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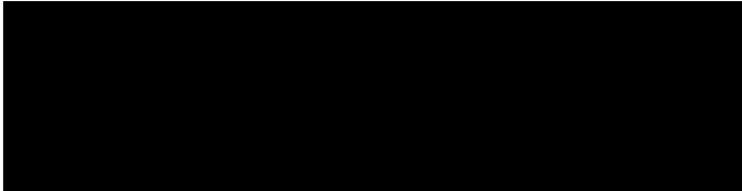
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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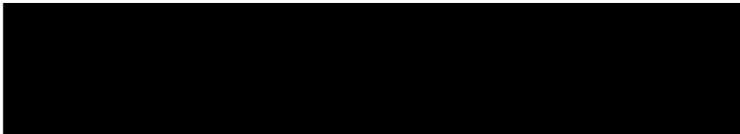


FILE: EAC 08 154 52363 Office: VERMONT SERVICE CENTER Date: APR 29 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is in the business of installing medical equipment. It seeks to employ the beneficiary as General Manager pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the petitioner failed to establish that the job offered qualifies as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (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, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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. 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner states that it is seeking the beneficiary's services as a General Manager. No position description was provided with the petition, although counsel submitted a copy of *O*Net OnLine's* Summary Report for Chief Executives.¹ The petitioner submitted the beneficiary's credentials along with a credential evaluation finding that the beneficiary has the equivalent of a U.S. Bachelor of Science in Psychology based on her foreign education and the equivalent of a U.S. Master of Science in Business Management based on a combination of her foreign education and experience. The evaluation states that a resume for the evaluator is

¹ By submitting the Occupational Information Network *O*Net On-line* Summary Report on Chief Executives, counsel and the petitioner are asserting that the proffered General Manager position is classified under Chief Executives and therefore the proffered position requires a minimum of a bachelor's degree. As discussed *infra* in this decision, the AAO does not find that sufficient evidence was provided to demonstrate that the proffered position is that of a Chief or Top Executive. However, on March 17, 2010, the AAO accessed the pertinent section of the *O*Net Online* Internet site, which addresses Chief Executives under the Department of Labor's Standard Occupational Classification code of 11-1011.00. *See* <http://online.onetcenter.org/link/summary/11-1011.00>. *O*Net Online* assigns Chief Executives a Job Zone “Five” rating, which groups them among occupations of which most employers require a graduate school degree and at least five years of experience. As the petitioner does not require a graduate degree plus extensive experience for the proffered position, this is additional evidence that the proffered position does not fit best under the *O*Net Online's* section on Chief Executives. Regardless, the *O*Net Online* does not indicate that degrees required by Job Zone Five occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *O*Net Online* information is not probative of the proffered position being a specialty occupation.

attached, but the petitioner did not include a copy of the evaluator's resume.

Although the Form I-129 indicates that the title of the proffered position is General Manager, the Form ETA-9035 Labor Condition Application (LCA) uses the job title of Operation Manager. According to the petitioner's LCA and Form I-129, the proffered wage is \$48.50 per hour and the prevailing wage listed on the LCA is also \$48.50 per hour.

The director's RFE asked for documentation to support a finding that the proffered position is a specialty occupation, including a detailed statement setting forth the beneficiary's proposed day-to-day duties and responsibilities in detail, as well as additional evidence to demonstrate the beneficiary is qualified to perform in a specialty occupation. The director noted that the credential evaluation submitted with the petition was not acceptable as an evaluation of the beneficiary's experience.

In response to the RFE, the petitioner wrote a letter that describes the proffered position as follows:

The employment position for [the beneficiary] will be as General Manager for the company. She will be managing our main office in Miami, FL as well as supervise [sic] our present and future branches throughout the US and in the Caribbean. Her duties will involve all accounting related work which will occupy over a [sic] 70% of her daily tasks. The remainder will be distributed through other administrative duties and other affairs of the company, such as: administer the affairs of the corporation in accordance with the other organizational policies; ensure the maintenance of the official records, by-laws, and standing rules according to Board action; submit an annual budget for approval, maximize investment and increase effectiveness in our new projects for expansion in other states and countries for sleep labs and DME; analyze our weekly operations in each branch and implement and ensure new programs for better customer service; provide recommendations regarding investments and cash strategies; develop annual plan for staffing in each branch and main office; hire, supervise, evaluate and, if necessary dismiss staff members as specified in the standing rules as well as coordinate our human resource department; oversee workplace operations in each sleep lab and DME, including holding staff meetings and retreats, and working with staff to maintain and improve effectiveness and efficiency; ensure that all staff members receive appropriate training to perform their duties effectively, each technician for sleep lab and for installation of equipments [sic]; revise staff job descriptions when necessary to increase efficiency and achievement of the company's goals, with input from our clients, patients and appropriate resources; act as arbitrator/mediator in work and personnel/personal disputes; convey board meetings and follow up with the agendas and drafts for each meetings [sic]. These include supervision of all accounting tasks, collections, account payables, and payroll.

The petitioner does not provide any objective evidence to support its assertion that 70% of the beneficiary's responsibilities will be related to accounting. Nor does the petitioner describe in detail what "accounting related work" means. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Instead, the petitioner focuses the description on the administrative tasks to be performed by the beneficiary.

Counsel also submitted job descriptions of employees who would report to the beneficiary, including one person in customer service, an administrative claims coordinator, and three patient services technicians. Some of these employees are located in the Dominican Republic. Counsel also resubmitted the same credential evaluation that the director previously found to be insufficient and, again, did not include any information regarding the evaluator's qualifications and experience.

Additionally, counsel submitted a copy of the section on Financial Managers from the *Handbook*, 2008-09 Edition, arguing that the proffered position is closest to that of a Financial Manager. However, this is different from the Chief Executive classification that counsel and the petitioner initially indicated was closest to the proffered position. Therefore, to the extent that the petitioner is now attempting to classify the proffered position as a Financial Manager, this would constitute a material change. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Regardless, the proffered position is clearly not that of a Financial Manager as, according to the *Handbook*, Financial Managers are responsible for overseeing the preparation of financial reports, directing investment activities, and implementing cash management strategies, duties that are not encompassed in the petitioner's job description.

On appeal, counsel submits an unsigned and undated copy of the Contract of Employment between the petitioner and the beneficiary. The Contract of Employment stated that the beneficiary will work as the petitioner's General Manager and that her main role will be to "[s]upervise and manage the main office in Miami as well as other branches throughout the country and overseas in all aspects of the organization, but overall supervise all company's personnel with their daily tasks. As [sic] well as to be responsible for the process of all patients' files and future follow ups."

The Contract of Employment also states that the proffered salary is \$42,000 per year for a 40 hour week. This is in contradiction to the petitioner's stated proffered (and prevailing) wage of \$48.50 per hour, which totals \$100,880 per year based on the petitioner's stated 40 hour work week for the proffered position. Counsel tries to explain this discrepancy in the wage by stating:

The prevailing wage for the position being offered to the Beneficiary is \$42,000, which is equal to \$26.82 per hour.² This amount is the amount being paid by the Applicant to the Beneficiary, for the occupation in question. Any other amount entered upon any documentation is the result of a typographical error. In fact, in the 2006 corporate income tax returns, on page 2, line 3, the total cost of labor for [the petitioner], is listed as \$70,798.00, hence \$100,880.00 could not have been the prevailing wage offered to the

² Although counsel states that a wage of \$42,000 per year is equal to \$26.82 per hour, a wage of \$42,000 per year is actually equal to \$20.19 per hour, based on a 40-hour work week.

Beneficiary.

Counsel submits no documentation to demonstrate that the prevailing wage for the proffered position is \$26.82 per hour. 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). In addition, on appeal, counsel's statements render Form I-129 and the LCA submitted by the petitioner as invalid because the wage proffered in those documents differ significantly from the wage offered to the beneficiary on appeal. Moreover, as the evidence demonstrates that the petitioner is unable to pay the beneficiary the prevailing wage,³ it also cannot be found that the petitioner will comply with the terms and conditions of employment as attested to in the submitted Form I-129 and LCA. Therefore, counsel is again attempting to materially change the petition on appeal. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. at 49. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. at 176.

On appeal, counsel also submits a more detailed position description. The job description lists 40 widely varying duties. On the management side, the beneficiary would supervise company personnel, hire and fire personnel, report directly to the CEO, and act as arbitrator/mediator in work/personnel disputes. However, the vast majority of duties appear to be administrative, including, in pertinent part, the following:

- Receive and process intake of patients;
- Prepare files for new patients and prepare invoices;
- Screen files for billing;
- Coordinate and supervise the log of all patient related calls;
- Process accounting information using software;
- Call physicians offices and labs when required;
- Process payments;
- Verify benefits and coverage with insurance;
- Distribute mail;
- Assemble personnel files; and
- Manage and control petty cash account.

In contrast to the petitioner's letter provided in response to the RFE, the majority of the duties listed in the position description provided on appeal are not managerial and/or financial. Moreover, it should be noted that this description does not list any accounting functions for the proffered position even though, in response to the RFE, the petitioner stated that 70% of the proffered position entails "accounting related work." 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

³ The 2006 U.S. Income Tax Return provided on appeal indicates that the petitioner received a gross income of \$176,367 for that year.

objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, the proffered position description provided on appeal lists a “High School Diploma” as a minimum requirement. Therefore, the petitioner does not even appear to require a bachelor’s degree in a specific specialty for the proffered position.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty 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)).

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.

As discussed above, the proffered duties vary widely between managerial and administrative responsibilities. It therefore appears that the proffered position is a hybrid between several different positions. Additionally, the description provided by the petitioner for the proffered position entails duties that are so widely varied that it is not clear under which section of the *Handbook* (2010-11 Online Edition) the position falls. However, even if the proffered position were to come under the *Handbook*’s section on Top Executives, this in and of itself would not be sufficient evidence that the proffered position is a specialty occupation. Under the section on Training, Other Qualifications, and Advancement, the *Handbook* states that “*The formal education and experience required by top executives vary as extensively as their responsibilities do, but many of these workers have at least a bachelor’s degree and considerable experience.*” (Emphasis added.) The *Handbook* then goes on to state as follows:

Many top executives have a bachelor’s or master’s degree in business administration, liberal arts, or a more specialized discipline. The specific type and level of education required often depends on the type of organization for which top executives work. College presidents and school superintendents, for example, typically have a doctoral degree in the field in which they originally taught or in education administration. (For

information on lower level managers in educational services, see the Handbook statement on education administrators.)

Some top executives in the public sector *have a degree in public administration or liberal arts*. Others might have a more specific educational background related to their jobs. (For information on lower level managers in health services, see the Handbook statement on medical and health services managers.)

Many top executive positions are filled from within the organization by promoting experienced lower level managers when an opening arises. In industries such as retail trade or transportation, for example, *individuals without a college degree may work their way up within the company* and become executives or general managers. When hiring top executives from outside the organization, those doing the hiring often prefer managers with extensive managerial experience.

(Emphasis added.) Because the *Handbook* indicates that working as a top executive does not normally require a degree *in a specific specialty* and as the evidence of record does not distinguish the proffered position from the type of position that requires no more than a bachelor's degree without particular specialization, the *Handbook* does not support the proffered position as being a specialty occupation, even if the petitioner had demonstrated, which it did not, that the proffered position is a top executive.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that 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.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

The petitioner does not provide any job-vacancy advertisements, expert letters, or other documentation evidencing a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which

provides that “an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree.” The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for executive positions. In fact, the petitioner only requires a high school diploma for the proffered position. Moreover, as mentioned previously, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than executive positions that can be performed by persons without a specialty degree or its equivalent, particularly in parallel positions in organizations similar to the petitioner.

Next, as the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As mentioned earlier, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than executive positions that are not usually associated with a degree in a specific specialty. Indeed, many of the duties described by the petitioner appear to be administrative.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason, the petition will be denied.

Although the finding that the proffered position is not a specialty occupation negates the necessity of examining the beneficiary's credentials, the AAO will nevertheless address this issue. Beyond the decision of the director, the AAO finds that the petitioner did not submit sufficient documentation to show that the beneficiary qualifies to perform services in any specialty occupation requiring a degree in business management or a related field under 8 C.F.R. § 214.2(h)(4)(iii)(C).

The beneficiary does not hold a U.S. degree in Business Management or a related field, and her foreign degree has not been determined to be the equivalent of a U.S. degree in Business Management or a related field. Instead, it has been found to be equivalent to a bachelor's degree in Psychology. Therefore, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), in order for the beneficiary to qualify for a specialty occupation requiring a degree in business administration or a related field, the record must demonstrate that she has education, specialized training, and/or progressively responsible experience equivalent to a U.S. baccalaureate or higher degree in business administration, as well as recognition of her expertise through progressively responsible positions directly related to this specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for

training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(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.

As the credential evaluation, which evaluated the beneficiary's experience together with her education as being equivalent to a Master of Science in Business Management, did not meet the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and 8 C.F.R. § 214.2(h)(4)(iii)(D), the director issued an RFE, which stated that the evaluation previously submitted was insufficient and requested additional documentation to demonstrate that the beneficiary has the equivalent of a U.S. baccalaureate or higher degree in business administration. However, the petitioner instead resubmitted the original evaluation previously found to be insufficient.

Upon review, therefore, it does not appear that the petitioner has demonstrated that the beneficiary satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C). While the beneficiary does, in fact, possess the equivalent of a baccalaureate degree from an accredited U.S. college or university in psychology, no evidence was provided to demonstrate that the beneficiary holds a United States baccalaureate or higher degree, or its equivalent, in a specific specialty required for entry into a specialty occupation being proffered to the beneficiary, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1), (2), and (4). Moreover, as stated above, the position description entails widely varying duties and requires only a high school diploma. The beneficiary does not possess a U.S. degree, nor does the beneficiary hold an unrestricted state license, registration or certification which authorizes her to fully practice in a specialty occupation and be immediately engaged in that specialty in the state of intended employment. Therefore, the requirements set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C)(3) are not applicable to these proceedings.

Therefore, the AAO finds that the petitioner did not demonstrate that the beneficiary is qualified to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C).

Finally, beyond the decision of the director, the AAO also finds that the petitioner failed to establish that the LCA supports the petition because the proffered wage, as provided in the Contract of Employment, is below the prevailing wage as stated in the LCA. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

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

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the rate of pay to an amount lower than the proffered and prevailing wage listed in the LCA filed with the Form I-129 is a material change in the terms and conditions of employment.

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

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

ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Emphasis added].

The LCA and Form I-129 in this matter, which indicate the proffered and prevailing wage as being \$48.50 per hour, do not correspond with the contract provided by the petitioner and the statement made by counsel on appeal, indicating that the proffered wage is actually much lower than that amount. Therefore, the AAO finds that the LCA does not support the H-1B petition and the petition will be denied on this additional ground. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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