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

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

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Date: FEB 1 5 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: 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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner described itself as a commercial jeweler and designer. In order to continue to employ the beneficiary in what it designates as a CAD designer-jewelry position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on January 25, 2010, finding that the petitioner has not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions.

A review of the record, however, demonstrates a more critical issue pertaining to the petitioner's eligibility 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). In this matter, the petition that the petitioner sought to extend (EAC 06 172 54463) expired on October 1, 2009. The instant petition was filed on October 28, 2009, twenty-seven days after the expiration of the validity of the original petition.[1] Counsel submitted a letter with the Form I-129 petition stating "please accept our sincere apologies for the delay in the submission of this petition."[2]

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[1] There is no discretion to grant a late-filed petition extension. Nevertheless, the AAO acknowledges that counsel for the petitioner stated that the Form I-129 petition was filed after the expiration of the original petition because of a delay in obtaining a Labor Condition Application (LCA) from the Department of Labor (DOL). Counsel reported that an LCA was submitted on September 25, 2009 to DOL but that the case was denied. Thereafter, the petitioner submitted an LCA to DOL on October 1, 2009, which was also denied. The record indicates that an LCA was certified by DOL on October 9, 2009. However, the petitioner did not submit the Form I-129 petition to USCIS until October 28, 2009 (19 days later). No explanation for this delay was provided.

[2] It must be noted for the record that, even if eligibility for the benefit sought was otherwise established, as the authority of the AAO is limited to that specifically granted or delegated to it by the Act, its implementing regulations, and the Secretary of the U.S. Department of Homeland Security pursuant to 8 C.F.R. § 2.1, the AAO cannot grant a petition *nunc pro tunc*.

Specifically and as discussed, *infra*, the regulations mandate that a petition extension be filed before the validity of the petition being extended has expired. *See* 8 C.F.R. § 214.2(h)(14). Furthermore, a petitioner must establish eligibility for the benefit sought at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). 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'r 1978). Accordingly, as the law does not provide a discretionary basis to do so, the AAO does not possess the authority to grant a petition *nunc pro tunc* in this matter.

As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension. U.S. Citizenship and Immigration Services (USCIS) does not have the discretion to disregard its own regulations, even if it would benefit a petitioner. *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946 (C.A.D.C. 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). In this matter, the director did not raise this issue in the denial, and thus it appears that the director erroneously exercised favorable discretion to the petitioner under the provisions of 8 C.F.R. § 214.1(c)(4)(i). The director's error is harmless, however, because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility, and the omission of this non-discretionary ground for denial did not result in the improper granting of a benefit in this matter, i.e., the error did not change the outcome of this case. *See Soltane v. DOJ,* 381 F.3d 143, 145 (3d Cir. 2004); *Black's Law Dictionary* 563 (7th Ed., West 1999) (defining the term "*harmless error*" and stating that it is not grounds for reversal).

As noted above, 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). This non-discretionary basis for denial renders the remaining issues in this proceeding moot. For this reason, the appeal must be dismissed and the petition denied.

As the petition must be denied on the non-discretionary basis detailed *supra*, the AAO does not need to examine the issue of the whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. However, the AAO will note that, in any event it reviewed the record of proceeding and, based upon that review, hereby endorses the director's analysis of the specialty occupation as written, finding that it accurately assesses the evidence of record and comports with the statutes and regulations governing the specialty occupation aspect of the H-1B program. Had the appeal not been dismissed as it was filed after the expiration of the petition it sought to extend, the AAO, nevertheless, would have affirmed the director's determination with regard to the specialty occupation on the grounds detailed in the director's decision and for the additional reasons discussed below.

First, the AAO will address counsel's assertion that the H-1B petition should have been granted because it is an extension of status involving the same parties for the same or similar position. Counsel references an April 23, 2004 memorandum authored by

The AAO observes that the memorandum's guidance does not apply in situations where, as here, the petitioner is not eligible to file a petition extension. The memorandum's "Purpose" section

indicates that the memorandum's guidance applies "during adjudication of a . . . request for petition extension."[4]

However, because the present petition for extension was not valid, consequent to it being filed after the expiration of the original petition's validity period, the petition was not a proper subject for adjudication beyond immediate denial, pursuant to the regulation at 8 C.F.R. § 214.2(h)(14), which states, in pertinent part: "A request for a petition extension may be filed only if the validity of the original petition has not expired."

Additionally, the memorandum acknowledges that a petition should not be approved, where, as here, due to the late filing of the extension petition, eligibility for the benefits sought does not exist. Specifically, the Yates memorandum states as follows:

> [A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International,* 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. *See* 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Further, even if the guidance in the memorandum were relevant to the petition now before the AAO, which it is not, that memorandum does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility pursuant to the controlling statute and regulations. In fact, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the petition should be approved.

Moreover, the memorandum clearly states that each matter must be decided according to the evidence of record. In the appeal, counsel suggests that USCIS was required to look at the prior record of proceeding dealing with the separate adjudication of the initial H-1B petition filed by the petitioner on behalf of the beneficiary and provide "a reason to challenge the first adjudication." This claim is without merit. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Each nonimmigrant and

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[4] The memorandum's "Purpose" section states, in full:

> This memorandum provides guidance on the process by which an adjudicator, during adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of a petition where there is no material change in the underlying facts.

immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of proceeding.[5] Accordingly, the director was not required to request and obtain a copy of the initial H-1B petition.

If a petitioner wishes to have previously filed evidence considered by USCIS in its adjudication of a subsequent petition, the petitioner is permitted to submit copies of such evidence that it either maintained itself or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit a copy of the initial H-1B petition and supporting documents, and the record of proceeding does not contain a complete or even partial copy of the initial petition. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

As the record of proceeding does not contain any evidence from the initial petition, there are no underlying facts to be analyzed and, therefore, no prior, substantive determinations which may be given deference. For this additional reason, the memorandum does not apply in this instance.

USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. at 597. A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

In the remainder of this decision the AAO will discuss why the AAO would dismiss the appeal and deny the petition extension even if it had been timely filed making it a proper subject for adjudication on the merits.

The AAO will first address the occupational classification for the proffered position. The AAO is not persuaded by counsel's assertion that the proffered position CAD designer-jewelry does not fall under the occupational category of "Jewelers and Precious Stone and Metal Workers." The AAO has long recognized the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*

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[5] USCIS does not engage in the practice of reviewing previous nonimmigrant petitions when adjudicating extension petitions. Given the various and changing jurisdictions over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[6] Based upon a review of the categories of occupations in the *Handbook*, the AAO finds that the section of the *Handbook* most relevant to this proceeding is the chapter "Jewelers and Precious Stone and Metal Workers."[7] The AAO compared the duties of the proffered position, to the extent that they are depicted in the record of proceeding, to the duties that comprise the occupational category "Jewelers and Precious Stone and Metal Workers" as described in the *Handbook*. The AAO observes that the beneficiary performs substantially the same and/or similar tasks that are described under the occupational category "Jewelers and Precious Stone and Metal Workers."

Counsel asserts that the proffered position does not fall under the occupational category for "Jewelers" because the *O*NET OnLine* Summary Report does not include the use of CAD/CAM [computer-aided design and manufacturing] tools in it is description of the tasks of "Jewelers."[8]

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[6] All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site *http://www.bls.gov/OCO/*. The website states that the *Handbook* is a career reference that describes the job duties, working conditions, education and training requirements, earnings levels, current employment levels, projected employment change, and employment prospects for hundreds of occupations. It presents the results of extensive research and analysis conducted by DOL's Bureau's Office of Occupational Statistics and Employment Projections.

[7] For this chapter, *see* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, "Jewelers and Precious Stone and Metal Workers" *at http://www.bls.gov/oco/ocos222.htm* (visited February 8, 2012).

[8] *O*NET OnLine* is accessible at *http://www.onetonline.org/*. As stated on the Home Page of this Internet site, *O*NET OnLine* is created for the DOL's Employment & Training Administration by the National Center for *O*NET* Development. The *O*NET OnLine* Summary Report for the occupational classification "Jewelers" is accessible on the Internet at *http://www.onetonline.org/link/summary/51-9071.01* (visited on February 8, 2012). The *O*NET OnLine* Summary Report for the occupational classification "Designers, All Other" is accessible on the Internet at *http://www.onetonline.org/link/summary/27-1029.00* (also visited on February 8, 2012).

Counsel claims that the proffered position falls under the occupational category "Designers, All Other" and cites to the *O*NET Online* Summary Report for this occupation. The AAO notes that the *O*NET Online* Summary Report for "Designers, All Other" describes the occupation as "All designers not listed separately." No further information regarding the tasks, knowledge, skills, abilities, work activities, work context, etc. is provided. Thus, there is no specific correlation between the description of the proffered position and the occupation "Designers, All Other."

Furthermore, counsel's reliance on the *O*NET Online* Summary Report to establish the proffered position as a specialty occupation is misplaced. A normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. The Summary Report does not provide any information as to the percentage of respondents in the category "Designers, All Other" who possess at least a bachelor's degree in a *specific specialty*. USCIS consistently interprets the term "degree" to mean not just any baccalaureate or higher degree, but one in a *specific specialty* that is directly related to the position. An occupation is not a specialty occupation if a bachelor's degree in any field of study, or in a general field of study, is acceptable. Here, the *O*NET Online* Summary Report does not provide any

Counsel claims, without corroborating evidence, that these "tools are not normally used by Jewelers, and since their use requires specialized knowledge that is normally gained throughout the attainment of a bachelor's or higher degree." However, counsel's assertions are inconsistent with the pertinent information regarding computer-aided design, and the training required to employ it, presented in the *Handbook's* "Jewelers and Precious Stone and Metal Workers" chapter.

The *Handbook* includes the following description of the duties for the occupational category of jewelers:

> CAD allows jewelers to create a virtual-reality model of a piece of jewelry. Using CAD, jewelers can modify the design, change the stone, or try a different setting and see the contemplated changes on a computer screen before cutting a stone or performing other costly steps. Once they are satisfied with the model, they use CAM to produce a mold. After the mold is made, it is easier for manufacturing firms to produce numerous copies of a given piece of jewelry, which can be distributed to retail establishments across the country. Similar techniques may be used in the retail setting, allowing customers to review their jewelry designs with the jeweler and make modifications before committing themselves to the expense of a customized piece of jewelry.

The introduction to the "Training, Other Qualifications, and Advancement" section of this chapter in the *Handbook* states the following:

> Jewelers usually learn their trade on-the-job over the course of several months; however, vocational or technical schools or distance-learning centers are becoming more common ways for workers to learn their skills. Formal training enhances employment and advancement opportunities.
>
> ***Education and training.*** Jewelers have traditionally learned their trade through several months of on-the-job training; while this method is still common, particularly in manufacturing plants, many are also learning their skills in vocational or technical schools or through distance-learning centers. Computer-aided design is becoming

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information regarding the major field of study for the respondents.

Moreover, O**NET OnLine* does not state or otherwise indicate that at least a bachelor's degree in a specific specialty is normally the minimum requirement for entry to the occupation "Designers, All Other." Rather, the results of the voluntary education-survey reported in the O**NET OnLine's* Education section of its Summary Report for the occupation "Designers, All Other" indicates that 45% percent of respondents do not have a bachelor's degree. Although not the result of a scientific survey, this figure nevertheless does not indicate that a bachelor's degree, or for that matter, a bachelor's degree in a specific specialty, is normally a minimum requirement for entry into this occupation. As such, it cannot be determined based upon the *O*NET Online* Summary Report that at least a bachelor's degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position.

> increasingly important to retail jewelers and students may wish to obtain training in it. This skill can usually be obtained through technical school; however, some employers may provide training in it, as well.
>
> In jewelry manufacturing plants, workers traditionally develop their skills through informal apprenticeships and on-the-job training. The apprenticeship or training period lasts up to 1 year, depending on the difficulty of the specialty. Training usually focuses on casting, setting stones, making models, or engraving.
>
> There are also many technical schools offering training designed for jewelers. Some manufacturers prefer graduates because they require less on-the-job training. Course topics can include blueprint reading, math, and shop theory.
>
> For jewelers who work in retail stores or repair shops, vocational training or college courses offer the best job preparation. These programs may vary in length from 6 months to a year and teach jewelry making and repairing skills, such as designing, casting, setting and polishing stones, as well as the use and care of jeweler's tools and equipment.
>
> There are various institutes that offer courses and programs in gemology. These programs cover a wide range of topics, including the identification and grading of diamonds and gem stones.
>
> While it is not required, some students may wish to obtain a higher level degree. For them, art and design schools offer programs leading to the degree of bachelor of fine arts or master of fine arts in jewelry design.

As previously mentioned, counsel contends that the use of CAD/CAM tools is "not normally used by Jewelers, and since their use requires specialized knowledge that is normally gained through the attainment of a bachelor's or higher degree." However this assertion is not supported by the *Handbook* which states that "[c]omputer-aided design is becoming increasingly important to retail jewelers and students may wish to obtain training in it. This skill can usually be obtained through technical school; however, some employers may provide training in it, as well." Moreover, the *Handbook* specifically states that a bachelor's degree or higher is not required for the occupation.

In response to the RFE, the petitioner provided a letter listing "key courses taken by the beneficiary within a master's degree program in Fine Arts that relate to his current employment/job duties." The AAO notes that while a few related courses may be beneficial in performing certain duties of the proffered 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. That is, in light of the *Handbook's* information and the absence of credible documentation refuting it, it appears that the requisite knowledge for the position could be developed via a wide range of unrelated degree programs, from job experience alone, from junior college or community college courses, from training provided by vocational

programs or by vendors, by on-the-job training, or by some combination thereof. In short, the petitioner failed to sufficiently demonstrate how the duties of the CAD designer-jewelry position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

Furthermore, based upon a complete review of the record of proceeding, the petitioner has not established that the duties of the proffered position are sufficiently complex, unique and/or specialized that performance would require a level of theoretical and practical knowledge normally associated with at least a bachelor's degree, or the equivalent, in a specific specialty. This is further supported by the Labor Condition Application (LCA) submitted by the petitioner with the Form I-129. The LCA indicates a wage level based upon the occupational classification "Designer, All Other" at a Level 1 (entry level) wage. Thus, by virtue of the related wage level specified therein, the LCA indicates the position is a low-level, entry position relative to others within the occupation.

The "Prevailing Wage Determination Policy Guidance" issued by DOL indicates that wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification.[9] 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.[10] Prevailing wage determinations start with an entry level wage (i.e. Level 1) and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) 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.[11] The 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 as indicated by the job description.

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[9] DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at *http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.*

[10] *Id.*

[11] 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.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels.[12] A Level 1 wage rate is described by DOL as follows:

> **Level 1** (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 worker in training, or an internship are indicators that a Level I wage should be considered.

By virtue of the related wage level specified on the LCA, the petitioner has indicated that the position is a low-level, entry position relative to others within the occupation. Based upon this wage rate, the beneficiary is a beginning level employee who has only a basic understanding of the occupation. He will be expected to perform routine tasks that require limited, if any, exercise of judgment. The beneficiary will work under close supervision, and he will receive specific instructions on required tasks and expected results. His work will be closely monitored and reviewed for accuracy. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex, unique and/or specialized that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that relates to the proffered position. Furthermore, the petitioner has not established that the nature of the specific duties is so complex, unique and/or specialized that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Further, the AAO finds that the opinion letter that the petitioner obtained from the expressed in the professor's January 4, 2007 letter to the service center, merits no deference and is not probative evidence that the proffered position is a specialty occupation. In reaching this determination, the AAO notes that the professor provides no documentary support for his ultimate conclusion regarding the education required for the position (such as, for instance, statistical surveys, authoritative industry publications, or professional studies), has not established himself as an expert or authority on the recruiting and hiring practices for the position upon which he opines, and has not addressed the DOL's contrary information in the *Handbook*. USCIS may, in its discretion, use as advisory opinions statements 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. 1988).

Further, beyond the decision of the director, the AAO finds that the petitioner failed to provide an LCA that corresponds to this petition. For this reason also, the petition must be denied. The AAO conducts

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[12] DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at *http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.*

appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition.

As indicated earlier in this decision, and notwithstanding counsel's arguments to the contrary, the proffered position, as described in the record of proceeding, falls within the occupation classification of "Jewelers," not "Designers, All Others." Accordingly, by submitting an LCA for "Designers, All Others," and not for "Jewelers," the petitioner failed to provide an LCA corresponding to the petition.

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.

[Italics added]. 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 of the proffered position, that is, specifically, that corresponds to the occupational category and level of work and responsibilities that the petitioner ascribed to the proffered position in accordance with the requirements of the pertinent LCA regulations. For this reason also, the petition must be denied.

Nevertheless, as previously mentioned, the issue of whether the petitioner established that the proffered position meets the statutory and regulatory provisions for a specialty occupation for the instant petition is moot. The petition must be denied as it was filed after the expiration of the validity of the petition it sought to extend.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

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