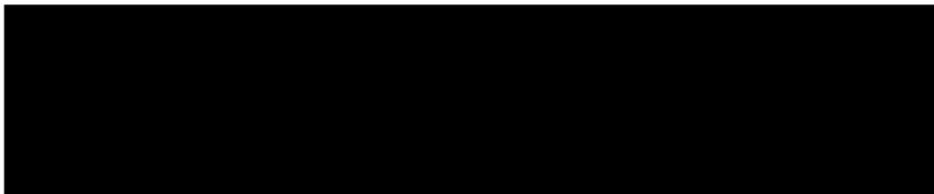




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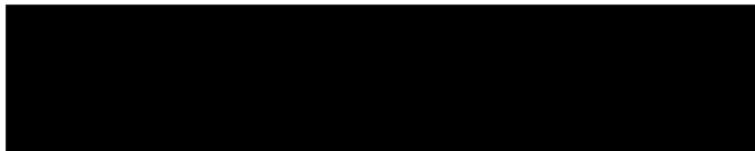


IN RE:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will be revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 13, 2007. The petitioner stated that it is a construction company, established in 2001, with 14 employees. Seeking to employ the beneficiary in what it designates as a construction equipment manager position, the petitioner filed this H-1B petition in an endeavor 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 record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's NOIR; (5) the response to the NOIR; (6) the director's revocation notice; and (7) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner has failed to credibly establish that the statement of material facts contained in the petition with regard to the beneficiary's work experience and qualifications for the proffered positioner were accurate. The documents submitted in response to the NOIR and on appeal fail to effectively rebut and overcome the basis for revocation specified at 8 C.F.R. §§ 214.2(h)(11)(iii)(2) and (4) below. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
 - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

(5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as construction equipment manager on a full-time basis. On the Form I-129, the petitioner described the proposed duties of the beneficiary as the "[m]anagement of use, leasing, renting, maintenance, and repair of heavy construction machinery and equipment." The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 20, 2007. The director outlined the evidence to be submitted by the petitioner.

In response to the director's RFE, the petitioner submitted a letter dated July 13, 2007. The AAO extrapolated the following description from the petitioner's letter regarding the job duties of the proffered position of construction equipment manager:

(a) New Projects (once every two months, 4 hours average per week or 30 – 35 hours per project).

Determination of full scope of the project, preparation of control schedule and execution plan for owned and rented equipment, setup of project files, cost estimates for labor, fuel, supplies, and service.

This tasks calls for detailed engineering knowledge of construction equipment and machinery, including their power, maximum and productive capacities, footprint, weight, vertical and horizontal sweeps.

(b) Field Control and Management of Equipment, Labor, Fuel, Supplies, and Service (daily, about 30 hours per week).

Monthly executive reports, weekly schedule updates, daily project diaries. Management of equipment and machinery exploitation, leasing, maintenance, installation, and transfer between construction sites. Maintenance of in-line documentation including drawing, specification, contract and manual files. Work with subcontracts, inspection and measurement of completed work.

This task calls for extensive managerial background and skills that are usually associated with the bachelor degree. This task equally calls for detailed engineering knowledge of construction equipment and machinery, including their power, maximum and productive capacities, footprint, weight, vertical and horizontal sweeps. In addition, this task requires profound engineering understanding of, and ability to site technical sketches and drawings. The Construction Equipment Manager must coordinate location and reach for each particular piece of equipment and machinery so as to avoid interference with other construction jobs performed at the site.

(c) Safety Control and Instructions (daily, about 5 hours per week).

OSHA pre-work review requests, worker orientations, daily inspections, maintenance of safety files, preparation of safety reports, accident investigation.

This is a purely managerial task also requiring engineering knowledge of equipment specifications and maximum workloads.

(d) Weekly management meetings (about 1 hour per week).

The petitioner stated that "all of the proposed functions of the Construction Equipment Manager are either managerial or engineering in nature. Clerical tasks that this position may entail are incidental to the qualifying duties." The petitioner also stated the proffered position of construction equipment manager was a new position and that the tasks had previously been distributed among its project managers. The director approved the petition on July 17, 2007.

Subsequent to the petition's approval, the United States Embassy in Tashkent, Uzbekistan reviewed the record of proceeding and information elicited from the beneficiary on two separate occasions, as well as public and government records. Based upon this information, the U.S. Embassy returned the petition to the director for review. The U.S. Embassy notified USCIS that during the course of the visa interview process, information was presented that was not available to the director at the time the petition was approved. The Consular Officer asked the beneficiary about his education and work experience and details about the proffered position. In its letter of support, the petitioner stated that the beneficiary possessed 18 years of managerial experience; however, the beneficiary told the consular officer that – despite the job titles in his employment record (work book) – he only served in a management position for one and a half years. The Consular Officer found that even then, the beneficiary could not articulate his management responsibilities. When questioned about his previous jobs, the beneficiary described only non-managerial tasks. Additionally, the beneficiary could not describe the proffered position even in his native language. The Consular Officer observed that it was evident that the beneficiary speaks no English, thus it did not appear that he would be able to fulfill the duties of the position as described in the petition. The Consular Officer considered all of the information and did not find the alleged assignment with the petitioner to be credible.

Thereafter, the director issued a NOIR to the petitioner. The NOIR contained a detailed statement regarding the information that USCIS had obtained from the U.S. Embassy in Tashkent, Uzbekistan and notified the petitioner that it was afforded an opportunity to provide evidence to overcome the stated grounds for revocation. Upon review of the record, the AAO finds that the NOIR placed the petitioner on notice that revocation of the approval of the petition was contemplated within the scope of the revocation-on-notice provisions, namely, that the approval of the petition violated the regulatory requirements regarding the proffered position at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner responded to the NOIR with a written statement from the beneficiary and additional evidence. Upon review, the AAO notes that the beneficiary's written statement is not an affidavit as it was not sworn to or affirmed by the beneficiary before an officer authorized to administer oaths or affirmations, who has confirmed the beneficiary's identity and administered the requisite oath or affirmation. *See Black's Law Dictionary 58* (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signer, in signing the statement, certifies the truth of the statement, under penalty of perjury. 28 U.S.C. § 1746. Furthermore, while the letter may provide some insight into the beneficiary's various statements to the Consular Officer, the petitioner should note that the letter represents a claim by the beneficiary (regarding his credentials), rather than evidence to support that claim.

The petitioner also submitted a letter from the director of a company "Effective Study" that is dated November 9, 2009. The letter states that the beneficiary "was studying at the learning center 'Effective Study' from August 15, 2007 to December 15, 2007. Learning level "Starter." The AAO notes that the letter is dated approximately two years after the beneficiary's participation in the course. Most notably, the letter does not indicate the subject matter that the beneficiary studied. Additionally, the letter does not contain any information regarding the frequency or duration of the course, the method of teaching, the number of participants, the beneficiary's performance, etc. The letter is devoid of sufficient information to establish its relevancy here and it has no probative value to these proceedings.

In addition, the petitioner submitted a letter of support, stating that the proffered position is still available to the beneficiary and that it did not expect the beneficiary to have any difficulties in performing his duties because of his lack of English fluency. The petitioner claims that most of its employees, contractors and suppliers are Russian speakers and that it "will benefit from having a Russian-language machine and equipment manager on staff." The petitioner also submitted evidence regarding upcoming projects.

The director reviewed the petitioner's response but found the information submitted insufficient to refute the findings in the NOIR. The director revoked the approval of the petition on March 10, 2010. Thereafter, the petitioner and counsel submitted an appeal.

In the appeal, counsel for the petitioner asserts that the beneficiary's written statement was supported by the employment registration record (work book) of the beneficiary and claims that "[i]ts veracity has never been called into question." The AAO notes that the employment record simply provides

the beneficiary's job titles and dates of employment in each position. It is insufficient to determine the nature and duties of a position by simply relying on a position's job title. The work book does not provide a description of the beneficiary's employment, such as the tasks and activities, complexity of the job duties, level of judgment and understanding required for performance, and supervisory responsibilities.¹

With the appeal, counsel submitted *O*NET* reports for several occupations and claims that they "demonstrate that job titles Engineer, Chief Engineer, Director, Production Director, Foreman are managerial positions. A Deputy Director, being a second-in-command is also a managerial position." The AAO observes that *O*NET* reports are sponsored and funded by the U.S. Department of Labor (DOL) and data is collected about the work attributes of occupations in the United States.² The AAO is not persuaded by counsel's assertion, and counsel has provided no evidence to support her claim, that the *O*NET* reports are authoritative sources on the nature of any particular occupational categories in Uzbekistan and, thus, relevant to the issue here. Additionally, the *O*NET* reports provide general tasks for occupations, but they do not provide any information about the beneficiary's specific duties and responsibilities. Furthermore, the *O*NET* reports appear to have been chosen by job title alone. For example, counsel submitted an *O*NET* summary report for Technical Directors/Managers – SOC code 27-2012.05, which deals with coordinating activities for radio and television programs and includes such duties as directing newscasts; taking responsibility for on-air products such as camera shots and graphics; and observing pictures through monitors. Counsel has not sufficiently demonstrated that the beneficiary ever held a position that would fall under this occupational category (and even if it was established, the relevancy of such experience to the proffered position is not apparent), and for this reason as well the *O*NET* report on Technical Directors/Managers appears to be extraneous.

The AAO reviewed the record of proceeding in its entirety, including the documents submitted in support of the petition and appeal, as well as the information obtained by the U.S. Embassy in Tashkent. The AAO notes that the record of proceeding contains material discrepancies regarding the beneficiary's qualifications for the proffered position and the petitioner has not sufficiently resolved the inconsistencies and established that the statement of facts contained in the petition is accurate. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent

¹ In response to the RFE, the petitioner submitted a letter from [REDACTED]. The letter states that "[the beneficiary] was employed as an engineering manager of [REDACTED] January 17, 1994 to December 15, 2003 in charge of construction machinery operation." The beneficiary's employment record indicates that the beneficiary worked for the company during this time period but that he served as a "repairman for Chinese equipment" then was promoted to a "specialist of [REDACTED] service" and then was "upgraded to a deputy director general for production." Neither the petitioner nor the beneficiary provided an explanation for this variance.

² *O*NET* Resource Center is the primary source of occupational information in the United States. Additional information is available on the Internet website <http://www.onetcenter.org> (last accessed May 30, 2012).

upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582. The petitioner has not met its burden of proof in this regard. Accordingly, the AAO agrees with the director's revocation of the approval of the petition.

Moreover, the AAO observes that even if the petitioner had overcome the stated grounds for revoking the approval of the petition (which it has not), the petition would still be remanded to the director for issuance of a new NOIR and initiation of a new revocation-on-notice process with regard to this petition's approval because of several additional matters that the AAO observes in the record of proceeding. More specifically, there are numerous, significant discrepancies in the record of proceeding with regard to the petitioner's occupational classification of the proffered position; the duties and requirements of the proffered position; the wage level for the proffered position; and the corresponding prevailing wage and offered wage for the position. The petitioner has (1) failed to submit a Labor Condition Application (LCA) that corresponds to the petition; and (2) failed to establish that it would pay the beneficiary an adequate salary for his work.

The AAO will now discuss the discrepancy between what the petitioner and counsel claim about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

The petitioner claims that that the duties of the proffered position are specialized and complex and that "all the proposed functions of the Construction Equipment Manager are either managerial or engineering in nature." The petitioner claims that the job duties require an "extensive managerial background" and that the beneficiary's daily duties will include "purely managerial task[s]." The petitioner also states that the beneficiary will make the "determination of full scope of project[s]." The petitioner asserts that the position involves "sophisticated tasks" and repeatedly claims that the construction equipment manager must have "detailed engineering knowledge" as well as a "profound engineering understanding of, and the ability to site technical sketches and drawings." In its letter of support dated March 26, 2007, the petitioner stated the position requires a candidate to possess "not less than a bachelor degree in an engineering field and a managerial background." The petitioner claimed that the beneficiary was the "perfect candidate" for the position based upon his education and "solid 18 years of managerial experience related to operation and maintenance of heavy construction and road machinery."³

In this regard, the petitioner's claims are questionable when reviewed in connection with the LCA and supporting documents submitted with the Form I-129 petition.

³ The record contains discrepancies regarding the translation of the beneficiary's diploma. For example, the petitioner submitted a translation of the beneficiary's university diploma with the initial petition that states that the beneficiary is "qualified as a Railroad Communications Engineer." Later, the petitioner submitted a second translation of the diploma that states that the beneficiary is "qualified as a Railway Engineer for Railway Operation." No explanation was provided for the variance.

In the Form I-129 petition, the petitioner identified the proffered position as falling under the occupational code 182, which, the AAO notes, is assigned by DOL to the category "Construction Industry Managers and Officials."⁴

In the LCA, the petitioner also specified the occupational code for the proffered position as 182. The petitioner listed the prevailing wage as \$41,642 per year, which corresponds to the occupational category "Business Operations Specialists, All Other" - SOC (ONET/OES) code 13-1199 for Richmond County (Staten Island), New York at a Level 1 (entry).⁵ The LCA was certified on March 20, 2007 and signed by the petitioner on March 26, 2007.

The petitioner provided a copy of the prevailing wage request it submitted to DOL. The AAO notes that when an employer requests a prevailing wage determination (i.e. from the State Workforce Agency (SWA), National Processing Centers, National Prevailing Wage and Helpdesk Center) the job is analyzed and categorized based on the information provided by the employer. Enough information must be given so that an analyst can determine the occupational category and the skill level within that category. In defining the job's occupational category, skill level and prevailing wage rate for the labor market area, the analyst considers the following elements of the job (which are provided by the employer): work tasks, work activities, equipment used, work environment, working conditions, complexity of the job duties, level of judgment and understanding required to perform the job, amount and nature of supervision received, and supervisory responsibilities.⁶ The petitioner also provides the experience, training and/or educational requirements (i.e. college degree – type and major field of study) for its position.⁷

In this case, the petitioner submitted a prevailing wage request to the SWA specifically for the beneficiary (the beneficiary is named on the request) for the proffered position of construction

⁴ See DOL, Employment and Training Administration, Form ETA 9035CP, Appendix 1, which provides a list of the "Three-Digit Occupational Groups." The form is accessible on the Internet at http://www.lca.doleta.gov/h1bcl_oc.pdf (last accessed May 30, 2012).

⁵ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, DOL, on the Internet at <http://www.bls.gov/oes/> (visited May 30, 2012). The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>. According to DOL's website regarding "Prevailing Wage Determinations for Specific Occupations," a Standard Occupational Classification (SOC) of "all other" is used when a more specific SOC cannot be identified. See DOL, Office of Foreign Labor Certification (OFLC) *Frequently Asked Questions and Answers*, available on the Internet at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#pwds3> (last accessed May 30, 2012).

⁶ 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. See also, DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised May 2005), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁷ *Id.*

equipment manager. The petitioner was asked to "fully describe the job duties of the job offered" and the petitioner stated that the duties were "to plan and coordinate machinery and equipment leasing, scheduling, operation, maintenance and repairs." No further information regarding the job duties and elements of the job were provided. The petitioner did not indicate that the position involved any managerial and/or engineering related duties. The petitioner stated that a bachelor's degree in management and one-year of experience were required to perform the duties of the position. The petitioner indicated that the position would not involve supervisory duties and that no special skills or other requirements were necessary for the position. The AAO notes that the petitioner did not indicate that Russian language skills were necessary for the position.

The petitioner failed to state in its prevailing wage request that the duties of the position are specialized and complex and that "all the proposed functions of the Construction Equipment Manager are either managerial or engineering in nature" and that the position requires an "extensive managerial background." The petitioner did not affirm that the construction equipment manager's duties include the "determination of full scope of project[s]." The petitioner failed to state that the position involves "sophisticated tasks." The petitioner did not indicate that the construction equipment manager must have "detailed engineering knowledge" as well as a "profound engineering understanding of, and the ability to site technical sketches and drawings." Furthermore, the petitioner did not state that the proffered position requires "not less than a bachelor degree in an engineering field." (The AAO notes that the petitioner stated on the prevailing wage request that the position requires a bachelor's degree in *management*. No explanation for this discrepancy was provided.) The job duties and requirements provided by the petitioner in the prevailing wage request vary significantly from the description of the proffered position submitted to USCIS.⁸ Although the information detailed above was not provided by the petitioner in the prevailing wage request, it appears relevant for determining the proper occupational category and wage level.

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

⁸ The regulations at 20 C.F.R. § 655.731(a)(2)(ii)(A)(3) state that when an employer obtains a prevailing wage determination from the National Prevailing Wage Center, DOL will accept that wage as correct and will not question its validity, i.e. the employer is granted "safe harbor" in connection with the request. However, obviously, this "safe harbor" cannot be accorded to employers who fail to fully and/or accurately describe the position, including such aspects as the tasks, work activities, knowledge, skills, and specific vocational preparation (education, training, and experience) that are considered by DOL for its determining of the nature of the job and wage level. In the instant case, there are significant discrepancies between the information provided in the prevailing wage request and the information provided to USCIS regarding the position.

In the instant case, the petitioner provided inconsistent information as to the salary to be paid to the beneficiary. In the Form I-129 (pages 3 and 10) and the LCA, the petitioner stated that beneficiary would be paid \$42,000 per year. In its letter of support, the petitioner stated that the beneficiary's salary would be \$45,000 per year. In the prevailing wage request, the petitioner stated that the rate of pay for the proffered position was \$50,000 per year. All of the documents are dated in March 2007. No explanation for the variance was provided.

The "Prevailing Wage Determination Policy Guidance" provides clear instructions with respect to selecting the most relevant *O*NET* occupational code classification for the LCA.⁹ The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The *O*NET* description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification.

* * *

The particulars of the employer's job offer should be compared with the full description to the tasks, knowledge, and work activities generally associated with the occupation to determine the most relevant occupational code.

* * *

If the employer's job opportunity has worker requirements described in a combination of *O*NET* occupations, the SWA should default directly to the relevant *O*NET-SOC* occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

The petitioner had an obligation to determine the appropriate occupational classification for the proffered position for the LCA.¹⁰ Based upon a review of the record of proceeding, the AAO finds the occupational classification chosen by the petitioner on the LCA for the proffered position questionable. A petitioner should list the *O*NET* occupation that most closely matches its job

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. See also, DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised May 2005), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

¹⁰ The AAO finds that the petitioner's description of the position in the prevailing wage request does not sufficiently correspond to the duties, responsibilities and requirements of the proffered position as depicted by the petitioner to USCIS.

offer.¹¹ If a petitioner believed its position was described as a combination of *O*NET* occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation.¹²

The petitioner listed the proffered position as falling under the occupational category of "Business Operations Specialists, All Other" at a Level 1 (entry) on the LCA. In response to the RFE, the petitioner provided an *O*NET* summary report for the occupational category of "General and Operations Managers." Counsel stated that "[t]he closest title is General and Operations Managers." It is noted that the prevailing wage for the occupational category "General and Operations Managers" at a Level 1 was \$69,035 per year at the time the petition was filed in this matter, a difference of over \$27,000 per year than the offered salary that was provided on the Form I-129 and LCA.¹³

The AAO also notes that the petitioner's statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level 1 entry-level position. Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.¹⁴

Prevailing wage determinations start with a Level 1 (entry) 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.¹⁵ DOL

¹¹ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised May 2005), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf, (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

¹² *Id.*

¹³ See DOL, Online Wage Library available on the Internet at <http://www.flcdatabase.com/>. All industries database for 7/2006 - 6/2007 with wage level for "General and Operations Managers" for Richmond County, NY available on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?area=35644&code=11-1021&year=7&source=1> (last accessed May 30, 2012).

¹⁴ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised May 2005), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf, (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

¹⁵ 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

emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."¹⁶ A Level 1 wage rate is describes 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 1 wage should be considered.

The petitioner claims that that the duties of the position are specialized and complex and that "all the proposed functions of the Construction Equipment Manager are either managerial or engineering in nature." The petitioner asserts that the job duties require an "extensive managerial background." The petitioner also states that the beneficiary will make the "determination of full scope of project[s]." The petitioner asserts that the position involves "sophisticated tasks" and repeatedly claims that the construction equipment manager must have "detailed engineering knowledge" as well as a "profound engineering understanding of, and the ability to site technical sketches and drawings."

The AAO notes that this characterization of the position and the claimed duties and responsibilities conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. The wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment, that he would be closely supervised, that his work would be closely monitored and reviewed for accuracy, and that he would receive specific instructions on required tasks and expected results. This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the assertions by the petitioner regarding the demands and level of responsibilities of the proffered position.

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.

¹⁶ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised May 2005), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf, (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The AAO finds that the claimed level of complexity, independent judgment and understanding is materially inconsistent with the LCA certification for a Level 1 entry-level position. As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

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

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether 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. The petitioner's statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level 1 entry-level position. The AAO notes that this conflict, along with the other inconsistencies in the record, including those related to the occupational classification, requirements, salary and duties, undermines the overall credibility of the petition.

In conclusion, based upon a complete review of the record of proceeding, the petitioner has failed to overcome the grounds specified in the NOIR for revoking the petition. The petitioner did not provide sufficient evidence to overcome the issues raised by the beneficiary's testimony to the Consular Officer at the U.S. Embassy in Tashkent, Uzbekistan. The petitioner failed to establish that the statement of facts contained in the petition is accurate. When a petitioner fails to resolve discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972).

Furthermore, even if the petitioner had overcome the stated grounds for revocation of the approval of the petition, the petition would still be remanded to the director for issuance of a NOIR regarding the discrepancies and inconsistencies with regard to the petitioner's occupational classification of the proffered position; the duties and requirements of the proffered position; the wage level for the proffered position; and the corresponding prevailing wage and offered wage for the position.

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The approval of the petition is revoked.