



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUL 25 2014

OFFICE: VERMONT 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 denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on October 1, 2012. In the Form I-129 visa petition and supporting documentation, the petitioner describes itself as a real estate business established in 2008.¹ In order to employ the beneficiary in what it designates as an administrative services manager position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on May 17, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We will also discuss three additional, independent grounds, not identified by the director's decision, that also preclude approval of this petition. Specifically, beyond the decision of the director, the petitioner (1) failed to submit a timely H-1B extension petition on behalf of the beneficiary; (2) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions; and (3) failed to submit a Labor Condition Application (LCA) that corresponds to the petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as an administrative services manager to work on a full-time basis. In the letter of support dated September 26, 2012, the petitioner stated that the proffered position involves the following duties:

¹ It must be noted for the record that the petitioner has provided inconsistent information regarding its type of business entity. For instance, in the Form I-129, the petitioner indicates "Inc." In the Labor Condition Application (LCA), the petitioner indicates "LLC." In addition, the petitioner's letterhead, submitted with the initial petition, indicates "TX." However, the letterhead submitted in response to the RFE, indicates "LLC." No explanation for the variances was provided.

The Administrative Service Manager will manage the daily office operations to meet the needs of our Spanish-speaking clients, sales associates and the Brokerage Manager. [The beneficiary] will be responsible for the management and daily operations of assigned projects/property. [The beneficiary] will coordinate the company's supportive services, such as record keeping of property sales, administrative management and other office support services. She will be responsible for staff development and for the quality and efficiency of the company's operation, assist sales associates with various inquiries, act as a liaison between sales associates and president, provide support to Brokerage Manager including providing reports and files, all office records and files, manage and maintain office equipment, supplies and forms; coordinate installation and repairs and other duties as assigned by management to assist in the operation of the office/department.

The petitioner did not state the requirements for the proffered position, but indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her education and professional experience. The petitioner provided an evaluation of the beneficiary's education prepared by Foreign Credentials Service of America, which states that the beneficiary has the equivalent of a Bachelor of Business Administration.²

In addition, the petitioner submitted an LCA in support of the instant petition in which it classified the proffered position as pertaining to the occupational classification "Administrative Services Manager" - SOC (ONET/OES Code) 11-3011, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 14, 2012. The director outlined the evidence to be submitted.

On March 11, 2013, the petitioner and counsel responded to the director's RFE. In a letter dated December 18, 2012, the petitioner stated the following requirements for the proffered position:

At least a bachelor's degree in the field of Business Administration or a related field[;] a Real Estate license[;], a member of the Realtor Association[;] must be able to read, write and speak in English & Spanish with a 100% fluency in both[;] and must have been in the industry for at least 3 years with the required 8 hours of continued education each year.

In addition, the petitioner provided the following revised list of duties for the proffered position:

² The petitioner provided a translation of the beneficiary's transcript prepared by the commercial evaluating service; however, the original foreign transcript was not provided. The petitioner provided a copy of the certificate of completion for one of the two foreign academic programs completed by the beneficiary, upon which the evaluation of the beneficiary's credentials is based.

1. Manage the daily office operations to meet the needs of our clients, [e]specially our Spanish-speaking clients, sales associates and the Brokerage Manager. Time 12%
2. Responsible for the management and daily operations of assigned projects/property such as rental surveys, property listings, applications, lease contract, move-in and move-out inspections. Time 10%
3. Monitor and schedule repairs, collect rental payments. Time 7%
4. Coordinate the company's supportive services, such as recordkeeping of property sales, administrative management and other office support services. Time 7%
5. Staff development and for the quality and efficiency of company's operation, assist sales associates with various inquiries. Time 7%
6. Act as a liaison between sales associates and president. Time 5%
7. Provide support to Brokerage Manager including providing reports and files, maintain all office records and files, manage and maintain office equipment, supplies and forms; coordinate installation and repairs and other duties as assigned by management to assist in the operation of the office/department. Time 3%
8. Review applicable accounting reports and accounts payable register to ensure accuracy. Time 3%
9. Responsible for managing cash collections and deposits. Time 3%
10. Directs and coordinates other administrative services, which may include office clerical and support services, printing, mail distribution and messenger services, telecommunications, maintenance, purchasing. Time 3%
11. Responsible for overseeing all leasing and sales contracts. Time 3%
12. Participate and conduct daily/weekly accountability meetings. Time 2%
13. Oversee procedures to ensure compliance with Federal and state policies. Time 2%
14. Timely completion and submission of income and expense reports. Time 2%
15. [Left blank by petitioner]
16. Oversee the preparation, analysis, negotiation, and review of contracts related to the purchase or sale of equipment, materials, supplies, products, or services. Time 2%
17. Oversee contract, insurance, and regulatory compliance. Time 7%
18. Handle the acquisition, distribution, and storage of equipment and supplies. Time 2%
19. Develop a new marketing program in the Hispanic segment, in order to achieve between 50% and 70% growth increase. Time 15%
20. Develop a project to establish a new relationship with H.U.D. Time 10%
21. Other duties as assigned. Time 2%

In addition to the letter, the petitioner provided documentation regarding the petitioner's owner's credentials, information sheets regarding the petitioner's business operations, an unsigned letter to [REDACTED], an "employee list," and documents regarding the beneficiary's prior employment.³

The director reviewed the information provided in the initial H-1B petition and in response to the RFE. Although the petitioner and counsel claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The director denied the petition on May 17, 2013.

Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief and additional evidence, including: (1) an opinion letter regarding the proffered position prepared by [REDACTED] (2) an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding the occupational category "Human Resources Managers"; (3) printouts from the Foreign Labor Certification Data Center Online Wage Library; (4) copies of documents provided in support of the beneficiary's prior H-1B visa with a different employer; and (5) copies of previously submitted documents.

II. UNTIMELY FILED H-1B EXTENSION PETITION

Beyond the decision of the director, the petitioner is ineligible to extend its employment of the beneficiary in H-1B status. Specifically, the petition must be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14).⁴ In this matter, the petition that the petitioner sought to extend [REDACTED] expired on September 30, 2012. The instant petition was filed on October 1, 2012, one day after the original petition's expiration. For this reason, the petition must be denied.

³ In an undated letter submitted in response to the RFE, counsel indicated that an organizational chart and job descriptions for the majority of the petitioner's positions had been provided. These documents do not appear in the record.

⁴ Title 8 C.F.R. § 214.2(h) states, in pertinent part, the following about petition extensions:

(14) Extension of visa petition validity. The petitioner shall file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. . . . *A request for a petition extension may be filed only if the validity of the original petition has not expired.*

(Emphasis added). As noted above, a request for a *petition extension* may be filed only if the *validity of the original petition has not expired*. Thus, the regulations do not permit for the late filing of a *petition extension*.

III. MATERIAL FINDINGS

The primary issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

A. Description of the Duties of the Proffered Position

To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (USCIS) must look 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The petitioner has not done so.

In the instant case, the duties of the proffered position described by the petitioner in its initial letter dated September 26, 2012 are taken verbatim from the letter written by the beneficiary's previous employer, [REDACTED] in support of the beneficiary's prior H-1B visa petition. A copy of this letter was submitted on appeal. Providing job duties for a prior position with a different employer is not sufficient for establishing H-1B eligibility for the instant proffered position. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary *in the context of the petitioner's business operations*, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Providing duties associated with a position at a company other than the petitioner does not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The job description provided thus fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertion with regard to the educational requirement for the position is therefore unpersuasive, as it is not supported by the job description or probative evidence.

In response to the RFE, the petitioner provided a list of duties which largely replicates that previously supplied duties, and the list of duties submitted by the beneficiary's prior employer in response to an RFE in that matter in a letter dated August 18, 2009. However, in addition to the original duties, in response to the RFE the petitioner asserts that in the proffered position, the beneficiary will spend over 35% of her time developing a new marketing program for the Hispanic market; developing a project to establish a new relationship with HUD; overseeing and ensuring compliance with regulations, insurance, contracts, and state and federal policies; and handling the company's equipment and supplies purchases and associated contracts.

The petitioner did not acknowledge or provide any explanation for failing to provide these additional duties that apparently include primary and essential duties. For example, the petitioner indicated in response to the RFE that the beneficiary is responsible for achieving 50% to 70% growth in the Hispanic market as a result of the marketing program she is expected to develop with 15% of her time.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner 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 must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *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 the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new, additional duties to the job description.

The record contains the original job description for the proffered position, which was copied entirely from documents prepared by a different company, and the revised job description provided in response to the RFE that contains new duties not previously mentioned. These descriptions are insufficient to credibly establish the duties of the proffered position. We are thus unable to assess whether the day-to-day tasks that the beneficiary is expected to perform require the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline.

B. Requirements for the Proffered Position

The academic requirement identified by the petitioner as the minimum education necessary to perform services in the proffered position does not qualify the position as a specialty occupation. Specifically, the petitioner stated that the duties of the proffered position require an individual with a bachelor's degree in business administration, or a related field. To qualify as a specialty occupation, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree (or 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 (Comm'r 1988).

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. 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. Although a general-purpose degree (including 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 139, 147 (1st Cir. 2007).⁵ The petitioner's assertions that a general purpose degree is sufficient to perform the duties of the position indicate that the proffered position is not in fact a specialty occupation.

C. Sufficiency of the LCA

We observe that the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. As previously noted, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Administrative Services Managers" - SOC (ONET/OES) code 11-3011. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.⁶ The LCA was certified on September 26, 2012 and signed by the petitioner on

⁵ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[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.

⁶ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

September 27, 2012. By completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁷

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the 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.⁸ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a

⁷ For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁸ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The petitioner has represented in the LCA that the proffered position is a Level I (entry level) position. As described above, a Level I designation is appropriate for entry level employees such as a worker in training or an individual undertaking an internship. However, in its letter dated December 18, 2012, the petitioner states that in addition to a bachelor's degree in business administration, the position requires:

- A Real Estate license;
- Membership in the Realtor Association;
- The ability to read, write, and speak English & Spanish with 100% fluency in both; and
- At least 3 years of industry experience with 8 hours of continuing education per year.

Thus, upon review of the assertions made by the petitioner, it appears that the level of complexity, independent judgment and understanding actually required for the proffered position exceeds the expectations of a Level I entry level position. The petitioner claims that knowledge of the Spanish language is required for the position. We note that a language requirement other than English in a petitioner's job offer is generally considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers. In the instant case, the petitioner has not established that the foreign language requirement has been reflected in the wage-level for the proffered position.

The requirements for the proffered position as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The prevailing wage of \$54,184 per year on the LCA corresponds to a Level I for the occupational category of "Administrative Services Managers" for [REDACTED] Texas.⁹ The petitioner stated in the

⁹ For additional information regarding the prevailing wage for administrative service managers in [REDACTED] County, Texas, see the All Industries Database for 7/2012 - 6/2013 for Administrative Services Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at

Form I-129 petition and LCA that the offered salary for the proffered position was \$54,184 per year. Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$72,218 per year for a Level II position, \$90,230 per year for a Level III position, and \$108,264 per year for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act. As such, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.¹⁰ Thus, even if it were determined that the petitioner overcame the director's ground for denying the petition (which it has not), for this reason also the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the

(last visited July 24, 2014).

¹⁰ In addition, we note that when the duties of a proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant O*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

On appeal, counsel claims that the duties of the proffered position "resemble that of a Human Resources Manager." Thus, if the petitioner believed its position was described as a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation. The prevailing wage for "Administrative Services Managers" is significantly lower than the prevailing wage for "Human Resources Managers." See All Industries Database for 7/2012 - 6/2013 for Human Resource Managers in [REDACTED] County, Texas at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at [REDACTED] (last visited July 24, 2014).

proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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

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

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

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

A review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the for the director's basis for denial of the petition, the petition could still not be approved.

IV. SPECIALTY OCCUPATION

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the

record of proceeding, and for the specific reasons described below, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

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 at 387. 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 at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely 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.

We now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). As explained earlier in this decision, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed within the petitioner's business operations. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it

is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the petitioner had adequately and accurately described the duties of the proffered position, we will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹¹ As previously discussed, the petitioner asserts that the proffered position falls under the occupational category "Administrative Services Managers." We reviewed the section of the *Handbook* regarding the occupational category "Administrative Services Managers," including the section entitled "How to Become an Administrative Services Manager," which describes the following preparation for the occupation:

Educational requirements vary by the type of organization and the work they do. They must have related work experience.

Education

A high school diploma or a General Educational Development (GED) diploma is typically required for someone to become an administrative services manager. However, some administrative services managers need at least a bachelor's degree. Those with a bachelor's degree typically study business, engineering, or facility management.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Administrative Services Managers, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-4> (last visited July 24, 2014).

When reviewing the *Handbook*, it must be noted that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. As previously noted, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation.

¹¹ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational categories are hereby incorporated into the record of proceeding.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* indicates that a high school diploma or a GED diploma is a sufficient academic credential for entry into the occupation.

On appeal, counsel provided an opinion letter prepared by [REDACTED] of [REDACTED]. Mr. [REDACTED] lists the duties of the proffered position as described by the petitioner in response to the RFE, and concludes that the proffered position is "clearly a specialty position, and requires the services of someone with advanced training through a Bachelor's program in Business Administration, or a related field."

Upon review of the opinion letter, there is no indication that Mr. [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond that which was provided in the petitioner's December 18, 2012 letter. There is no evidence that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise.

Furthermore, it does not appear that Mr. [REDACTED] is aware that the petitioner designated the proffered position as a Level I (entry) position in the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. It appears that Mr. [REDACTED] would have found this information relevant for the opinion letter. Without this information, the petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position.

We may, in our discretion, use an advisory opinion or statement submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion, we decline to regard the advisory opinion letter as probative evidence of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion regarding the opinion letter into our analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the 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 has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, we will review the record 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 to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 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 petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

The letter from Mr. [REDACTED] discussed above, asserts that a bachelor's degree in business administration or a related field "is considered an industry standard requirement for the [proffered position]." However, as previously discussed, it is not apparent that Mr. [REDACTED] has sufficient knowledge of the proffered position to reach this conclusion. Further, Mr. [REDACTED]'s qualifications to make such a statement have not been established.¹²

Thus, based upon a complete review of the record of proceeding, we find that the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We 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 its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted flyers regarding its [REDACTED]¹³ The petitioner also

¹² Mr. [REDACTED] bases his competency to assess the proffered position on his academic employment, experience in the field of business administration, and his education. While Mr. [REDACTED] lists his various academic affiliations, his specific experience and education relevant to the proffered position is not described. A curriculum vitae was not provided.

¹³ [REDACTED] is not defined.

submitted an unsigned "Letter of Intent for HUD Local Listing Broker Application," and an "employee list," which appears to contain the names of the petitioner's affiliated real estate agent contractors.¹⁴

We reviewed all of the evidence; however, we find that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. 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. 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.¹⁵

The petitioner has indicated that the beneficiary's educational background and prior work experience will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner has not established which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has not satisfied the second alternative prong of 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, USCIS reviews the petitioner's past recruiting and hiring practices, information regarding employees who previously held the position, as well as any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under 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. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a

¹⁴ The petitioner represented on the Form I-129 that it has 10 employees. The "Employee List" provided lists 81 individuals.

¹⁵ Again, we note that the petitioner designated the proffered position on the LCA as an entry-level position within the occupational category "Administrative Services Managers."

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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the RFE, the petitioner's broker owner submitted a letter stating that in the past the company had only one previous individual in the proffered position, and that that person has bachelor's degree in the field of business administration. In support of this assertion, the petitioner's broker owner submitted an evaluation of his own foreign education. We note that the petitioner has not established that the duties of the proffered position, as described by the petitioner, were previously performed by the broker owner. Notably, the petitioner stated in the Form I-129 that it has 10 employees, but has not explained what positions they hold. We observe that even if the petitioner had established that the proffered position was previously held by an individual with a degree in business administration, as previously discussed, a requirement for a general purpose degree is insufficient to qualify a position as a specialty occupation.

Upon review of the record, the petitioner has not provided probative 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.

Counsel asserts that the nature of the specific duties of the position in the context of its business operations 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. We reviewed all of the evidence in the record, including the petitioner's statements, and the documents regarding the petitioner's business operations. However, we find that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we also reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties.

The petitioner has not established that the nature of the specific duties is 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. We, therefore, conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established 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. The appeal will be dismissed and the petition denied for this reason.

V. CONCLUSION AND ORDER

We will not examine the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

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

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

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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