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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
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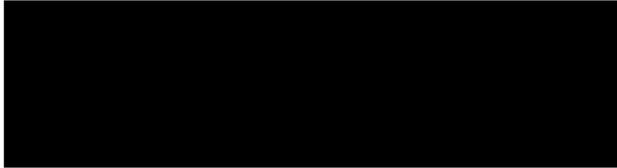
Date: Office: CALIFORNIA SERVICE CENTER File: 

MAY 07 2012

IN RE: Petitioner: 
Beneficiary: 

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:

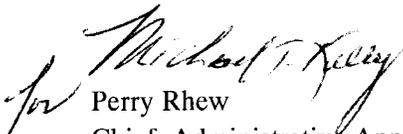


INSTRUCTIONS:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and, in response, the petitioner filed a motion to reconsider. The director subsequently granted the motion but issued a decision affirming the earlier decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on October 6, 2009. The petitioner stated that it was established in 2008 and described its type of business as "gas station and convenience stores" with 164 employees. The petitioner did not provide its gross annual income and net annual income on the Form I-129 petition.

Seeking to employ the beneficiary in what it designates as an operations 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 director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). Upon granting the petitioner's subsequently filed motion to reconsider, the director affirmed the earlier decision to deny the petition. The director determined that the petitioner failed to establish that the proffered position qualifies as a specialty occupation, and additionally determined that the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment. On appeal, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's denial letter; (3) the petitioner's Motion to Reconsider; (4) the director's request for evidence (RFE); (5) the response to the RFE; (6) the director's Dismissal of the Motion to Reconsider; and (7) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

Later in this decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition.¹ Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to establish that the Labor Condition Application (LCA) submitted with the petition properly supports

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

the Form I-129. For these additional reasons also the petition may not be approved, with each considered as an independent and alternative basis for denial.

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as an operations manager on a full-time basis. The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 12, 2010. The RFE requested that the petitioner submit additional information to demonstrate that the proffered position is a specialty occupation, including a more detailed description of the proffered position with the approximate percentage of time for each duty the beneficiary will perform.

In response to the director's RFE, the petitioner's counsel submitted a letter dated February 11, 2010, which included the same duties (verbatim) as the petitioner had provided with the initial petition along with the percentage of time that the beneficiary would spend performing each of the duties. The following job description was provided for the proffered position of operations manager:

- Responsible for coordination of petroleum projects to include securing quotes, reviewing for accuracy and compliance with state regulations; 10%
- Maintain equipment inventory staged at various vendor locations, and procure equipment from inventory for damaged equipment in field, ongoing projects; 10%
- Coordinate the successful execution and completion of assigned projects; 10%
- Provide project status updates, and make frequent visits to project sites for petroleum related projects, including new construction, brand/image changes, revitalizations, petroleum installs/upgrades and large scale maintenance activities; 10%
- Prepare annual volumes and expenses for budgeting; 10%
- Participate in strategic planning and budget processes, proactively contributing to the strategic goals for the company; 10%
- Create and maintain a workplace environment that promotes fair and equal treatment of employees, open communication and the highest standards of ethical behavior; 10%
- Maintain strict compliance with all environmental and governmental regulations, corporate policies and laws; 10%
- Promote new techniques and activities in order to increase potential markets and stay ahead of competition; 10%

- Supply management with all necessary operational reports including failure reports, monthly reporting, equipment and personnel status, client complaints; 5%
- Ensure that financial, operational, safety and customer service goals are developed, communicated and achieved within the company. 5%

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's duties would necessitate services, on a full-time basis, at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the entire period requested. The director denied the petition and the matter is now before the AAO.

The AAO reviewed the record of proceeding in its entirety. Before addressing the grounds for the director's denial of the petition, the AAO will first make some initial findings, beyond the decision of the director, that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record.

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).

The AAO will now highlight an aspect of the petition that undermines the petition's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect is the discrepancy between what the petitioner claims about the level of responsibility inherent in the proffered position, on the one hand, and, on the other, the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of the petition.

Counsel states that the job duties indicate the "highly discretionary and demanding nature of the proffered position." Furthermore, counsel repeatedly claims that the proffered position involves "duties that are more discretionary, demanding, complex, and specialized." Counsel also asserts that the operations manager must be "extremely well-versed in the various environmental and governmental regulations and state laws" and that "only an individual with extensive experience in the industry and a degree in the field" would be able to perform the duties. Counsel further claims that the "[p]etitioner requires the services of an individual that is extremely knowledgeable and experienced" to assume the duties and that the petitioner's business "substantiates the specialized and complex duties" of the position. Moreover, counsel states that the operations manager must use his "discretion when participating in strategic planning and budgeting processes and coordinating projects."

In this regard, counsel's claims are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. The AAO notes that the petitioner provided an LCA in

support of the instant petition that indicates the occupational classification for the position is "Petroleum Engineers" - SOC (ONET/OES Code) 17-2171, at a Level 1 (entry level) wage.

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.² Prevailing wage determinations start with an entry level wage 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.³ The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels.⁴ A Level 1 wage rate is described by DOL as follows:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be

² 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.

³ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

⁴ 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.

considered.

Counsel repeatedly claims that the duties of the proffered position are complex, unique and/or specialized. As previously mentioned, counsel asserts that the proffered position involves "duties that are more discretionary, demanding, complex, and specialized." Furthermore, counsel states that the job duties indicate the "highly discretionary and demanding nature of the proffered position." Counsel claims that the operations manager must be "extremely well-versed in the various environmental and governmental regulations and state laws" and that "only an individual with extensive experience in the industry and a degree in the field" would be able to perform the duties. Counsel further asserts that the "Petitioner requires the services of an individual that is extremely knowledgeable and experienced" to assume the duties and that the petitioner's business "substantiates the specialized and complex duties" of the position. Moreover, counsel states that the operations manager must use his "discretion when participating in strategic planning and budgeting processes and coordinating projects." However, the AAO must question the level of complexity, independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position.

The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will 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 petitioner's assertions regarding the demands and level of responsibilities of the proffered position. 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. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.⁵ See 20 C.F.R. § 655.705(b), which states, in pertinent part:

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

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. For this reason also, the petition may not be approved.

The AAO will now address the primary basis upon which the petition was denied, namely, the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described by the petitioner constitutes a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

⁵ The AAO notes that the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Petroleum Engineers" - SOC (ONET/OES Code) 17-2171. Counsel mistakenly claims that the director should have "follow[ed] the information clearly contained in the LCA" in determining the occupational classification for the proffered position. Pursuant to section 212(n)(1)(G)(ii) of the Act, DOL's role is limited by statute to "only" reviewing LCAs "for completeness or obvious inaccuracies." DHS / USCIS is responsible for ensuring that an LCA certified to it in fact corresponds with the Form I-129 H-1B petition with which it is filed. More specifically, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that 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) and 655.715.

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

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

An occupation which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] 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 and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition

of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such 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.

The title of the proffered position, operations manager, is amorphous and may encompass a spectrum of positions differing in the range of constituent duties and associated educational requirements. Depending on the substantive nature of those duties, some of those positions may be performed with experience alone, some may require a general bachelor's degree, and some may require a bachelor's or higher degree in a specific discipline. To determine whether this particular position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. The AAO finds that the petitioner in the instant case has not done so.

As described, the duties of the proffered position fail to communicate either the actual work entailed or an adequate correlation between that work and the petitioner's stated business operations. For instance, the abstract level of information provided regarding the proffered position and the duties comprising it is exemplified by the phrases "[c]oordinate the successful execution and completion of assigned projects"; "[p]romote new techniques and activities in order to increase potential markets and stay ahead of competition"; "[e]stablish business goals and objectives and ensure they are consistent with overall goals and objectives of the company"; and "[c]reate and maintain a workplace environment that promotes fair and equal treatment of employees, open communication and the highest standards of ethical behavior." The petitioner does not adequately describe the actual duties involved in these tasks. Because of the lack of specificity as to the duties the beneficiary would perform on a day-to-day basis, the particular level of knowledge to be applied in this case is not self-evident. The AAO further finds that the minimum level of training, experience, and/or formal education that would be required to attain the requisite knowledge to perform the tasks is not self-evident in the duty descriptions, even

considered in the aggregate and in the context of the evidence that the record of proceeding relates about the general business operations in which they would be applied.

The petitioner fails to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level of education in a body of highly specialized knowledge in a specific specialty. Consequently, the petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not supported by substantive evidence of specific levels of complexity, uniqueness and/or specialization inherent in the duties of the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above comments and findings into its analysis of each of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) below.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

As previously mentioned, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes 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.⁶ The petitioner and counsel assert that the proffered position falls under the occupational category "Petroleum Engineers." The AAO reviewed the *Handbook's* chapter on "Petroleum Engineers" but did not find that the duties of the proffered position correspond to this occupational classification. The *Handbook* describes the duties of "Petroleum Engineers" in the

⁶ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

subsection entitled "What Petroleum Engineers Do" and states the following about the duties of this occupation:⁷

Petroleum engineers design and develop methods for extracting oil and gas from deposits below the earth's surface. Petroleum engineers also find new ways to extract oil and gas from older wells.

Duties

Petroleum engineers typically do the following:

- Design equipment to extract oil and gas in the most profitable way
- Develop ways to inject water, chemicals, gases, or steam into an oil reserve to force out more of the oil
- Develop plans to drill in oil and gas fields, and then to recover the oil and gas
- Make sure that wells, well testing, and well surveys are completed and evaluated
- Use computer-controlled drilling or fracturing to connect a larger area of an oil and gas deposit to a single well
- Make sure that oil field equipment is installed, operated, and maintained properly

Oil and gas deposits, or reservoirs, are located deep in rock formations underground. These reservoirs can only be accessed by drilling wells, either on land or at sea from off-shore oil rigs.

Once oil and gas are discovered, petroleum engineers work with geologists and other specialists to understand the geologic formation of the rock containing the reservoir. They then determine drilling methods, design and implement the drilling equipment, and monitor operations.

The best techniques currently being used recover only a portion of the oil and gas in a reservoir, so petroleum engineers also research and develop new ways to recover the oil and gas. This helps to lower the cost of drilling and production.

The petitioner does not claim that the beneficiary will be employed to design and develop methods for extracting oil and gas from deposits below the earth's surface. Moreover, there is no indication that the proffered position involves finding new ways to extract oil and gas from older wells. The petitioner did not provide any evidence to suggest that the beneficiary will design equipment to extract oil and gas and develop ways to inject water, chemicals, gases, or steam into an oil reserve. The petitioner's job description of the proffered position does not indicate that the beneficiary will develop plans to drill in oil and gas fields, and then to recover the oil and gas. The duties of the proffered position do not include making sure wells, well

⁷ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Petroleum Engineers, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/petroleum-engineers.htm#tab-2> (visited April 27, 2012).

testing, and well surveys are completed and evaluated. The petitioner has not established that the beneficiary will use computer-controlled drilling or fracturing to connect a larger area of an oil and gas deposit to a single well. Additionally, there is no evidence to suggest that the beneficiary will be responsible for making sure that oil field equipment is installed, operated, and maintained properly. The petitioner has not indicated that the beneficiary will work with geologists and other specialists to understand the geologic formation of rocks, and determine drilling methods, design and implement the drilling equipment, and monitor operations.

The petitioner classified the proffered position under the occupational category of "Petroleum Engineers" on the LCA.⁸ It is noted that the instructions for the LCA indicate that employers should choose the occupational code for the position that most clearly described the work to be

⁸ Guidance issued by DOL states that "[t]he *O*NET* description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification" for determining the prevailing wage for the LCA. See 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.

*O*NET Online* states that petroleum engineers "[d]evelop methods to improve oil and gas extraction and production and determine the need for new or modified tool designs. [They] [o]versee drilling and offer technical advice." Additionally, *O*NET Online* provides the following tasks for the occupational category of petroleum engineers:

- Assess costs and estimate the production capabilities and economic value of oil and gas wells, to evaluate the economic viability of potential drilling sites.
- Develop plans for oil and gas field drilling, and for product recovery and treatment.
- Direct and monitor the completion and evaluation of wells, well testing, or well surveys.
- Analyze data to recommend placement of wells and supplementary processes to enhance production.
- Monitor production rates, and plan rework processes to improve production.
- Interpret drilling and testing information for personnel.
- Specify and supervise well modification and stimulation programs to maximize oil and gas recovery.
- Assist engineering and other personnel to solve operating problems.
- Confer with scientific, engineering, and technical personnel to resolve design, research, and testing problems.
- Coordinate the installation, maintenance, and operation of mining and oil field equipment.

The petitioner has not provided any documentation to establish that the duties for the occupational category of "Petroleum Engineers" as depicted in *O*NET Online* (or as depicted in the *Handbook* or other authoritative source) describes the work to be performed by the beneficiary in the proffered position.

performed.⁹ Additionally, DOL guidance indicates that a determination should be made by "consider[ing] the particulars of the employer's job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected."¹⁰ However, on appeal counsel acknowledges that the position does not correspond to a petroleum engineer position. Specifically, counsel states that the position of petroleum engineer "is not the offered position. The offered position is of a Management position in the petroleum business."

While the proffered position of operations manager for a "gas station and convenience store" may require some understanding of petroleum principles and systems, the record contains no evidence that the duties of the proffered position are substantially the same or similar to the duties normally associated with "Petroleum Engineers." In this context, the fact that a person may be employed in a position designated by an employer as that of an operations manager for a gas station and convenience store and may apply some knowledge of petroleum principles and systems in the course of his or her job is not in itself sufficient to establish the position falling under the occupational category of "Petroleum Engineers."¹¹ Occupations are categorized based on the type of work and job duties performed, as well as the experience, skills, education and training required to perform the job.¹²

The director reviewed the job description provided by the petitioner and found that the proffered position falls under the occupational classification of "Administrative Services Managers." In the appeal, counsel acknowledges that "the beneficiary's duties are similar to that of an Administrative Services Manager" but claims that the duties of the proffered position are distinguishable because "experience and familiarity with [p]etroleum is important and understanding the industry in general is crucial for the Beneficiary to carry out his assigned duties." The AAO reviewed the *Handbook's* chapter on "Administrative Services Managers" and finds that there are many aspects of the duties of the proffered position that relate to this occupational category. The AAO finds that the occupational category does not fully encompass every duty of the proffered position. However, the typical duties of "Administrative Services Managers" as described in the *Handbook* contain multiple tasks in common with the

⁹ See ETA Form 9035CP – General Instructions for the 9035 & 9035E, available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035CP.pdf (last accessed April 27, 2012).

¹⁰ See 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.

¹¹ As the AAO has determined that the occupational category for the proffered position is not "Petroleum Engineers," the O*NET summary report referenced by counsel is not relevant to this proceeding as it does not correspond to the occupational category for the proffered position.

¹² See 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.

beneficiary's duties as described by the petitioner. Furthermore, the *Handbook* states that "[a]dministrative services managers plan, coordinate, and direct a broad range of services that allow organizations to operate efficiently." Thus, the petitioner's requirement of "experience and familiarity with [p]etroleum" appears to indicate the need for skills beyond those of an *entry level worker* under the occupational category – but, without more, does not indicate that the proffered position falls under a separate occupational category.¹³

The *Handbook* states, in pertinent part, the following about the duties of this occupation:¹⁴

Administrative services managers typically do the following:

- Buy, store, and distribute supplies
- Supervise clerical and administrative personnel
- Recommend changes to policies or procedures to improve operations, such as changing what supplies the organization keeps and improving how the organization handles records
- Plan budgets for contracts, equipment, and supplies
- Monitor the facility to ensure that it remains safe, secure, and well maintained
- Oversee the maintenance and repair of machinery, equipment, and electrical and mechanical systems
- Ensure that facilities meet environmental, health, and security standards and comply with government regulations

Administrative services managers plan, coordinate, and direct a broad range of services that allow organizations to operate efficiently. An organization may have several managers who oversee activities that meet the needs of multiple departments, such as mail, printing and copying, recordkeeping, security, building maintenance, and recycling.

The work of administrative services managers can make a difference in employees' productivity and satisfaction. For example, an administrative services manager might be responsible for making sure the organization has the supplies and services it needs. Also, an administrative services manager who is responsible

¹³ DOL guidance states that "[t]he employer's requirements for experience, education, training, and special skills shall be compared to those generally required for an occupation as described in O*NET and shall be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III), or fully competent (Level IV) worker and warrants a prevailing wage determination at a higher wage level. See 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.

¹⁴ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Administrative Services Managers, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm> (visited April 27, 2012).

for coordinating space allocation might take into account employee morale and available funds when determining the best way to arrange a given physical space.

Administrative services managers also ensure that the organization honors its contracts and follows government regulations and safety standards.

Administrative services managers may examine energy consumption patterns, technology usage, and office equipment. For example, managers may recommend buying new or different equipment or supplies to lower energy costs or improve indoor air quality.

They also plan for maintenance and the future replacement of equipment, such as computers. A timely replacement of equipment can help save money for the organization, because eventually the cost of upgrading and maintaining equipment becomes higher than the cost of buying new equipment.

The following are examples of types of administrative service managers:

Contract administrators handle buying, storing, and distributing equipment and supplies. They also oversee getting rid of surplus or unclaimed property.

Facility managers oversee buildings, grounds, equipment, and supplies. Their duties fall into several categories, including overseeing operations and maintenance, planning and managing projects, and dealing with environmental factors.

Facility managers may oversee renovation projects to improve efficiency or ensure that facilities meet government regulations and environmental, health, and security standards. For example, they may influence building renovation projects by recommending energy-saving alternatives or efficiencies that reduce waste. In addition, facility managers continually monitor the facility to ensure that it remains safe, secure, and well maintained. Facility managers also are responsible for directing staff, including maintenance, grounds, and custodial workers.

The *Handbook* provides the following information in the subsection entitled "How to Become an Administrative Services Manager" for this occupational category.¹⁵

Educational requirements vary by the type of organization and the work they do. They must have related work experience.

¹⁵ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 Edition*, Administrative Services Managers, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm> (visited April 27, 2012).

Education

A high school diploma or a General Educational Development (GED) diploma is typically required for someone to become an administrative services manager. However, some administrative services managers need at least a bachelor's degree. Those with a bachelor's degree typically study business, engineering, or facility management.

The AAO notes that the *Handbook* does not report that, as an occupational group, "Administrative Services Managers" require at least a bachelor's degree in a specific specialty. The *Handbook* explains that the educational requirements vary by the type of organization and the work performed but that related work experience is required. The *Handbook* states that a high school diploma or GED diploma is typically required for administrative services managers.¹⁶ The *Handbook* does not indicate that "Administrative Services Managers" normally require a baccalaureate or higher degree, or its equivalent, in a specific specialty for entry into the occupation.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. However, the petitioner has not adequately established its assertion that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the particular position.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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.

As previously mentioned, the petitioner described its type of business as "gas station and convenience stores" with 164 employees. The petitioner did not provide its gross annual income and net annual income on the Form I-129 petition.

¹⁶ As previously noted, wage levels for an occupation are based on a comparison of the employer's job requirements to the occupational requirements. In the instant case, the petitioner indicated on the LCA that the proffered position is a Level 1, low-level entry position.

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. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations in the petitioner's industry attesting that a degree is a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from firms or individuals in the industry to meet this criterion of the regulations.

The petitioner provided several job announcements in its response to the RFE. However, upon review of the documents, the AAO finds that they do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions.

The AAO notes that for the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered).

The AAO notes that all of the postings provided by the petitioner are devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the business operations. Moreover, the petitioner has not demonstrated that the advertised positions are similar to the proffered position. A review of these descriptions does not indicate that the duties are parallel positions to the proffered position. The burden of proof remains with the 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. The AAO finds that the petitioner has not done so.

It must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these three advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and

that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty or its equivalent for organizations that are similar to the petitioner, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Thus, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied 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 shows that the position is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

A review of the record indicates that the petitioner has failed to demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The AAO notes that the petitioner did not provide any documentation to indicate that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The AAO here incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. As previously discussed, counsel for the petitioner repeatedly claims that the proffered position involves highly complex, unique and/or specialized duties. Yet, the petitioner designated the proffered position at a Level 1 wage level. It would be expected that such a position involving highly complex, unique and/or specialized duties would be classified at a higher-level, requiring a significantly higher prevailing wage.

Moreover, the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Additionally, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties counsel claims are so complex or unique. While a few related courses may be beneficial in performing some of the proposed duties, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific

specialty or its equivalent is required to perform the duties of the proffered position. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Accordingly, the petitioner failed to establish that the position is so complex or unique that it can only be performed by an individual who has attained at least a bachelor's degree, or the equivalent, in a related specialty. Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion entails an employer demonstrating that it normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring a bachelor's degree, or the equivalent, in a specific specialty in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.¹⁷

Upon review of the record, the petitioner did not provide any documentary evidence regarding its current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who have previously held the position. It is also noted that the petitioner did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position. The record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

¹⁷ To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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 384. 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").

In the instant case, no evidence was submitted regarding the petitioner's past recruiting and hiring practices. The record of proceeding does not establish that the petitioner normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

The AAO again incorporates this decision's earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position on the LCA as a low-level, entry position relative to others within the occupation. Therefore, it is simply not credible that the position is one with specialized and complex duties as such a position would be classified at a higher-level, requiring a significantly higher prevailing wage. Moreover, the petitioner has not provided any documentary evidence to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

Upon review of the record, the petitioner has not met its burden of proof in this regard. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

As discussed in this decision, the petitioner has not established eligibility for the benefit sought. Therefore, the AAO need not and will not address the issue of whether the petitioner has demonstrated that there exists a reasonable and credible offer of employment, except to note that, in any event, the petitioner submitted a Form I-129 petition on behalf of the beneficiary for the position of management analyst for a period from October 1, 2009 to September 30, 2012. The petition was denied on August 11, 2009. On October 6, 2009, the petitioner submitted the instant

petition on behalf of the beneficiary for the position of operations manager and requested the same validity dates. Counsel stated that the following:

The specialty occupation was changed in the current petition as Petitioner reviewed Beneficiary's qualifications. Based upon Beneficiary's educational background and work experience in Mexico . . ., Petitioner believes that Beneficiary will be suited to perform the job duties of an Operations Manager . . . rather than the job duties of the other position.

The director noted that it appeared that the petitioner created a position that corresponded with the beneficiary's educational background and past experience. In the appeal, counsel claims that the "Petitioner changed the specialty occupation because the Beneficiary was more qualified for the position of Operations Manager."

In this regard, the AAO notes that it has not reviewed the previous filing. However, because the appeal must be dismissed for the reasons previously discussed, it renders this issue moot. Thus, it is unnecessary for the AAO to request and review the first filing on behalf of the beneficiary to make a determination on this issue. Accordingly, the AAO will not examine this basis for the director's denial of the petition and it will be withdrawn.

The petition will be denied because the petitioner (1) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) failed to submit a certified LCA that corresponds to the petition. Each reason will be considered as an independent and alternative basis for denial.

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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

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