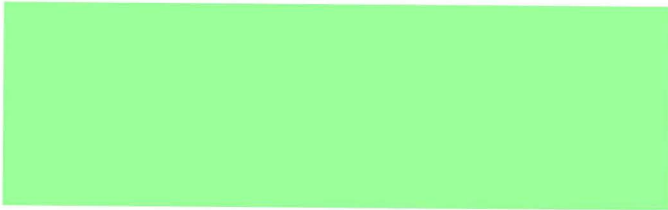




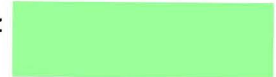
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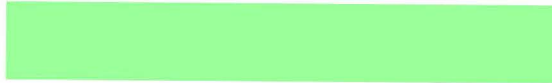
OFFICE: CALIFORNIA SERVICE CENTER FILE:



IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 initially approved the nonimmigrant visa petition. Upon subsequent review of the record of proceeding, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The director certified the decision to the Administrative Appeals Office (AAO) for review. Upon review, the AAO will affirm the decision of the director. The approval of the petition will remain revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Texas Service Center on August 8, 2003. In the Form I-129 visa petition, the petitioner described itself as a real estate holdings and management business established in 1983. In order to employ the beneficiary in what it designated as a vice president of engineering position, the petitioner sought to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petition was approved on August 20, 2003, for what was designated as a vice president of engineering position. On April 7, 2005, the Director of the Texas Service Center, issued a NOIR on the basis that, as the Department of State (DOS) revoked all visas issued to the beneficiary, the beneficiary had not maintained a valid nonimmigrant status. Ultimately, the director revoked the approval of the petition on that basis, on May 12, 2005. Subsequently, the petitioner filed an appeal. On August 3, 2005, the AAO withdrew the director's revocation, finding that DOS' invalidation of the beneficiary's visas offers no basis to revoke the petitioner's H-1B petition. Thereafter, the petitioner filed more petitions to request extensions of H-1B nonimmigrant classification on behalf of the beneficiary.<sup>1</sup>

On December 3, 2010, the director issued a NOIR for all previously approved petitions including the instant petition. In the NOIR, the director noted that the petitioner and the beneficiary, may have engaged in activities in violation of the immigration laws of the United States. On October 24, 2011, upon subsequent review of the record of proceeding upon which approval of the petition was based, the director ultimately revoked the approval of the petition for a second time. Subsequently, an appeal was filed, but the AAO rejected it 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 on June 27, 2013, asserting that the director's basis for revoking the approval of the petition was erroneous and that the petitioner satisfied all evidentiary requirements.

<sup>1</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
	12/21/2010	N/A	04/22/2011	10/24/2011

Pertinent to the issues certified to the AAO, the record of proceeding contains: (1) the Form I-129 and supporting documentation; (2) the director's NOIR dated April 7, 2005; (3) counsel's response to the NOIR with supporting documentation; (4) the director's decision dated May 12, 2005; (5) a Form I-290B, counsel's appeal brief, and supporting documentation; (6) the AAO's decision dated August 3, 2005; (7) the director's NOIR dated December 3, 2010; (8) counsel's response to the NOIR with supporting documentation; (9) the director's decision dated October 24, 2011; (10) a second Form I-290B and supporting materials; (11) the AAO's decision dated December 5, 2012; (12) the Form I-290B and supporting documentation; (13) the AAO's decision dated February 26, 2013; (14) the director's Notice of Certification dated May 30, 2013; and (15) 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.

## I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a vice president of engineering. The AAO first notes that the petitioner provided inconsistent information regarding the rate of pay for the proffered position. For example, on page 2 of the Form I-129, the petitioner indicated that the beneficiary will be paid \$180,000 per year. The petitioner further indicated that "other compensation" was "N/A." However, on the Form I-129W, H-1B Data Collection and Filing Fee Exemption, the petitioner stated that the rate of pay is \$200,000 per year. In the Labor Condition Application (LCA), the petitioner stated that the beneficiary will be paid \$180,000 up to \$190,000 per year. In its letter of support, dated July 25, 2003, the petitioner indicated that the "position is being offered at a salary rate of \$180,000 per year." No explanation was provided for the discrepancies.

In the same letter, the petitioner described the duties of the proffered position as follows:

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.

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.

Furthermore, he will be in charge of the physical plant of these building[s] and will supervise apartment managers who 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.

The petitioner further stated that "[t]his temporary position offered to [the beneficiary] is an extremely challenging specialty position requiring extensive knowledge of engineering management." The AAO notes that the petitioner does not claim that the position requires

"extensive knowledge of engineering management" obtained by at least a baccalaureate degree, directly-related, in a specific specialty. Instead, the petitioner emphasizes that the beneficiary "is ideally qualified." The petitioner noted that the beneficiary received a Bachelor of Science in Textile Engineering from [REDACTED] in 1964. The petitioner stated that the beneficiary's "extensive background in accounting, business management, and engineering management, allows him to be familiar with the duties and responsibilities involved as a [v]ice [p]resident for [e]ngineering in our company." The AAO notes, however, that 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. Here, the petitioner failed to establish or even assert that the proffered position requires at least a bachelor's degree in a specific specialty.

The petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the occupational code for the proffered position is designated as 189, which corresponds to the occupational code, "Miscellaneous Managers and Officials."<sup>2</sup>

The petition was approved on August 20, 2003, for what was designated as a vice president of engineering position. On April 7, 2005, the Director of the Texas Service Center issued a NOIR. As noted above, the director stated in the NOIR that the United States Citizen and Immigration Services (USCIS) was notified that DOS revoked any and all visas issued to the beneficiary. On this basis, the director concluded that it appeared that the beneficiary was not maintaining a valid nonimmigrant status and the petition should not have been approved. On May 9, 2005, the director revoked the Form I-129 petition finding that the petitioner did not respond to the NOIR. However, it was later discovered that a response had been received via facsimile after hours on May 9, 2005, and the director reopened the Form I-129 to consider the evidence. In response to the NOIR, counsel for the petitioner claimed that contrary to the regulatory requirements in issuing the NOIR, the director failed to provide a factual basis for the petitioner to respond, but made "[m]ere reference to an act performed by another government body." Counsel further asserted that the revocation of a visa by DOS is facially deficient because its "regulations do not authorize the revocation of any visa when the beneficiary is present in the United States," and it also failed to provide "a bona fide and legitimate reason sufficient to revoke a visa." The director reviewed the evidence submitted and revoked the I-129 petition on May 12, 2005. An appeal was timely filed. On August 3, 2005, the AAO withdrew the director's revocation finding that the DOS' invalidation of the visas offers no basis on which to revoke the extension of the H-1B petition under 8 C.F.R. § 214.2(h)(11)(iii)(A). The AAO did not address the duties of the proffered position or the beneficiary's qualifications since the director's revocation did not question the nature of the petitioner's proffered employment or the beneficiary's qualifications to perform the duties of that position, additional issues which the petitioner would first have to be given notice of to be the basis of a revocation on notice action.

Subsequently, on December 3, 2010, the director issued NOIRs on all previously approved petitions including this petition, stating that USCIS has determined that the petitioner and the beneficiary have

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<sup>2</sup> For more information about occupational codes see the Dictionary of Occupational Titles at [http://www.occupationalinfo.org/defset3\\_5324.html](http://www.occupationalinfo.org/defset3_5324.html) (last visited June 11, 2014).

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 noted a lawsuit pending against the beneficiary and his brother in the [REDACTED] in [REDACTED] Florida, filed by the government of Ecuador, the beneficiary's country of birth. The lawsuit alleged the beneficiary and his brother of embezzlement as former administrators of [REDACTED] Ecuador's [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 noted that the beneficiary has 33.33% of the ownership in the petitioning company. The director referenced the petitioner's 2003 U.S. Corporation Income Tax Return discovered as a result of an investigation and noted that most of the petitioner's 19 affiliates listed in Schedule K 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 stated that "the petitioner's statements about its textile operations are so ambiguous that it is difficult if not impossible to determine what it means by 'textile operations.'"

Further, the director noted that the petitioner filed this petition seeking a change in the beneficiary's approved employment as a director of textile technology engineering operations to vice president of engineering, where the instant job description more closely resembles the duties of a property manager. Moreover, the petitioner subsequently filed three additional H-1B petitions requesting an extension of stay in the same position. 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 alleged inconsistencies between the job title and the description of its business.

The director then identified the following grounds for the NOIR: (1) the position offered is not a specialty occupation; (2) the beneficiary is not qualified for the position; and (3) the petitioner violated the terms and conditions of the approved petition by not paying the attested wage. The director noted that "20 months after the beneficiary was granted a change of status to H-1B as the Director of Textile Technology Engineering Operations on December 19, 2001, the petitioner fundamentally changed the industry in which it was engaged and the nature of its operations from textiles to real estate management." The director further found that "the position described by the petitioner more closely reflect the duties of a Property, Real Estate, and Community Association Manager[s] as listed" in the Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*, but noted that the position of a property, real estate, and community association manager 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 the foreign education credential evaluators may only evaluate an individual's foreign educational credentials-not training or work experience. In addition, the director found that the petitioner did not pay the proffered wage. The director noted that in the petitioner's 2004 U.S. Corporation Income Tax Return (valid from September 1, 2004 to August 31, 2005), discovered as a result of the investigation, the amount of claimed compensation, at \$131,538, received by the beneficiary was below the attested wage of \$180,000.

Counsel for the petitioner responded to the NOIR 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 as a vice president of engineering, and the occupational code used in the LCA which corresponds to the DOT code 189, "Miscellaneous Managers and Officials," 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's (O\*NET's) description of "Chief Executives" "provide an almost perfect match to the description of [the beneficiary's] job in the petition."

Counsel also noted that this is the second time that "the government has tried to revoke the approval of this very petition." Counsel stated that in 2005, "a prior Director sought to invalidate the approval because the State Department revoked [the beneficiary]'s visa." However, counsel noted that the AAO reversed the prior Director's attempt. Counsel claimed that the AAO stated that "the prior Director had no authority to revoke the petition" and that "the prior Director raised none of the points raised in Notice-even though any relevant information was available." 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 asserted that the beneficiary qualifies for the proffered position through his education. Counsel submitted a letter from Mr. [REDACTED] General Manager of [REDACTED] dated May 7, 2007 that described the beneficiary's duties as the President of [REDACTED] to demonstrate that the beneficiary "had successfully performed job duties that were consistent with being a managing engineer who would use his technical background to supervise individuals and physical properties, to devise systems to maximize the efficiency of these workers and investments, and to set out a strategic plan for efficiently and profitably running a portfolio of real estate investments."

In addition, counsel claimed that the beneficiary received the proper wage. Specifically, counsel stated that the petitioner paid him \$600,000.00 in 2001; \$350,000.00 in 2002; \$184,433.02 in 2003; \$180,000.00 in 2004; and \$180,000 in 2006. Counsel further stated that "although the company only paid the beneficiary \$124,615.44 in 2005, the shortage exists because the company did not employ or pay [the beneficiary] during the period when a prior Director improperly revoked his H-1B visa." Counsel also provided further rebuttals for additional issues raised in the NOIR that are not relevant to this proceeding.

The petition was revoked 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 the Entry of Appearance as Attorney or Accredited Representative (Form G-28) filed for and signed by the beneficiary, who is not a recognized party in this 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) and 103.3(a)(1)(iii)(B). 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. The AAO specifically noted that the Form G-28 submitted by counsel clearly limits his representation/appearance to the beneficiary, and nowhere on the form is it indicated that the beneficiary is 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 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 found that the petitioner did not have legal standing in the motion, however, because the motion was based on a rejected appeal, improperly filed by the beneficiary and 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 is 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 properly filed 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(a)(2)(v)(A)(2) applies to a situation where the appeal was filed without a properly executed Form G-28. In this case, the appeal was filed with a properly executed Form G-28, but by a party not entitled to file; therefore, USCIS was not required to request the Form G-28 pursuant to 8 C.F.R. § 103(a)(2)(v)(A)(2). 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, giving the AAO jurisdiction to review the director's revocation of the instant petition's approval.

Upon review of the record of proceeding, the AAO agrees that the petitioner has not overcome the bases for the revocation of the petition. Accordingly, the director's bases for revoking the approval of the H-1B petition will be affirmed, and approval of the petition will remain revoked.

## II. LAW AND ANALYSIS

### A. Revocation

With regard to the revocation of the approval of a petition, the regulation at 8 C.F.R. § 214.2(h)(11) states the following:

Revocation of approval of petition--(i) General. (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility . . . . An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. . . .

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
  - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
  - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
  - (3) The petitioner violated terms and conditions of the approved petition; or
  - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
  - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

As a preliminary matter, the AAO finds that the bases specified for the revocation on notice action are proper grounds for such action. The director's statements in the NOIR were adequate to notify the petitioner of the intent to revoke approval of the petition in accordance with the regulatory provisions at 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), (2), (3), (4), and (5), and allotted the petitioner the required time for the submission of evidence in rebuttal specified under 8 C.F.R. § 214.2(h)(11)(iii)(B). As will be discussed below, the AAO further finds that the director's decision to revoke the approval of the petition accords with the evidence or lack of evidence in the record of proceeding, and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, the director properly determined that: (1) the position is not a specialty occupation; (2) the beneficiary is not qualified for the position; and (3) the petitioner violated the terms and conditions of employment. In addition, the director discussed several issues related to the beneficiary under the heading "Remaining Issues," which include the validity of the beneficiary's passport, the Ecuadorian government's lawsuit against the beneficiary in Florida circuit court, and the State Department's revocation of the beneficiary's visa. As stated by the director, such issues are not the bases for revoking the petition, but they are "derogatory information that led to the investigation" that revealed the above mentioned reasons for revocation. Since such issues are not the bases for the revocation, the AAO will not discuss the merits of these issues.

The grounds of revocation certified to the AAO are (1) whether the petitioner established that the proffered position is a specialty occupation position, (2) whether the beneficiary qualifies for the position, and (3) whether the petitioner violated the terms and conditions of employment.

## **B. 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 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 a body of highly specialized knowledge 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 the certification, as well as the information in the record obtained during the investigation. The AAO notes that the record of proceeding contains material discrepancies regarding the proffered position, and the petitioner has not sufficiently resolved the 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 provided inconsistent information regarding its business operations. On the Form I-129 petition, the petitioner stated that it is a real estate holdings and management business. In the letter dated July 25, 2003 filed with the Form I-129, the petitioner stated it is a "conglomerate with many different business interests." The petitioner further indicated that its "primary business is real estate holdings and real estate management" and holds over \$5.0 million in residential properties in [REDACTED] County, Florida. In addition, the petitioner stated that it owns a management company that oversees the properties.

Moreover, the petitioner designated its operations under the North American Industry Classification System (NAICS) code 531310. The AAO notes that 531310 is an invalid code; however, 53131 is described as "Real Estate Property Managers."<sup>3</sup> The NAICS website describes this industry as follows:

This industry comprises 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, 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, however, that in the previously approved petition, [REDACTED] filed just twenty months prior to the instant petition, the petitioner had identified itself as "textile import and export" business on the Form I-129 and had provided a different but also invalid NAICS code

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<sup>3</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).

"8742." In the letter filed with the petition [REDACTED] dated December 4, 2001, the petitioner stated that "our corporation 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." Specifically, the petitioner had indicated that "our corporation is becoming a leader in textile operations" and "we are investing millions of dollars into this division to make it one of the premier textile operations in the United States." Just twenty months later, the petitioner did not provide any information about its claimed textile operations. Instead, it changed entirely the industry it is in and filed for a completely different position for the beneficiary.

As previously noted, the petitioner filed a total of six H-1B petitions including this petition beginning in 2001 for the beneficiary. However, the record contains very few documents regarding its business operations. The only documents on record are: 1) a document entitled [REDACTED]; 2) a copy of the petitioner's 2003 Corporation Income Tax Return; and 3) a copy of the petitioner's 2004 Corporation Income Tax Return, containing the first two pages only and no schedules. The AAO finds that these documents do not sufficiently 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 the 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 or who authored the document. Further, this document is not substantiated with corroborating documentary evidence.

Moreover, while the petitioner claims that it was established in 1983, more than twenty years prior to filing this petition, the petitioner only submitted one copy of the corporation tax return from 2003. Further, it is noted that this particular tax return was obtained during an investigation and was provided to the petitioner as an exhibit in the NOIR. The record also contains the first two pages of the 2004 corporation income tax return obtained during the investigation.

In the NOIR, 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." In response to the 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 stated that "the record shows the company has significant assets" and that Mr. [REDACTED] affidavit "demonstrates that the company is conducting real estate operations."

The AAO finds that while the 2003 tax return establishes that the company 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>4</sup> The AAO notes that this is inconsistent with the information provided on the Form I-129 for the instant case, 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 a similar code 53131 corresponds to "Real Estate Property Managers." Further, while this tax return indicated that the petitioner's total assets is estimated at \$26 million, the Schedule L indicated 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 the investments are not provided.

The AAO notes that 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.

\* \* \*

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

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<sup>4</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).

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 documentary 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 began his employment with the company in 2003, and some information that he attests to 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[-]story 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 the filing of 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 finds that the record fails to establish that there was a bona fide position. First, counsel, through Mr. [REDACTED] had made inconsistent statements about its textile operations in the previous petition [REDACTED]. 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. On the other hand, he stated that the beneficiary established a "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 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. 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 records could be located, the petitioner should have been able to substantiate the existence of its past operations with internal records. However, no such documents were submitted. 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 the penalty of perjury that the petition and the evidence submitted with it are true and correct. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. See 8 C.F.R. § 214.2(h)(10)(ii); see also 8 C.F.R. § 103.2(b)(1). 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. 582, 591 (BIA 1988).

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

Second, the AAO finds that the petitioner materially changed the job description of the proffered position over time.<sup>5</sup> As noted, the petitioner filed this petition 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." The petitioner titled the position as "vice president of engineering." The petitioner indicated that the beneficiary "will formulate policies and direct the operations of the real estate interests of the company," "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."<sup>6</sup>

In response to the certification, counsel emphasized that the LCA filed in support of the Form I-129 indicated that the position would correspond to job code 189, miscellaneous managers and officials. Counsel claimed that "[b]y using this designation, [the petitioner] indicated [the beneficiary] would be working as a managing engineer." Counsel further claimed that the beneficiary performed the following duties in the proffered position according to Mr. [REDACTED]'s affidavit:

In particular, [the petitioner] hired a managing industrial<sup>7</sup> engineer who could analyze the real estate products and services that the company provided, determine whether they were functioning properly and efficiently, and then formulate plans to expand the business. 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.

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<sup>5</sup> The AAO notes that the petitioner failed to abide by the provisions of 8 C.F.R. § 214.2(h)(11)(i)(A) to "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility" for H-1B nonimmigrant classification, such as a change in the beneficiary's occupation and/or job duties.

<sup>6</sup> The AAO finds that while the position is titled "vice president of engineering," the duties did not appear to include any specific engineering related duties and knowledge.

<sup>7</sup> The AAO notes that in Mr. [REDACTED] affidavit, this position is described as "managing systems engineer." No explanation was provided for the discrepancy.

As discussed above, Mr. [REDACTED] affidavit is not substantiated with evidence and is therefore not probative. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

The AAO finds that this description is significantly different from the job description previously provided with the petition's filing. The beneficiary's job description has changed from "authoriz[ing] maintenance of properties" and "be[ing] in charge of the physical plant of these buildings" to "analyz[ing] the real estate products and services...to determine whether they are functioning properly and efficiently... and then formulat[ing] plans to expand the business." The AAO notes that 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. The 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. 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 industrial engineering duties to the initial job description.

Further, in response to the certification, counsel also referred to the job descriptions provided in the 2010-2011 edition of the *Handbook* for "Industrial Engineers" and O\*NET's description for "Chief Executives" to state 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 the AAO will further discuss later, however, there is insufficient evidence in the record to support the finding that all positions that may be classified as chief executives qualify as specialty occupations on the sole basis of that occupational classification. Further, 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. *Michelin Tire Corp.*, 17 I&N Dec. 249.

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 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. 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.

Although the petitioner requested the beneficiary be granted H-1B classification for a three-year period, the evidence did not establish that the petitioner would be able to sustain an employee performing the duties of a vice president of engineering at the level required for the H-1B petition to be granted for the entire period requested, and there was insufficient information regarding how the beneficiary's duties were allocated during this three-year period. The petitioner failed 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 definite and nonspeculative for the entire period of employment specified in the Form I-129. Further, 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 or the equivalent in a specific specialty, as required for classification as a specialty occupation.

A position may be eligible for H-1B classification only on the basis of record 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 such evidence. 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>8</sup> 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 *Michelin Tire Corp.*, 17 I&N Dec. 249; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As such, 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.

In addition to materially changing the job description, the AAO notes that the position is described in general and generic functions that fail to convey sufficient substantive information to establish

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<sup>8</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.

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 beneficiary will "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, recording rental receipts, and performing other activities necessary to the efficient management of [the petitioner]'s real estate holdings." Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a body of highly specialized knowledge or a particular level of education, or educational equivalency, 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 in "determining maintenance schedules of common areas" or "supervis[ing] apartment managers who collect rent, make minor repairs and perform daily maintenance." The AAO observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. 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.

## **2. Does not Meet the Applicable Statutory and Regulatory Requirements**

Further, based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below.

Again, 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 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 in a vice president of engineering position. 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.

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>9</sup> As previously discussed, the petitioner asserted that the proffered position was an industrial engineer position combined with chief executive. The AAO also notes that the occupational code for the proffered position is designated as 189, which corresponds to the occupational code, "Miscellaneous Managers and Officials."

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>10</sup> However, the AAO finds that there is insufficient evidence that the proffered position is an industrial engineer position.

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<sup>9</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" and "Top Executives."

<sup>10</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-2> (last visited June 11, 2014).

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 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 reviewed the record of proceeding but is not persuaded by the petitioner's claim that the proffered position of vice president of engineering falls under the occupational category for "Industrial Engineers." As previously noted, in response to the NOIR and the certification, counsel provided a significantly revised job description, adding engineering related duties. For example, the original 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." In response to the certification, however, counsel relied on Mr. [REDACTED] affidavit to add duties of an industrial engineer and claimed for the first time that the beneficiary "regularly reviewed the general business and economic environment to determine whether the company's real estate investments were suited to the market" and "reviewed, amended, and developed systems and procedures at the company."

In addition, the AAO finds that the petitioner 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. As previously noted, Mr. [REDACTED] affidavit is unsubstantiated and is not probative evidence. Further, 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. *Michelin Tire Corp.*, 17 I&N Dec. 249. The totality of the evidence in this proceeding, including information and documentation regarding the proposed duties and the petitioner's business operations, does not establish that the duties of the proposed position are substantially comparable to those of industrial engineers.

As noted above, counsel had also asserted that the proffered position "when combined with the tasks of industrial engineer, the tasks associated with Vice President provide almost [a] perfect match to the description of [the beneficiary]'s job in the petition."<sup>11</sup>

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

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 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**

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. While the *Handbook* indicates that many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work, the *Handbook* indicates that top executives that are promoted from lower level positions may be able to substitute experience for education to move up in the company. It stops short of stating, however, that such experience would be equivalent to the education for which it is substituted. For example, the *Handbook* states 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. More importantly, 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. The *Handbook* reports top executives in the public sector often have a degree in business administration, public administration, law or liberal arts, while top executives of large corporations often have a master of business administration. Often having a degree in business administration is not the same as such a degree being a minimum entry requirement. Even if it was, the petitioner has not submitted any evidence to establish that the field of business administration encompasses a specific specialty.

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 marketing and computer information science, 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>12</sup> Section 214(i)(1)(B) of the Act (emphasis added).

Here, the *Handbook* indicates that top executives often have a degree in business administration. 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.<sup>13</sup> Therefore, the

<sup>12</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.

<sup>13</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

*Handbook's* recognition that a general, non-specialty degree in business/business administration is sufficient for entry into the occupation 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 revocation decision, the director concluded that the "analysis of the proposed duties revealed that the position described by the petitioner more closely reflect the duties of a Property, Real Estate, and Community Association Managers as listed in the [*Handbook*]." According to the *Handbook* and as noted by the director, a Property, Real Estate, and Community Association Manager position is not an occupation that requires a bachelor's degree in a specific specialty as a normal, minimum for entry into the occupation.

Specifically, the subchapter of the *Handbook* entitled "How to Become a Property, Real Estate, and Community Association Manager" 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.

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[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

*Id.*

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).

Therefore, the *Handbook* does not report that "Property, Real Estate, and Community Association Managers" comprise an occupational group for which normally the 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 residential and commercial properties. A preference for a post-secondary degree is not a requirement for such education. As such, the *Handbook* does not indicate 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. As discussed, 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. Section 214(i)(1)(B) of the Act (emphasis added).

As also discussed, while 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. To reiterate, 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, 560 (Comm'r 1988). Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree in a specific specialty is not normally the minimum entry requirement for this occupation. Accordingly, the *Handbook* does not support the particular position proffered here as being a specialty occupation based on the information it provides on how to become a Property, Real Estate, and Community Association Manager.

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 normally the 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 will review the record of proceeding regarding 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.

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 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 has not established that its particular position is one for which the *Handbook*, or other authoritative source, reports a standard, minimum entry 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. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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.

As previously noted, the petitioner did not indicate that a bachelor's degree in a specific specialty is required for the position. Instead, in the letter dated July 25, 2003, the petitioner indicated that the proffered position "is an extremely challenging specialty position requiring extensive knowledge of engineering management." 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.

Moreover, the petitioner failed to sufficiently demonstrate how the duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or its equivalent. The petitioner stated in the letter dated July 25, 2003 that the beneficiary received a Bachelor of Science degree in textile engineering. The petitioner further stated that the beneficiary's "academic studies, combined with his continued learning he acquired through his over 27 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, the petitioner did not establish that a curriculum in a specific specialty, i.e., engineering management, or its equivalent is necessary to perform the duties it claims are "extremely challenging." While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. Further, 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 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 at least 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 will not 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 10 employees and that it was established in 1983 (approximately 18 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.

The AAO acknowledges that the petitioner and counsel may believe 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. However, upon review of the record of the proceeding, the AAO finds that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. As discussed, the job description for the position changed significantly from the time of filing to responding to the NOIR. For example, in the support letter dated July 25, 2003, the Vice President of Engineering "will determine maintenance of common areas," "will manage and supervise staff engaged in preparing lease agreements, recording rentals receipts," and "will be charge of physical plant of these buildings and will supervise apartment managers who collect rent, make minor repairs, and perform daily maintenance." However, in response to the NOIR dated December 31, 2010, counsel claimed that the beneficiary "regularly reviewed 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

Moreover, as discussed above, the petitioner failed to provide sufficient probative documentation to substantiate its assertions regarding its business activities in connection with the claimed duties the beneficiary will perform.

Upon review of the record of proceeding, the AAO finds that the petitioner has submitted inadequate probative evidence 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.

### C. The Beneficiary's Qualification

Next, the AAO will address the director's determination that the petitioner failed to establish that the beneficiary qualifies for the proffered position. 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 petitioner established that the proffered position is a specialty occupation, the AAO finds that the petitioner failed to establish that the beneficiary qualifies for the proffered position. In this case, the beneficiary received a Bachelor of Science in Textile Engineering from [REDACTED] on June 7, 1964. 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]. Further, the record also contains a letter submitted by [REDACTED], a professor in the Mechanical and Industrial Engineering Department at the [REDACTED], to claim that the beneficiary qualified for the past positions held at the petitioning company. In response to the certification, counsel refers to the evaluations and advisory opinions in the record to claim that the beneficiary qualifies for proffered position. However, the AAO finds that counsel's reliance on the evaluations and advisory opinions is misplaced.

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 the two previously mentioned evaluations and the advisory opinion from Professor [REDACTED] for the beneficiary's qualifications. Upon review of documents, however, the petitioner has failed to establish that the beneficiary is qualified to serve in a specialty occupation position.

The AAO will first discuss the evaluations. The AAO notes that the evaluations offer two different conclusions regarding the beneficiary's qualification. 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."

Further, both evaluations fail to establish that the beneficiary qualifies for the proffered position. For example, 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 NOIR, a credentials evaluation service's evaluation is limited to education only, not training and/or work experience. Specifically, the evaluator does not

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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.

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 affiliated with a university that has a program for granting such credit based on an individual's work experience).

Furthermore, there is no independent evidence in the record from appropriate officials, such as deans or provosts, to establish 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)(1), "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." In fact, while it appears that Dr. [REDACTED] has 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)(1) 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)(1) for competency to render to USCIS an opinion on the educational equivalency of work experience.

On the other hand, the evaluation from Dr. [REDACTED] is accompanied by a letter from the Department Head of Industrial and Systems Engineering at [REDACTED], Dr. [REDACTED] Ph.D. 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 state that all faculty members have such authority or specifically that Dr. [REDACTED] has authority to grant college-level credit for training and work experience.

Aside from the decisive fact that the evidence of record does not establish Dr. [REDACTED] as eligible under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate the beneficiary's experience, the AAO finds that the content of this evaluation regarding the beneficiary's experience would merit no weight even if the evaluators were qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Specifically, this evaluation is not supported by probative evidence to support Dr. [REDACTED] 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 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). Accordingly, there is insufficient evidence that this experience was gained through progressively responsible positions directly related to industrial engineering. 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 that Dr. [REDACTED]'s evaluation fails to establish that the beneficiary more likely than not possesses the equivalent of a bachelor's degree in industrial engineering based upon the information provided regarding his work-related duties and responsibilities.

In light of the lack of a sufficient factual foundation discussed above, the evaluations are insufficient even if they had been rendered by an official eligible to do so under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). Accordingly, the AAO accords little weight to the assessments of the beneficiary's work experience by the evaluators and to the ultimate respective conclusions of the evaluators that the beneficiary holds the equivalent of a U.S. bachelor's degree in engineering management or industrial engineering.

In response to the certification, counsel asserts that the beneficiary "never acted as a property manager as the Director suggests." Instead, "he was the engineer who managed the real estate portfolio for the real estate division of a multi-million dollar holding company." As mentioned, counsel relied on the letter submitted by Professor [REDACTED] a professor in the Mechanical and Industrial Engineering Department at the [REDACTED] to claim that the beneficiary qualified for the past positions held with the petitioner as a director or textile engineering operations and also as a vice president for engineering. The AAO reviewed the opinion letter in its entirety. As discussed below, the letter from Professor [REDACTED] is not persuasive.

Professor [REDACTED] provided a summary of his education and experience and attached a copy of his curriculum vitae. He described his qualifications, including his educational credentials, professional experience, and information regarding his research interests and awards, and provided a list of the publications he has written. Based upon a complete review of Professor [REDACTED] letter, the AAO notes that Professor [REDACTED] may, in fact, be an expert on various topics; however, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. While he attached his curriculum vitae, he has not established his expertise pertinent to the assessment of qualifications of individuals for positions similar to the positions mentioned in the instant case. Professor [REDACTED] opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or

studies pertinent to the qualifications for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority in this area.

Professor [REDACTED] states that the "documentation was indirectly provided to [him], which [he] used in forming [his] opinion," and that he is in no position "to authenticate any of these documents." Further, he stated that his "opinions are limited to the information that [he] received and [his] educational and professional experience and judgment." Professor [REDACTED] listed that the following documents were provided by counsel:

- Information on [p]ast [p]ositions including: ETA form, employment letters and past [p]etition [l]etters.
- Education [d]ocuments: diploma & transcript.
- Information on the U.S. school (it has since changed names but was accredited).
- ETA form & employment letter verifying [the beneficiary's] 1964 to 2000 employment experience.
- [REDACTED] [website] where the beneficiary served as its president from July[ ] 1966 to November[ ] 2000 (more than 24 years of experience in that top position).

Upon review of the opinion letter, there is no indication that Professor [REDACTED] possesses any knowledge of the beneficiary's qualifications or the petitioner's business operations beyond this information. In addition, Professor [REDACTED] does not demonstrate or assert in-depth knowledge of the beneficiary's qualifications or the petitioner's specific business operations or how the duties of the position was actually performed in the context of the petitioner's business enterprise.

Professor [REDACTED] claims that "based on [the beneficiary's] U.S. education and progressively responsible employment experience in top executive positions as General Manager at [REDACTED] from August 1964 through July 1966 and primarily in Ecuador from 1966 to 2000 (more than 34 years) as president of [REDACTED] in the field of public media engineering management, he was qualified and hired by [REDACTED] the Petitioner, as Director of [REDACTED] from December 2001 to August 2003 and as Vice President of Engineering, since August 2003 where he successfully continues to perform the position's responsibilities." However, it must be noted that there is no indication that the petitioner and counsel advised Professor [REDACTED] that there is no evidence that the petitioner engaged in textile operations in the United States. It is likely that Professor [REDACTED] would have found this information relevant for his opinion letters. Moreover, without this information, the petitioner has not demonstrated that Professor [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's business operations and appropriately determine the beneficiary's qualifications for the past positions that he allegedly held at the petitioner's company.

Professor [REDACTED] also did not provide any documentation to establish his credentials to assess an individual's qualifications for the proffered position. He claims to possess expertise in the field of industrial engineering, mechanical engineering, manufacturing engineering, and related fields,

but he did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here.

Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the beneficiary's qualifications for the particular positions here at issue. There is no evidence that Professor [REDACTED] has visited the beneficiary's places of employment or the petitioner's business, observed the petitioner's business operations, or documented the knowledge that the employees apply on the job. He has not provided sufficient facts that would support the contention that the beneficiary qualified for the past positions. Professor [REDACTED] does not provide sufficiently substantive and analytical bases for his opinion.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the opinion letter rendered by Professor [REDACTED] is not probative evidence to establish the beneficiary qualified for the positions held at the petitioner's business. The conclusions reached by Professor [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record. Therefore, the AAO finds that the letter from Professor [REDACTED] does not establish that the beneficiary qualified for the past positions or would qualify for the proffered position. As such, neither Professor [REDACTED] findings nor his ultimate conclusions are worthy of any deference.

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 therefore, the AAO will next perform a Service 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 expertise 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>;

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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. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's

- (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 corroborating evidence as 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 included the theoretical and practical application of a body of highly specialized knowledge in a field directly related to the proffered position or that the beneficiary has recognition of expertise in the industry. 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.

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. 820. Therefore, the AAO finds that the petitioner failed to establish that the beneficiary qualifies for the proffered position.

#### **D. Violation of Terms and Conditions of Employment**

Next, the AAO will discuss whether the petitioner paid the proffered wage. Specifically, in the notice of revocation, the director found that according to the 2004 U.S. Corporation Income Tax Return, valid from September 1, 2004 to August 31, 2005, the beneficiary received only \$131,538 instead of \$180,000 as attested on the Form I-129, which is only 73% of the wages claimed on the petitioner and in the LCA. The director noted the petitioner's explanation "that the reason the beneficiary was not paid the full \$180,000 in 2005 was because the company did not employ the beneficiary during the period when the H-1B visa revoked." The director further noted that the petition was revoked on May 12, 2005, and the appeal on the revocation was sustained on August 3, 2005. The director concluded that this was a period of approximately three months, which is about \$45,000. The director stated that when this is added to the claimed salary paid to the beneficiary of \$124,615, the total is approximately \$169,615.44. The director further stated that when subtracted from \$180,000, the beneficiary was still short of \$10,384.56.

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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. *Id.*

In response to the certification, counsel refers to Mr. [REDACTED] affidavit to assert that while an appeal was pending on the revoked H-1B visa, "[the beneficiary] did not work for the company, and the company did not pay him," but that he returned to work when his visa was reinstated. However, as previously noted, Mr. [REDACTED] affidavit is not substantiated with independent evidence and is not considered probative evidence. Further, the petitioner failed to provide documentary evidence to establish that the beneficiary was placed on administrative leave in 2005.

Upon review of the record, the AAO finds that the petitioner failed to establish that it abided by the terms and conditions of the approved petition and paid the proffered wage. As mentioned, the petitioner provided inconsistent rate of pay for the proffered position. For purposes of this analysis, the AAO will assume, however, that the rate of pay was \$180,000 per year. First, the AAO finds that the director's reliance on the 2004 U.S. Corporation Income Tax Return, is misplaced since it covers the tax year beginning September 1, 2004 to August 31, 2005, and does not accurately capture the beneficiary's rate of pay for calendar year 2005. Therefore, the AAO withdraws this part of the director's conclusion, and the analysis will be based on the 2005 Form W-2, Wage and Tax Statement, indicates that the beneficiary received approximately \$124,615.00 that year.

In response to the certification, counsel states that "[t]he Director alleges [the petitioner] still failed to pay [the beneficiary] \$10,384.56 in 2005, but the Director's calculation is pure speculation." Counsel states that the "Director does not claim which date [the beneficiary] stopped working, nor when he resumed work." Counsel further claims "at [the beneficiary]'s pay rate, the purported \$10,384.56 'deficit' amounts to just under 15 days of work." The AAO notes that the burden is on the petitioner to establish that dates of the beneficiary's employment and amount of salary received minus the alleged administrative leave. Here, the petitioner failed to substantiate its claim with documentary evidence such as pay stubs or company records to establish that the dates that the beneficiary stopped and resumed working. 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).

Counsel again refers to Mr. [REDACTED] affidavit to state that "the shortfall in [the beneficiary]'s pay was due to the disruption and delay that the prior Director caused by revoking [the beneficiary]'s visa." Again, counsel's explanation regarding the shortage is not credible since it is based on Mr. [REDACTED] affidavit which is uncorroborated and is not probative evidence. The record of proceeding does not contain any evidence of the beneficiary being on administrative leave during the above mentioned period. Counsel also states that "[e]ven without the [REDACTED] affidavit, though, the Director knows well that [the beneficiary] did not immediately return to work after the AAO corrected the decision," and that "[a]t a minimum, it was necessary for the company to receive and analyze the decision to ensure compliance." However, the AAO reminds the petitioner 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506

(BIA 1980). Therefore, the AAO finds that the petitioner failed to establish that the beneficiary was paid the proffered wage of \$180,000 in 2005.

Moreover, the AAO finds that the petitioner violated the terms and conditions of employment for the other reasons discussed below. Specifically, the Form W-2s in the record indicate the following:

Year	Employer	Amount
2000		\$600,000
2001		\$600,000
2002		\$350,000
2003		\$138,443
		\$ 45,000
		\$183,443
2004		\$180,000
2005		\$124,615

The Form W-2s indicate that the beneficiary was paid by [REDACTED] not the petitioner, from 2000 to 2003, in part. Counsel relies on Mr. [REDACTED] affidavit to claim that the petitioner "used the profits from [REDACTED] (its wholly owned subsidiary) to pay all of its employee wages and their benefits, including [the beneficiary]" and that "to this day, [REDACTED] administers the company's health insurance program, including [the beneficiary]'s plan." As mentioned, counsel based his statements entirely on Mr. [REDACTED] affidavit, which is not corroborated by documentary evidence, and is not considered probative evidence. The AAO finds that the petitioner did not submit any documents related to [REDACTED] that there is no evidence that [REDACTED] as a subsidiary of the petitioner, paid the salary for the services that the beneficiary performed on behalf of the petitioner in the proffered position. Even if it had, as it is clear that [REDACTED] did not act as a payroll services company by using its own profits to pay the beneficiary's salary, it is just as likely based on the evidence submitted that the beneficiary worked without authorization for [REDACTED] and thus received compensation directly from that company. An H-1B worker is only authorized to work for the U.S. employer approved in the petition. *See generally* 8 C.F.R. §§ 214.1(e), 214.2(h), and section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

An H-1B beneficiary may not work without authorization for a separate legal entity, even if that entity is an affiliate, subsidiary, or parent corporation of the corporation, for which the beneficiary is authorized to work. Otherwise, the petitioner should have been able to provide evidence to explain why [REDACTED] paid the beneficiary directly instead of providing the money necessary to pay the beneficiary's salary to the petitioner through a loan or in exchange for additional stock in that corporation. Therefore, the AAO finds that the petitioner violated the terms and conditions of employment.

### III. CONCLUSION

Based upon a complete review of the record of proceeding as certified to the AAO, the petitioner has failed to overcome the revocation grounds specified in the NOIR and the subsequent revocation decision.<sup>16</sup> Accordingly, the director's decision to revoke the approval of the petition is affirmed. The approval of the petition remains revoked.

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 to revoke the approval of the petition is affirmed. The petition remains revoked.

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<sup>16</sup> The AAO conducts review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the petition is revoked for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceeding.