

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



D2

Date: JUN 12 2012 Office: CALIFORNIA SERVICE CENTER FILE [Redacted]

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:
[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 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 service center director 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.

On the Form I-129 visa petition, the petitioner stated that it is an importer and exporter of dismantled automobile parts. To employ the beneficiary in a position it designates as chief executive officer (CEO), the petitioner endeavors 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 petitioner is a corporation that incorporated on September 3, 2002. The petitioner's tax returns and other evidence in the record demonstrate that the beneficiary owns 100% of the petitioner.

The appeal is filed to contest each of the two independent grounds upon which the director denied this petition, specifically, the director's separate determinations that the petitioner (1) failed to establish that it has standing to file the visa petition for the beneficiary as it has not established that it is the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), and (2) failed to establish that the proffered position is a specialty occupation position.

The AAO will first analyze the specialty occupation issue. Section 101(a)(15)(H)(i)(b) of the Act provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. Because the petitioner is seeking to have a visa issued to the beneficiary so that it may employ the beneficiary pursuant to that section of law, whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position is properly at issue.

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

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health,

education, business specialties, accounting, law, theology, and the arts, and which (2) requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, 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 a particular position 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry

requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

On the visa petition, the petitioner indicated that it was established in 2002, that it has only one employee, and that it has a gross annual income of \$200,897 and a net annual income of \$94,158. The wage proffered to the beneficiary for working in the proffered position is \$69,000 annually.

The record contains a letter from [REDACTED]. In that letter, which represents that [REDACTED] is the petitioner's treasurer, [REDACTED] stated that, in the proffered position, the beneficiary would:

. . . monitor the development of long- and short-term business plans to strategically position the [petitioner] within the automobile parts industry; . . . coordinate the development and implementation of the [petitioner's] overall economic and financial policies and programs that will support business strategies; . . . establish strategies for sales, purchasing and competitive pricing to increase the [petitioner's] profitability; . . . analyze collected data and oversee a plan to track and forecast trends in consumer economic behavior, as well as identify potential economic market opportunities; . . . initiate the economic research and identification of consumer needs in order to develop sound business methodologies to improve and increase customer satisfaction; . . . monitor and analyze automotive parts industry to ensure that the company [will] develop and will retain a competitive edge; . . . develop a business model for the company's automotive engine products that will lead to name branding and recognition; . . . review the company's financial statements and progress reports to evaluate productivity, goal meeting, and level of achievement. The individual will hire departmental managers [and] Measure and improve the effectiveness of the [petitioner's] economic strategies and overall business plans.

[REDACTED] further stated:

The duties of the position are so complex and specialized that in order to perform the job duties the individual must have acquired at least a Bachelor of Science degree with a major in Economics, Business or a related discipline, or its equivalent.

The AAO finds, to the contrary, that, as reflected in the first paragraph quoted above from [REDACTED] letter, which described the proposed duties, the petitioner describes the proffered position, and its constituent duties, in broad terms of generalized functions that do not illuminate the substantive nature of the particular work that the beneficiary would perform, or, for that matter, the nature and educational level of knowledge that such work might demand. In this regard, the AAO observes that not only are the constituent duties asserted in broad, abstract terms (such as, for instance, monitoring and analyzing the automobile parts industry), but so also are the matters upon which the duties would concentrate (such as, for example, sales strategies and "the company's financial statements and progress reports").

Further, the AAO finds that the broadly stated, generalized, and generic information upon which the petitioner relies is insufficient to establish that the proffered position is one that normally requires at least a bachelor's degree in a specific specialty, and is also insufficient to establish that the proffered position or its duties are so unique, complex, and/or specialized as to either necessitate a person with at least a bachelor's degree in a specific specialty or require the application of knowledge usually associated with attainment of least a bachelor's degree in a specific specialty.

For economy's sake, the AAO hereby incorporates by reference the above comments and findings into all of its discussions below regarding the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Mr. [REDACTED] stated, yet further, "The [petitioner] has located an individual with such qualifications. [The beneficiary] has acquired a Bachelor of Science degree with a major in Economics from [REDACTED]?"

The record contains various documents showing that the beneficiary earned a bachelor's degree in agriculture from [REDACTED], in [REDACTED]. The petitioner provided an evaluation that states that this is equivalent to a bachelor's degree with majors in both agriculture and economics earned at a university in the United States.

On April 14, 2009, the service center issued a request for evidence (RFE) in this matter. The service center requested, *inter alia*, copies of the petitioner's 2005, 2006, and 2007 income taxes; tax record transcripts from IRS for 2006 and 2007; a legible copy of the IRS notice according the petitioner an Internal Revenue Service tax identification number, also called an FEIN; and copies of the petitioner's business licenses.

In response, the petitioner provided its 2005, 2006, 2007, and 2008 Form 1120 W.S. Corporation Income Tax Returns. It did not provide the tax record transcripts, the IRS notice according the petitioner a tax identification number, or the business licenses requested by the service center.

Although the visa petition states that the petitioner's tax identification number is [REDACTED], the tax returns state that it is [REDACTED]. Counsel submitted his own response to the RFE. That response did not address the tax identification number discrepancy.

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 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, 591-92 (BIA 1988).

Further, counsel did not address the petitioner's failure to provide the tax record transcripts, the IRS notice according the petitioner an FEIN, or the petitioner's business licenses, all of which were specifically required by the request for evidence.

In the decision of denial, the director analyzed the duties of the proffered position as described in the petitioner's submissions and found that they do not demonstrate that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty, and that the petitioner did not, therefore, demonstrate that the proffered position qualifies as a specialty occupation. Although the AAO agrees with the director's analysis, it is not essential to rendering a decision in this case.

In the letter of March 27, 2009, [REDACTED] who was then identified as the petitioner's treasurer and has subsequently been identified as its CEO, stated that the proffered position requires ". . . at least a Bachelor of Science degree with a major in Economics, Business or a related discipline, or its equivalent."

The petitioner's referencing degrees in "Economics, Business, or a related discipline" as qualifying degrees for the proffered position is not indicative of the its being a specialty occupation position. Any position, the educational requirement of which may be satisfied by an otherwise undifferentiated degree in business administration does not require a minimum of a bachelor's degree or the equivalent in a specific specialty and does not qualify as a specialty occupation position. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as Business Administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge in a specific specialty as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

The petitioner has not demonstrated, nor even alleged, that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The failure of the petitioner even to allege that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty is a sufficient reason, in itself, to find that the petitioner has not demonstrated that the proffered position is a specialty occupation position, and sufficient reason, in itself, to deny the visa petition. However, the AAO will continue its analysis of the specialty occupation issue, in order to identify other evidentiary deficiencies that preclude approval of this petition.

The AAO will now discuss the application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first address the supplemental, alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied if the petitioner demonstrates that the normal minimum entry requirement for the proffered position is a bachelor's or higher degree in a specific specialty or its equivalent.

The AAO recognizes the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ In this instance, the petitioner might have been able to meet this criterion by (1) establishing the occupational classification under which the proffered position should be classified and (2) providing evidence that the *Handbook* supports the conclusion that this occupational classification normally requires a bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation in the United States.

In the chapter entitled "Top Executives," the *Handbook* provides the following descriptions of the duties of those positions:

- Establish and carry out departmental or organizational goals, policies, and procedures
- Direct and oversee an organization's financial and budgetary activities
- Manage general activities related to making products and providing services
- Consult with other executives, staff, and board members about general operations
- Negotiate or approve contracts and agreements
- Appoint department heads and managers
- Analyze financial statements, sales reports, and other performance indicators
- Identify places to cut costs and to improve performance, policies, and programs

The referenced section of the U.S. Dept. of Labor's Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/Management/Top-executives.htm> (last accessed May 29, 2012).

The described duties of the proffered position are consistent with the duties of a top executive as described in the *Handbook*, and the AAO finds that the proffered position is a top executive position as described in the *Handbook*.

The *Handbook* states the following about the educational requirements of top executive positions:

Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. College presidents and school superintendents typically have a doctoral degree in the field in which they originally

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012–2013 edition available online.

taught or in education administration. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts. Top executives of large corporations often have a Master of Business Administration (MBA).

Top executives who are promoted from lower level managerial or supervisory positions within their own firm often can substitute experience for education. In industries such as retail trade or transportation, for example, people without a college degree may work their way up to higher levels within the company and become executives or general managers.

That chapter of the *Handbook* does not support the proposition that top executive positions require a minimum of a bachelor's degree or the equivalent in a specific specialty. It states that, for instance, college presidents may have a doctorate in the subject they originally taught, prior to their promotion. That is not a degree specifically related to the job of college president. In fact, a degree in any subject taught in college might qualify one for a college president job, according to the *Handbook*.

The *Handbook* further states that a bachelor's degree in business administration or liberal arts may be a sufficient educational qualification for a top executive position. As was noted above, *Matter of Michael Hertz Associates, supra*, indicates that a position the educational requirement of which may be satisfied by an undifferentiated degree in business administration does not qualify as a specialty occupation position. Similarly, liberal arts is not a specific specialty, and any position for which the educational requirement may be satisfied by a degree in liberal arts without further specification is not a specialty occupation position.

On appeal, counsel asserted that USCIS should consider evidence from DOL's *O*NET OnLine*, stating that the proffered position should correctly be classified in the specific vocational preparation (SVP) level 8, and Job Zone 5.

Even if the proffered position were demonstrated to be correctly categorized as SVP level 8 and Job Zone 5, that would not, in itself, demonstrate that the proffered position is a specialty occupation position.²

SVP Level 8 indicates that positions within that classification require more than four years, and up to and including ten years, of preparation. It does not denote any division of that time between academic preparation and other preparation. It does not even indicate that any portion of the preparation for a position in that classification must be in college, or that the preparation, once completed, is equivalent to a minimum of a bachelor's degree or the equivalent in a specific specialty. Thus, that a position is classified in SVP Level 8 does not demonstrate that it qualifies as

² For an explanation of SVP levels and Job Zones, see <http://www.onetonline.org/help/online/svp> and <http://www.onetonline.org/help/online/zones>, respectively.

a specialty occupation position by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty.

Job Zone 5 indicates that most of the occupations thus classified require graduate school. That most require a graduate school education suggests that some do not. What alternative preparation may be appropriate to some positions, and whether it is equivalent to at least a bachelor's degree, is unstated.

Further, the Job Zone within which a position is classified does not address the critical issue of a degree requirement *in a specific specialty*. A position correctly classified in Job Zone 5 might only require, for example, a bachelor's degree in business administration. If a position requires such a degree, or even permits it as one alternative educational qualification, then, as was explained above, that position would not qualify it as a specialty occupation position.

Further still, the AAO finds that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of technical knowledge in business, but do not establish any particular level of formal education as minimally necessary to attain such knowledge.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was observed above, the *Handbook* does not report that the petitioner's industry normally requires top executives to possess a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association of top executives that requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry. The record contains no letters or affidavits from others in the petitioner's industry. In short, the record contains no evidence that suggests that similar companies in the petitioner's industry require their top executives to have a minimum of a bachelor's degree or the equivalent in a specific specialty.

In summation, the petitioner has provided no evidence to support the proposition that companies similar to the petitioner in its industry commonly require a minimum of a bachelor's degree or the equivalent in a specific specialty for positions parallel to the proffered position. The petitioner has not, therefore, satisfied the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner establishes that, notwithstanding that other top executive positions in its industry may not require a minimum of a bachelor's degree, or the equivalent, in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such credentials.

As was observed above in this decision's earlier comments about the position and its duties, the description of duties provided does not set the proffered position apart. Rather, the duties described appear to be duties typically expected of people in top executive positions, some of which positions, the *Handbook* indicates, do not require at least a bachelor's degree or the equivalent in a specific specialty.

Again, monitoring the development of business plans; coordinating the development and implementation of the petitioner's policies and programs; establishing strategies for sales, purchasing and pricing; analyzing collected data; overseeing a plan to track and forecast trends in consumer economic behavior and identify market opportunities; initiating economic research; identifying consumer needs; etc., are so abstract that they contain no indication of uniqueness or complexity beyond the ken of a top executive without a specialized degree. The petitioner has not, therefore, satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).³

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree, or the equivalent, in a specific specialty.

³ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Again, however, the duties described are insufficiently specific to demonstrate such specialization and complexity that the knowledge required to perform them is usually associated with the attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty.

Given the abstract and generalized way in which they and the matter upon which they would be performed are described – as noted earlier in comments incorporated herein -- monitoring and analyzing the automotive parts industry, developing a business model, reviewing financial statements and progress reports, hiring departmental managers, measuring and improving the effectiveness of the petitioner's economic strategies and overall business plans, for instance, contain no indication that they are so specialized and complex that the knowledge required to perform them is usually associated with a bachelor's degree, especially in view of the indication in the *Handbook* that some top executive positions, which might encompass similar duties, may not require a minimum of a bachelor's degree or the equivalent in a specific specialty. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director did not err in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the submissions on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

The remaining basis upon which the petition was denied is the director's finding that the petitioner failed to demonstrate that it has standing to file the visa petition for the beneficiary as the beneficiary's prospective United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the director stated:

The petition may not be approved because the petitioner does not have the ability to hire or fire or otherwise control the work of this beneficiary (himself) in a qualifying employer-employee relationship.

On appeal, counsel contended that the director's findings are erroneous. Counsel stated:

The fact that [the same person] is both the Beneficiary of the Petition and the sole shareholder of the Petitioner company does not mean that the Petitioner "could not" appropriately control the employee, Beneficiary.

Counsel cited *Matter of M-*, 8 I&N Dec. 24 (BIA 1958, A.G. 1958) and *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986) for the proposition that, "The beneficiary's ownership of shares in the petitioning company does not preclude the owner from being able to file this nonimmigrant petition on the beneficiary's behalf." Counsel also observed that, in tort law, the owners of a corporation are afforded limited liability if they observe the requisite corporate formalities.

The salient issue is whether the petitioner has demonstrated that it would have an employer-employee relationship with the beneficiary. *Matter of Silver Dragon Chinese Restaurant*, cited by counsel, made clear that, notwithstanding that a beneficiary's ownership of a petitioner does not preclude it from filing a petition for that beneficiary, that beneficiary's ownership of the petitioner may yet be a material fact to be considered in determining whether the petition is approvable. In *Silver Dragon*, which apparently involved a Form I-140 Immigrant Petition for Alien Worker, the petitioner's ownership was material to whether the proffered position had been open to other applicants. In the instant case, the beneficiary's ownership of the petitioner is relevant to whether the petitioner would exercise the requisite degree of control over the beneficiary that they would have an employer-employee relationship.

Counsel has not detailed any similarities between the facts of this case and the facts of the cases cited. Clearly, the decisions in the cases cited do not control whether the facts of the instant case demonstrate that the petitioner would have an employer-employee relationship with the beneficiary. Further, concepts of tort law or even corporate law are not controlling in the matter of whether the petitioner in this case would exercise the requisite control over the beneficiary.

The issue, as was stated above, is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the immediate question is whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may*

hire, pay, fire, supervise, or otherwise control the work of any such employee; and

- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary. Applying the tests mandated by the Supreme Court of the United States for construing the terms "employee" and "employer-employee relationship," the record is not persuasive in establishing that the beneficiary will be an "employee" of the petitioner as its sole member, sole employee, and managing member.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the legacy Immigration and Naturalization Service ("INS") nor U.S. Citizenship and Immigration Services ("USCIS") defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

Within the context of H-1B nonimmigrant petitions, when an alien beneficiary is also a partner, officer, member of a board of directors, or an owner of the corporation, the beneficiary may only be defined as an "employee" having an "employer-employee relationship" with a "United States employer" if he or she is subject to the organization's "control." 8 C.F.R. § 214.2(h)(4)(ii). The Supreme Court decision in *Clackamas* specifically addressed whether a shareholder-director is an employee and stated that six factors are relevant to the inquiry. 538 U.S. at 449-450. According to *Clackamas*, the factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1)(d), (EEOC 2006).

Again, this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Clackamas*, 538 U.S. at 450 (citing *Darden*, 503 U.S. at 324).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁴

⁴ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. See, e.g., section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.⁵

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁶

controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

⁵ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

⁶ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

In the past, the legacy INS considered the employment of principal stockholders by petitioning business entities in the context of employment-based classifications. However, these precedent decisions can be distinguished from the present matter.

The decisions in *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm'r 1979) both conclude that corporate entities may file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The AAO does not question the soundness of this particular conclusion and does not take issue with a corporation's ability to file an immigrant or a nonimmigrant visa petition. The cited decisions, however, do not address an H-1B petitioner's burden to establish that an alien beneficiary will be a bona fide "employee" of a "United States employer" or that the two parties will otherwise have an "employer-employee relationship." *See id.*; 8 C.F.R. § 214.2(h)(4)(ii).

Although an H-1B petitioner may file a visa petition for a beneficiary who is its sole or primary owner, this does not necessarily mean that the beneficiary will be a bona fide "employee" employed by a "United States employer" in an "employer-employee relationship." *See Clackamas*, 538 U.S. at 440. Thus, while a corporation that is solely or substantially owned by a beneficiary is not prohibited from filing an H-1B petition on behalf of its alien owner, the petitioner must nevertheless establish that it will have an "employer-employee relationship" with the beneficiary as understood by common-law agency doctrine.

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

Moreover and as detailed above, in addition to the sixteen factors relevant to the broad question of whether a person is an employee, there are six factors to be considered relevant to the narrower

question of whether a shareholder-director is an employee. *See Clackamas*, 538 U.S. at 449. These factors include whether the organization can hire or fire the individual; whether and to what extent the organization supervises the individual's work; whether the individual reports to a more senior officer or employee of the organization; and whether the individual shares in the organization's profits, losses, and liabilities. *Id.* at 449-450.

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is not dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right* to provide the tools required to complete an assigned project. *See id.* at 323.

In applying the test as outlined in *Clackamas*, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; *cf. Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988) (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." As explained above, the petitioner purports to be a corporation which is solely owned the beneficiary. The petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner. In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an "employee" having an "employer-employee relationship" with a "United States employer." It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. To the contrary, although, as counsel observed, the

petitioner and the beneficiary are separate entities for the purposes of tort law, the beneficiary *is* the petitioner for most practical purposes. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; and he will share in all profits and losses. Finally, the AAO also notes that there is no record of employment actions or any employment history for this corporation that would establish that it ultimately controls the work of the beneficiary. Therefore, based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

Accordingly, the petitioner and the beneficiary are not eligible for the benefit sought, and the appeal must be dismissed and the petition denied for this additional reason.

The record suggests additional issues that were not addressed in the decision of denial.

On the visa petition, the petitioner stated that its FEIN [REDACTED]. Its tax returns state that the petitioner's FEIN [REDACTED]. The RFE issued in this matter on April 15, 2009 included the following request:

Submit a legible copy of the Internal Revenue Service (IRS) notice that shows the FEIN assigned to the petitioner. If the petitioner has more than one FEIN, explain and provide the IRS notices for those numbers as well.

Counsel's response to the RFE did not include the requested IRS notice or any explanation.

Absent clarification of whether the petitioner has an FEIN and what that number is, the instant petition could not be approved, as the petitioner has not demonstrated that it meets the criterion of 8 C.F.R. § 214.2(h)(4)(ii)(3). For this additional reason, the petitioner has not established that it has standing to file an H-1B visa petition as the beneficiary prospective U.S. employer. The petition must be denied for this additional reason.

Further, in the April 15, 2009 RFE, in addition to requesting the IRS notice or notices according an FEIN to the petitioner, the service center requested that the petitioner provide tax record transcripts and business licenses. Those documents were directly relevant to the material issue of whether the petitioner is actually doing business in the United States at the [REDACTED] address where it claims the beneficiary would work, which is an issue material to the approvability of the instant visa petition.

The petitioner did not provide the requested tax record transcripts, IRS notice, or business licenses. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition must be denied on this additional basis.

Further still, even if the petitioner had established that the proffered position qualifies as a specialty occupation and that it requires a minimum of a bachelor's degree or the equivalent in either

economics or business, the beneficiary has not been shown to have a bachelor's degree in either of those diverse specialties.

The evaluation provided states that the beneficiary's foreign degree in agriculture is the equivalent of a bachelor's degree with a major in both agriculture and economics earned in the United States. This is *prima facie* unlikely. The evaluation explains that, in attaining his degree in agriculture and subsequently, the beneficiary took various classes related to economics.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in [section 214(i)(1)(B) of the Act, which is set out above] for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Counsel has not argued that the beneficiary is qualified for the proffered position based on his licensure or experience, but based only on his education and degree.

The AAO notes that, as per sections 214(i)(2)(C) and 241(i)(1)(B) of the Act, the petitioner's degree must be shown to be equivalent to a bachelor's degree in economics, without reference to additional courses taken that did not lead to any degree. A translation of the beneficiary's undergraduate transcript shows that the undergraduate classes that the beneficiary took that were directly related to economics were (1) a four-credit class in economics, apparently introductory; (2) a two-credit class in the economics of forestry; (3) a four-credit class in "Principle of Economics;" (4) a four-credit class in economic history; and (5) a four credit class in economic policy. Notwithstanding the conclusion of the evaluator, the AAO does not believe that those five classes, totaling 18 credits, qualify the beneficiary's foreign degree as the equivalent of a bachelor's degree in economics earned in the United States. The evaluator provided no analysis of that issue, but merely his conclusion that the beneficiary's foreign bachelor's degree in agriculture is equivalent to a U.S. bachelor's degree in both agriculture and economics.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where, as here, 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, if USCIS does not believe that a stated fact is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see

also Anetekhai v. I.N.S., 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The beneficiary does not have a minimum of a bachelor's degree or the equivalent in economics and, if the proffered position required such a degree, he would not be qualified to perform in it. The petition must be denied on this additional basis.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

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