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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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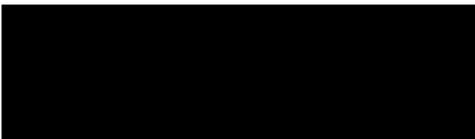
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Date: **MAY 08 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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,

for 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 a "Real Estate Development and Wholesale Trading" firm.¹ To employ the beneficiary in what it designates as an architect/project manager position, the petitioner endeavors to classify her 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 it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's decision was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief.

As will be discussed below, the AAO has determined that the director's decision to deny the petition on the specialty occupation issue was correct. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position.

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.

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 requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to,

¹ The nature of the petitioner's wholesale trading business and whether it has any bearing on the instant visa petition is not made clear by any of the evidence in the record.

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 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.

With the visa petition, counsel submitted (1) evidence that the beneficiary received a PhD in architectural engineering from Yonsei University in Korea; (2) an evaluation that states that the beneficiary's Korean degree is equivalent to a PhD in architectural engineering from a U.S. institution; (3) a letter, dated November 30, 2009, from the petitioner's CEO; (4) printouts from various U.S. Department of Labor (DOL) websites; and (5) counsel's own letter, dated November 30, 2009.

In his November 30, 2009 letter, the petitioner's CEO provided the following description of the duties of the proffered position:

1. Perform as project manager in programming, design review, and construction for large capital improvement projects;
2. Recommend technology, engineering organization, and standards for implementing products;
3. Work closely with executives to align products and systems with the organizations that specify, develop, test, and deploy them;
4. Direct activities and monitor all steps of construction including design, and construction time plan, other specifications and on-site observations;
5. Communicate architectural decisions and intent with project team;
6. Assist project management to provide leadership, technical and management expertise to clients, project teams and other project staff to ensure client satisfaction, quality and profitability of projects;
7. Manage a wide variety of tasks that encompass the development, execution, and reporting aspects of large and small projects;
8. Create and execute project work plans and revision as appropriate to meet changing needs and requirements;
9. Assume responsibility for leading and coordinating all aspects of project management including the hiring and terminating of project personnel, awarding contracts, managing customer relationships, developing and managing timelines, etc.
10. Direct and coordinate activities relating to multiple construction projects.

The petitioner's CEO further stated that the position requires a minimum of a four-year bachelor's degree, but did not state that the requisite degree must be in any specific specialty. In her own November 30, 2009 letter, counsel cited the printouts from DOL websites as evidence that the proffered position qualifies as a specialty occupation position.

On December 9, 2009, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. Among the evidence specifically requested was a more detailed, specific description of the duties of

the proffered position. That RFE suggested that, based on its duties, the proffered position might be a construction manager position, as described in the DOL's *Occupational Outlook Handbook (Handbook)*, one of the DOL publications cited by counsel.

In response, counsel submitted more printouts from DOL websites and counsel's own letter.² In her own letter, counsel provided what purports to be a description of the duties of the proffered position and an estimate of the percentage of the beneficiary's time to be spent on each of those duties, which description follows:

1. Research available real estate properties which suits [sic] the customer's needs. Assess operational validity and profitability of each possible site, carefully analyzing elements such as social atmosphere or economic capacity of the neighborhood, traffic flow and availability of mass transportation in the vicinity. Oversee sales negotiation with the ownership of prospective real estate property on behalf of the investor. (25%)
2. Analyze the structural composition of the existing building. Identify architectural issues that need to be addressed. Decide if renovation or improvement to the existing structure is sufficient to meet client's needs. Decide if demolition and new construction is a more profitable course of action based on long-term operational projections. Communicate the resulting architectural decisions with architects and specialty trade contractors. (30%)
3. Determine the type and construction method to be utilized, in conjunction with architectural or construction contractors. Recommend technology, engineering organization, and contracting standards for implementation of project planning. Make sure that all required licenses and permits are acquired. Make sure that building design submitted by the contracted architect meets the client's directives as well as local and federal specifications and regulations. (25%)
4. Perform general supervision of project scheduling and allocation of investment capital. Contact and negotiate with local contractors on behalf of the client. (20%)

Who provided that list of duties to counsel, or whatever other basis she may have for asserting that it is an accurate summary of the duties of the proffered position, is unclear. However, the AAO notes that it is not merely more detailed than the description provided by the petitioner's CEO, but an almost entirely different list of duties.

The list of duties provided by counsel includes researching and analyzing properties; overseeing sales negotiation for selected properties; evaluating structures on the property, if any, and deciding between rehabilitation and demolition; consulting with architectural or construction contractors pertinent to types and methods of construction; ensuring that licenses and permits pertinent to construction are acquired; negotiating with contractors; and scheduling and allocation of investment

² Although counsel's letter is dated January 16, 2009, the AAO notes that it was submitted in response to the December 9, 2009 RFE, the response to which was due, and received, on January 20, 2010. The AAO observes that the letter apparently should be dated January 16, 2010.

capital. Those duties, which make up the bulk of the duties described by counsel, were never previously described. Counsel's description of the duties of the proffered position is not merely more detailed than the list provided by the petitioner's CEO, but describes entirely new duties.

The service center requested a more detailed explanation of the various duties described, *e.g.* "Work closely with executives to align products and systems with the organizations that specify, develop, test, and deploy them." Instead, counsel stated that the proffered position is composed of a new set of duties, *e.g.* researching and analyzing properties and overseeing sales negotiations.

A petitioner cannot, after filing a visa petition, offer a new position to the beneficiary, or materially change a position's job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits approval of the visa petition. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The new duties asserted by counsel will not be considered, both because their source is unknown and because they represent a material change in the responsibilities of the proffered position from that asserted when the visa petition was filed.

Further, the AAO finds that the submission of this new and materially different set of duties fatally undermines the credibility of the petition as a whole and this precludes approval of this petition. 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).

The director denied the petition on January 28, 2010, finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation. More specifically, the director found that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel, referring to the duty description she provided in response to the RFE, asserted:

Inssofar as the company's current operational need and the fundamental need for the proffered position is considered, the duties of the position requires [sic] decision making and administrative responsibility of the highest level. Because of this reason, even though the job title is Architect/Project Manager, the counsel believes that the duties of the proffered position is [sic] actually more closely involved with that of a top executive.

Counsel then referred to the *Handbook* chapter pertinent to top executives as support for the proposition that the proffered position qualifies as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty.

As was stated above, and for the reasons provided, the new duties described by counsel in response to the RFE will not be considered.

The AAO will now address the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first address the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner establishes that the proffered position is one for which the normal minimum requirement for entry is a baccalaureate degree, or its equivalent, in a specific specialty.

In the November 30, 2009 letter submitted with the visa petition, counsel cited various DOL websites as evidence that the proffered position qualifies as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty.

Counsel stated that various DOL sites have accorded "Architect/Program Manager" positions a Job Zone Five rating, an Education & Training Category Code of five, and a Specific Vocational Preparation Code of 8.0 and above. The AAO notes that those ratings were accorded to architect positions, rather than architect/program manager positions. They are relevant to the instant case only if the proffered position is demonstrated to be an architect position.

As to the *Handbook*, counsel stated that the "Architect/Project Manager" section supports the proposition that the proffered position is a position in a specialty occupation. Counsel has since asserted that the proffered position is more correctly characterized as a Top Executive position as described in the *Handbook*.

The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. However, to determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform.

The AAO notes that the *Handbook* contains no "Architect/Program Manager" chapter.³ In the chapter entitled *Top Executives*, the *Handbook* describes the duties of top executive positions as follows:

³ 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 2010 – 2011 online edition.

All organizations have specific goals and objectives that they strive to meet. *Top executives* devise strategies and formulate policies to ensure that these goals and objectives are met. Although they have a wide range of titles—such as *chief executive officer, chief operating officer, general manager, president, vice president*, school superintendent, county administrator, and mayor—all formulate policies and direct the overall operations of businesses and corporations, public-sector organizations, nonprofit institutions, and other organizations.

The referenced section of the U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., was available at <http://www.bls.gov/oco/ocos012.htm> (last accessed January 4, 2012).

The duties of the proffered position as described by the petitioner's CEO, which description was provided with the visa petition, contains no indication that the beneficiary would formulate policy or direct the petitioner's overall operation. To the contrary, the duties the petitioner's CEO described are all related to managing construction projects. The AAO finds that the duties of the proffered position, as described by the petitioner's CEO, are not consistent with the duties of a top executive, and the proffered position is not a top executive position as described by the *Handbook*.

The *Handbook* chapter entitled *Architects, Except Landscape and Naval*, states the following about the duties of architect positions:

People need places in which to live, work, play, learn, worship, meet, govern, shop, and eat. *Architects* are responsible for designing these places, whether they are private or public; indoors or out; rooms, buildings, or complexes. Architects are licensed professionals trained in the art and science of building design who develop the concepts for structures and turn those concepts into images and plans.

The referenced section of the U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos038.htm> (last accessed January 4, 2012).

The duties of the proffered position as described by the petitioner's CEO contain no indication that, in that position, the beneficiary would design buildings. The AAO finds that description of the duties of the proffered position to be inconsistent with the *Handbook* description of the duties of an architect, and finds that the proffered position is not an architect position.

In the chapter entitled *Construction Managers*, the *Handbook* describes the duties of those positions as follows:

Construction managers plan, direct, coordinate, and budget a wide variety of construction projects, including the building of all types of residential, commercial, and industrial structures, roads, bridges, wastewater treatment plants, and schools and hospitals. Construction managers may supervise an entire project or just part of one.

They schedule and coordinate all design and construction processes, including the selection, hiring, and oversight of specialty trade contractors, such as carpentry, plumbing, or electrical, but they usually do not do any actual construction of the structure.

The duties of the proffered position as described by the petitioner's CEO in the description provided with the visa petition are entirely consistent with the duties of a construction manager position as described in the *Handbook*. Based on that duty description, the AAO finds that the proffered position is a construction manager position.

The *Handbook* describes the educational requirements of construction manager positions as follows:

For construction manager jobs, a bachelor's degree in construction science, construction management, building science, or civil engineering, plus work experience, is becoming the norm. However, years of experience, in addition to taking classes in the field or getting an associate's degree, can substitute for a bachelor's degree.

Although the *Handbook* indicates that a degree in one of those four areas is *becoming* the norm, it does not indicate that such a degree is *now* the norm. In fact, it indicates that experience, coupled with an associate's degree or some relevant classes, is sufficient. The *Handbook* does not support the proposition that the particular position offered in this case normally requires a minimum of a bachelor's degree in a specific specialty.

The record contains no other evidence that a bachelor's or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The petitioner 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* provides no support for the proposition that the petitioner's industry, or any other, requires construction managers 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 construction managers 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 real estate development or construction industries.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, satisfied 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 construction manager positions in the petitioner's 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.

The duties of the proffered position as described by the petitioner's CEO include the various aspects of a project manager's duties, reviewing the building design; recommending technology and an engineering organization; directing and monitoring building construction; communicating decisions with members of the project team; assisting management in providing leadership and technical and management expertise; leading and coordinating project management, including hiring and termination of workers and contractors; and developing and managing the construction schedule. That description, far from demonstrating that the proffered position is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree or the equivalent in a specific specialty, appears to include only the general and generic duties of a construction manager, some of which positions, the *Handbook* indicates, do not require a specialized degree.

The record contains no other evidence to demonstrate that the proffered position is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree or the equivalent in a specific specialty. 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 pertinent to anyone that the petitioner has ever previously hired 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).

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.

Again, however, the duties of the proffered position, as described by the petitioner's CEO, contain no indication of such specialization and complexity that the knowledge required to perform them is usually associated with attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty. Reviewing the building design; recommending an engineering organization;

directing and monitoring building construction; communicating decisions with members of the project team; assisting management in providing leadership and technical and management expertise; leading and coordinating project management, including hiring and termination of workers and contractors; and developing and managing the construction schedule contain no indication of specialization and complexity such that they are usually associated with a minimum of a bachelor's degree or the equivalent in a specific specialty, notwithstanding that the *Handbook* indicates that other construction manager positions require no such degree. The petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct 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 record suggests two additional issues that were not addressed in the decision of denial, but each of which precludes approval of this petition. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The first issue beyond the decision of the director is the conflict between the Labor Condition Application (LCA) and the position asserted in the petition.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) expressly includes a certified LCA among the documents that a petitioner "shall submit" with an H-1B petition, and the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupation specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary."

In order to correspond to a visa petition and to be used to support it, the LCA submitted must be valid for employment in the proffered position. The nature of the position proffered is among the factors that determine the prevailing wage threshold that sets the minimum wage or salary that the petitioner must pay. If the position specified in the LCA submitted to support the visa petition does not correspond to the position in which the beneficiary would work, it does not satisfy the regulatory requirements that the petition be filed with a corresponding LCA.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

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

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

The LCA submitted to support the instant visa petition is certified for an architect position. On appeal, however, counsel stated,

[E]ven though the job title of the proffered position is Architect/Project Manager, the counsel believes that the duties of the proffered position is [sic] actually more closely involved with that of a top executive."

Counsel has thereby asserted that the LCA submitted to support the instant visa petition does not correspond to the visa petition in that, although the LCA is certified for an architect, the proffered position is more closely related to a top executive position. The visa petition must be denied for this additional reason.

Finally, and also beyond the decision of the director, the AAO finds that the petition as filed – that is, for an architect – would not be approvable even if the petitioner had established that the proffered position was that of an architect, as the record of proceeding does not establish that the beneficiary was the holder of an architect's license. *See, in particular*, the California Business and Professions Code, Section 5536, prohibiting practice as, or holding oneself out to be, an architect unless licensed as one.

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, that burden has not been met.

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