies as a United States employer with standing to file the instant petition in this matter. See section 214(c)(1) of the Act (requiring an "Importing Employer"); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the "United States employer . . . must file" the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only "United States employers can file an H-1B petition" and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). That is, based on the tests outlined above, the record of proceeding as currently constituted does not establish that the petitioner will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

Accordingly, the AAO finds that the petitioner and the beneficiary are not eligible for the benefit sought, and the petition remains denied for this additional reason.

#### **D. Additional Issues Beyond the Director's Decision**

The AAO reviewed the record of proceeding in its entirety and, as will be discussed below, has identified additional issues that preclude the approval of the H-1B petition that was not identified by the director. Thus, even if the petitioner overcame the grounds for the director's denial of the



petition (which it has not), it could not be found eligible for the benefit sought for these additional reasons discussed *infra*.

### 1. The LCA Does Not Correspond

The AAO finds that the record of proceeding contains discrepancies between what the petitioner claims about the occupational category, duties the beneficiary will perform, and level of responsibility inherent in the proffered position set against the stated occupational category and level of responsibility conveyed by the petitioner in the LCA submitted in support of the petition.

More specifically, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Industrial Engineers" - SOC (ONET/OES) code 17-2112. The petitioner stated in the LCA that the wage level for the proffered position was a Level IV (fully competent) position, with a prevailing wage of \$74,256 and proffered wage of \$180,000 per year. The LCA was certified on December 14, 2010 and signed by the petitioner on December 15, 2010. As previously mentioned, in response to the NOID, counsel stated that "O\*NET's description for Chief Executives is also relevant." Counsel states "[i]n fact, when combined with the tasks of industrial engineer, the tasks associated with Vice President provide an almost perfect match to the description of [the beneficiary]'s job in the petition." On certification, counsel asserted that the proffered position is a combination of O\*NET's description of "Chief Executives" and industrial engineers. As previously noted, the petitioner or counsel cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner and counsel must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 249.

With respect to the LCA, DOL provides clear guidance for selecting the most relevant Occupational Information Network (O\*NET) classification code. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the SWA should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

A search of the Foreign Labor Certification Data Center Online Wage Library reveals that the prevailing wage for "Chief Executive" – SOC (O\*NET/OES) Code 11-1011 for Dade County (Miami, Florida) at Level IV is \$217,131.<sup>19</sup> Thus, if the petitioner believed its position was a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for *the highest paying* occupational category, in this case "Chief Executive." Instead, the petitioner chose the occupational code for *the lowest paying* occupational category.

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, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The petitioner's offered wage to the beneficiary of \$180,000 per year is below the prevailing wage for the occupational classification of "Chief Executives" in the area of intended employment. Again, the Level IV prevailing wage for the occupational category of "Chief Executives" in the area of intended employment was \$217,131 per year at the time the petition was filed in this matter. As such, the difference in salary would be \$37,131 per year.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. Thus, for this reason as well, the H-1B cannot be approved.

Moreover, the 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, petitioner, 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. . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a

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<sup>19</sup> For more information regarding the prevailing wage for Chief Executives in Dade County, see the All Industries Database for 7/2009 - 6/2010 for Chief Executives at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=11-1011&area=33124&year=10&source=1> (visited June 11, 2014).



petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1). 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.

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

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

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

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

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. In the instant case, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA for the proper occupational category and prevailing wage that applied at the time the petition was filed. Therefore, the petitioner has failed to comply with the filing requirement at 8 C.F.R. § 214.2(h)(4)(i)(B) by providing a certified LCA that corresponds to the instant petition. For this reason also, the petition may not be approved.

## 2. Not Eligible for An Extension

It is noted that in the instant petition, the petitioner marked "b" under "Basis for Classification" of Part 2 to indicate that the petition is "continuation of previously approved employment without change with the same employer." Under "Requested Action," the petitioner marked "c" to "extend the stay of the [beneficiary] since they now hold this status." However, the AAO notes that all

previous petitions filed on behalf of the beneficiary have been revoked as of October 24, 2011.<sup>20</sup> Thus, the beneficiary was not entitled to the benefit and the petition can not be deemed to have ever been valid. *See Matter of Al Wazzan*, 25 I&N Dec. 359, 367 (AAO 2010) (stating that "it would severely undermine the immigration laws of the United States to find that a petition is 'valid' when that petition was never approved or, even if it was approved, it was filed on behalf of an alien who was never 'entitled' to the requested visa classification."). As the revoked H-1B petition is not deemed to have ever been valid, it may not be extended. *See* 8 C.F.R. § 214.2(h)(14) (stating in part that a "request for a petition extension may be filed only if the validity of the original petition has not expired."). That is, knowing now that all prior petitions have been fully revoked and as the petitions were thereby never valid to begin with, prior petitions may not be deemed to have been valid at the time this petition extension was filed. Accordingly, the instant petition extension must be denied for this additional reason.

### III. CONCLUSION

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 145 (noting that the AAO conducts its review of service center decisions 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 director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial. 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 director's decision is affirmed. The petition is denied.

<sup>20</sup> The petitioner filed several H-1B petitions on behalf of the beneficiary including the following:

Receipt Number	Date filed	Date approved	Date of NOIR/NOID	Date of revocation/denial
	12/13/2001	12/19/2001	12/03/2010	10/24/2011
	03/31/2006	05/05/2006	12/03/2010	10/24/2011
	06/26/2008	09/17/2008	12/03/2010	10/24/2011
	09/22/2009	10/02/2009	12/03/2010	10/24/2011