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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



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JAN 06 2010

FILE: WAC 08 145 50924 Office: CALIFORNIA SERVICE CENTER Date:

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).

Michael T. Kelly
Perry Rhew
for Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 a medical practice with 14 employees. It seeks to employ the beneficiary as a financial specialist 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 proffered position is a specialty occupation.

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

The AAO will first consider whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (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), U.S. Citizenship and Immigration Services (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.

In this matter, the petitioner seeks the beneficiary’s services as a financial specialist. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s March 25, 2008 offer letter; an employee job notice dated February 29, 2008; an organizational chart; and a job description provided in response to the RFE. The job notice and offer letter indicate the proffered position would require the beneficiary to work as a bilingual financial specialist and perform the following duties:

- Provide and explain a practice[’s] financial policy to both Polish and English speaking patients;
- Oversee billing and collections;
- Prepare statements and translate them to Polish speaking patients;
- Send claims to Polish insurance companies;
- Manage and control cash receipts and disbursements;
- Record transactions into computer database; and
- Prepare and analyze corporation financial statements.

The job notice states that the proffered position requires a Bachelor’s Degree generally, but does not appear to require a Bachelor’s Degree in a specific specialty. The petitioner submitted the beneficiary’s transcript from Davenport University in the United States, dated March 20, 2008, for coursework taken towards a Bachelor’s degree in Business Administration - Finance, but no document was submitted indicating that a degree was conferred. Moreover, a letter dated March 11, 2008 from [REDACTED] from Davenport University that was submitted with the petition indicates that the beneficiary “is a student maintaining F-1 status . . .,” but

does not indicate that the beneficiary received her degree.

The Labor Condition Application (LCA) was submitted for a "Financial Specialist in Health Care" to work at the petitioner's offices at an hourly rate of \$18.05.

On May 1, 2008, the director requested additional information from the petitioner. In part, the director requested the following: (1) a more detailed description of the work to be performed, including specific job duties and percentage of time to be spent on each duty; (2) evidence that the proffered position is a common position required by similarly sized offices with similar annual incomes and the petitioner's competitors; (3) evidence that a degree requirement is common to the industry in parallel positions among similar organizations; and, (4) evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher, to perform the duties of the proffered position. The director also requested an organizational chart and evidence pertaining to the petitioner.

In the petitioner's response, it provided a more detailed job description of a bilingual financial specialist that states the beneficiary will be responsible for the "efficient and effective management and control of medical billing and finances of the corporation having about 15,000 active patients, herein 51% of Polish patients, 5% of Ukrainian patients, and 1% of Russian patients." The job description detailed the beneficiary's proposed duties as follows:

- Support the practice[']s billing with the aspects of the medical billing, including accounts receivable management, reimbursement management, collection management
- Prepare and send statements on the monthly basis; if needed, translate and explain them to Polish, Ukrainian, and Russian speaking patients
- Provide and explain the practice[']s financial policies in [sic] both English and Polish speaking patients
- Respond to the patient enquiries regarding their bills, and insurance benefits
- Send claims to Polish insurance companies for visitors receiving medical services in the United States
- Record financial transactions to the computer database
- Manage and control cash receipts and cash disbursements
- Prepare financial reports on a monthly, quarterly, and annual basis
- Present financial reports to the shareholders
- Perform any duty specifically designated by the Metro Medical Practice as being properly the responsibility of the Bilingual Financial Specialist

The petitioner does not explain what percentage of time the beneficiary will spend on each duty. The job description states that the minimum qualifications for the position are a Bachelor's degree or equivalent plus at least one year of financial and medical experience. No specific field for the Bachelor's degree or equivalent requirement is provided.

The petitioner also submitted a letter from its Operating Manager, who states as follows:

Based on the research I have done in other medical practices and hospitals, the position of

Bilingual Financial Specialist (similar listing: Financial Manager, Financial Analyst, Manager Accounts Receivable, in smaller practices just Manager) has a common degree of requirements in the healthcare industry. Each organization employs a person who handles its finances, including the cash management, accounts receivable management, accounts payable management, accounting, and financial reporting. However, due to the specificity of each organization, some uncommon requirements are added to the proposed position, that diversifies it from others. For example, looking at [the petitioner], it has a large percentage of immigrants and refugees from different countries that very often speak only their native languages. What is more, since June 2007 [the petitioner] subleases offices, employees and the patients' pool to Infinity Medical Group, the other organization, internists and specialty doctors. Therefore, due to that unique practice organization, it is hard to compare the requirements for that position among other practices.

The petitioner also provided three job postings for positions in the fields of financial analysis and accounts payable.

In addition, the petitioner provided a job description for a Business/Office Manager. It is not clear if this job description was added inadvertently as it differs from the proffered position. The organization chart provided by the petitioner in response to the RFE indicates that the beneficiary is working as a Bilingual Financial Specialist and reports directly to someone with the title of "Bilingual Billing Person." According to the chart, the petitioner also employs an Accountant and a Bilingual Operating Manager.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. In the denial, the director also found that "[a]n analysis of the proposed duties reveals that the position described by the petitioner reflect the duties of bookkeeper, accounting, and auditing clerks as listed under the title financial clerks in the Occupational Outlook Handbook (OOH), 2008-09 edition, a publication of the United States Department of Labor."

On appeal, the accredited representative of the petitioner contends that the director erred in denying the petition, and that the proposed position in fact qualifies for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The accredited representative states that she believes:

[t]hat the application was denied because the Petitioner failed to get professional advice and expertise when filing the H1B Visa. They lacked the knowledge, expertise and guidance to properly respond to your request for evidence. This lack of knowledge, expertise, and guidance resulted in unintentional errors and mistakes being made in response to your request for evidence. This appeal has corrected the errors and mistakes previously submitted to your office. . . .

On appeal, the accredited representative states that the petitioner has changed the proffered position title from Bilingual Financial Specialist to Bilingual Financial Manager and that the daily duties include the following:

- Communicating complex financial issues in regards to billing, credit, medical insurance, hospital and other complex issues and questions that arise in the course of doing business with a clientele that only speaks and understands Polish, Ukrainian, or Russian languages.
- Develop, plan, prepare and present short and long range accounting programs to forecast budgets, profit analysis, and internal auditing for and on behalf of the board of directors.
- Responsible for calculation, distribution and accuracy of physician income and productivity.
- Investigate and decide appropriate action with regard to financial business decisions with respect to and on behalf of the board of directors, employees, vendors, business clients, banks, etc.
- Responsible for controlling, monitoring and recording cash receipts and accounts receivables. In addition, ensuring that accounts payable are properly recorded and distributed in a timely fashion to creditors.
- Authority to withdraw and deposit bank funds on behalf of the corporation, authority to sign and issue pay checks to all employees.
- Obtaining and administering lines of credit on behalf of the corporation.
- Managing the human resources department, training new employees, hiring and firing employees, obtaining and administering insurance programs for employees' health care insurance, workers' compensation insurance, malpractice insurance and any claims that arise during the course of doing business.
- Develop and implement policies and procedures to ensure compliance with regulatory agencies.
- Participate in professional development activities and maintain professional affiliations.

The accredited representative also states that the beneficiary developed a Microsoft Excel program to improve financial services and that such development could only be performed by a person with a Bachelor's Degree in Finance or Accounting. Additionally, the accredited representative provides a copy of the *Occupational Outlook Handbook (Handbook)* section on Financial Managers. The revised organization chart provided on appeal indicates that the beneficiary will be given the title of "Bilingual Financial Manager" and reports directly to the doctors who are partners in the practice. All employees other than the doctors will report directly to the beneficiary according to the revised chart. The Bilingual Billing Person and the Accountant are not listed on the revised chart.

On appeal, the representative for the petitioner attempts to change the nature and title of the proffered position to be that of a financial manager. This claim will not be considered by the AAO, and, as the duties presented on appeal materially expand the scope and nature of the position for which the petition was filed, they will not be considered on appeal. On appeal, 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 the associated job responsibilities. 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). Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition and in response to the RFE.

In addition, the accredited representative's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) state:

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.

Moreover, the AAO takes administrative notice of the Foreign Labor Certification Data Center Online Wage Library (from which the petitioner obtained the prevailing wage listed in the LCA). The proffered wage from the Online Wage Library meets the prevailing wage listed for "Financial Specialists, All Other" for the geographical area of Troy, Michigan at the time the LCA was certified. However, the proffered wage is lower than the prevailing wage listed for a Financial Analyst, Financial Manager, or Accountant. Therefore, even if the petitioner could demonstrate that the proffered position is actually closer to that of a Financial Manager, as claimed by the accredited representative on appeal, the AAO would have to deny the petition on the ground that it is not supported by an LCA that corresponds with the petition.

The request to reconsider the original petition on appeal with the new job duties presented is therefore rejected for all of the reasons described above.

To make its determination whether the proffered position, as described in the initial petition and the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO 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 *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)).

On appeal, the accredited representative of the petitioner argues that the proffered position most closely resembles the position of financial manager in the *Handbook*. However, this argument is based on the revised job title and duties provided on appeal, which, as stated above, will not be considered. Therefore, the AAO must reject this argument.

In reviewing the duties provided by the petitioner in support of the petition and in response to the RFE, the AAO agrees with the director that the proffered position most closely resembles that of bookkeeping, accounting, and auditing clerks.

The *Handbook's* description of bookkeeping, accounting, and auditing clerks provides in pertinent part:

Bookkeeping, accounting, and auditing clerks are financial recordkeepers. They update and maintain accounting records, including those which calculate expenditures, receipts, accounts payable and receivable, and profit and loss. These workers have a wide range

of skills from full-charge bookkeepers, who can maintain an entire company's books, to accounting clerks who handle specific tasks. All these clerks make numerous computations each day and must be comfortable using computers to calculate and record data.

In small businesses, bookkeepers and bookkeeping clerks often have responsibility for some or all the accounts, known as the general ledger. They record all transactions and post debits (costs) and credits (income). They also produce financial statements and prepare reports and summaries for supervisors and managers. Bookkeepers prepare bank deposits by compiling data from cashiers, verifying and balancing receipts, and sending cash, checks, or other forms of payment to the bank. Additionally, they may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

* * *

Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents to ensure that they are mathematically accurate, and properly coded. They also correct or note errors for accountants or other workers to fix.

As organizations continue to computerize their financial records, *many bookkeeping, accounting, and auditing clerks use specialized accounting software, spreadsheets, and databases.* Most clerks now enter information from receipts or bills into computers, and the information is then stored electronically. *The widespread use of computers also has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, procurement, and billing. Many of these functions require these clerks to write letters and make phone calls to customers or clients.*

(Emphasis added.) In short, the duties described above closely resemble those of the proffered position as described by the petitioner with the initial filing and in response to the RFE.

With respect to education and training requirements for bookkeeping, accounting, and auditing clerks, the *Handbook* states:

Most bookkeeping, accounting, and auditing clerks are required to have a high school degree at a minimum. However, having some postsecondary education is increasingly important and an associate degree in business or accounting is required for some positions. Although a bachelor's degree is rarely required, graduates may accept bookkeeping, accounting, and auditing clerk positions to get into a particular company or to enter the accounting or finance field with the hope of eventually being promoted.

In other words, a bachelor's degree in a specific specialty is not required.

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 the *Handbook* indicates no degree requirement for employment as a bookkeeping, accounting or auditing clerk, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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.

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)).

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. To establish its degree requirement as an industry norm, the petitioner has submitted three advertisements from other companies, two for Senior Financial Analysts and one for an Accounts Payable Manager. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry. As discussed previously, the proffered position is not that of a Senior Financial Analyst or an Accounts Payable Manager. Therefore, the announcements are not probative for the purposes of these proceedings. Moreover, the two Senior Financial Analyst positions are with a health corporate services company and the Accounts Payable Manager position does not provide information about the employer. Therefore, these three advertisements are not in the same industry as the petitioner. Likewise, the two advertisements submitted by the petitioner's accredited representative on appeal are not probative because they are all for Controller/Financial Manager positions. As a result, these announcements do not establish a degree requirement in parallel positions. The three letters provided on appeal from other medical practices are also not probative because they are for Financial Advisors or Office Managers, which, for the reasons described previously, are not the same as the proffered position as described in the initial submission of the petition or in response to the RFE.

The petitioner also failed to satisfy 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 a bachelor's degree is not required in a specific specialty. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks

sufficiently detailed information to distinguish the proffered position as unique from or more complex than bookkeeping, accounting, or auditing clerk positions that can be performed by persons without a specialty degree or its equivalent. Moreover, as discussed previously, the AAO will not consider the letters and affidavits provided on appeal that attempt to describe the complex nature of the position because they refer to the new or materially changed position provided by the accredited representative for the first time on appeal, rather than the proffered position.

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).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's 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. The AAO does not find that the proffered duties, as described by the petitioner in support of the petition and in response to the RFE, reflect a higher degree of knowledge and skill than would normally be required of bookkeeping, accounting, and auditing clerks who have responsibility for the accounts and financial statements. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a bookkeeping, accounting, or auditing clerk. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the evidence provided by the petitioner was insufficient to determine whether the beneficiary was qualified to perform in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C) at the time the petition was filed.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the

specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

As mentioned previously, the education documents provided by the petitioner do not indicate that a bachelor's degree was conferred on the beneficiary at the time the petition was filed. The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i). The 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). Additionally, insufficient evidence was provided to determine whether the beneficiary is qualified under the other criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C). Therefore, the petition will also be denied on this additional ground.

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 appeal will be dismissed and the petition denied 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.