



U.S. Citizenship  
and Immigration  
Services

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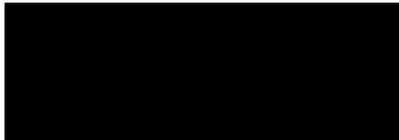
Date: **OCT 18 2012** Office: CALIFORNIA SERVICE CENTER

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, (“the director”) denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will remain denied.

The petitioner describes itself on the Form I-129, Petition for a Nonimmigrant Worker, as an IT Consulting Company established in 2010 with one current employee. It seeks to employ the beneficiary as a programmer analyst and 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 determining that the petitioner had not provided a credible offer of employment for specialty occupation work throughout the requested period of employment.

The record of proceeding before the AAO contains: (1) Form I-129, and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s response to the RFE; (4) the notice of decision; and (5) Form I-290B, Notice of Appeal or Motion, with counsel’s supplemental brief and additional documentation. The AAO reviewed the record in its entirety before issuing its decision. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On the Form I-129 petition submitted on October 21, 2010, the petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 1, 2010 until September 30, 2013 at an annual salary of \$65,000. The petitioner also provided a Labor Condition Application (LCA) certified on September 21, 2010, valid for a period beginning October 1, 2010 to September 30, 2013 for a Level I (entry-level), programmer analyst SOC (ONET/OES) code 15-1021,<sup>1</sup> to be located in Bothell, Washington.

In the September 29, 2010 letter submitted in support of the petition, the petitioner stated that it provides information technology services, including IT, business analysis, project management, development, testing and integration of complex systems, to businesses in retail, healthcare, financial services, travel and manufacturing industries. The petitioner stated that it needed a programmer analyst “to design, develop, test and implement client server applications using tools such as DataWarehouse/Oracle to develop interfaces using Java, HTML, DHTML, AJAX, JavaScript, and Java Servlet. The petitioner stated that the beneficiary would work with JAVA, a general purpose programming language, and HTML (Hypertext Markup Language), a computer language used for web displays. The petitioner noted that the holder of the proffered job position required at least a baccalaureate degree in Computer Science, Software Engineering, Mathematics, Physical Sciences or a related field.

On February 7, 2011, the director issued an RFE advising the petitioner, in part, that as it appeared to be engaged in the business of providing consulting services, the petitioner must establish that it had sufficient specialty occupation work that is immediately available for the beneficiary upon his entry into the United States. The director requested, in part, copies of signed contracts between the petitioner and the beneficiary detailing the terms and conditions of

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<sup>1</sup> The petitioner’s LCA identifies the SOC (ONET/OES Code) as 15 -1021.00 – computer programmers; however, the codes have been revised and the new SOC code for computer programmers is 15-1131.00.

employment, the nature of the employer-employee relationship, and the services to be performed by the beneficiary. The director also requested contracts, statements of work, work orders, service agreements, and letters between the petitioner and the ultimate end-client companies for whom the beneficiary's services would be delivered as well as a copy of a position description or any other documentation describing the skills required to perform the job offered.

In response, counsel for the petitioner provided, in pertinent part: a December 14, 2010 offer letter and employment contract between the petitioner and the beneficiary; and copies of contracts between the petitioner and various clients. The employment offer and the employment contract between the petitioner and the beneficiary did not identify the beneficiary's proposed position or include any specific duties the beneficiary would perform. Upon review of the various contracts between the petitioner and various clients, we observe: the [REDACTED] agreement was effective on February 1, 2011 with an anticipated length of one year with a possibility of an extension without a specific description of duties to be performed pursuant to the agreement; the [REDACTED] agreement is dated June 1, 2010 and includes a statement of work indicating that the petitioner will provide system development testing, implementation, consulting and support services for [REDACTED] and clients; the [REDACTED] agreement is with the petitioner's president and is dated August 4, 2010 and states that [REDACTED] Inc. has a temporary position available for the petitioner's president with its client; and the [REDACTED] agreement is dated April 28, 2010 and is also with the petitioner's president and places the petitioner's president with one of [REDACTED] clients.

The petitioner in its March 7, 2011 response to the RFE stated that the beneficiary would work in a home office located in Bothell, Washington and that the petitioner had agreements with several companies to provide software engineering assistance on projects. The petitioner noted the agreements with [REDACTED] and [REDACTED], and its client [REDACTED] and stated that the petitioner was providing services to these entities' clients - [REDACTED] and [REDACTED], respectively. The petitioner reiterated its need for a programmer analyst to help complete the projects and provide needed technological assistance. The petitioner also reiterated that the beneficiary would design, develop, test and implement client server applications using tools such as DataWarehouse/Oracle to develop interfaces using Java, HTML, DHTML, AJAX, JavaScript, and Java Servlet. The petitioner added:

[W]hen there are issues in the system [the beneficiary] will look into setups, codes and make modification as needed. [The beneficiary] will communicate with users on their queries on using the application systems and on the other software functions.

The director denied the petition on June 15, 2011 determining that the petitioner had not provided a credible offer of employment for specialty occupation work throughout the requested period of employment.

On appeal, counsel for the petitioner asserts that the individual in the proffered position will not be working at a client site and will be the petitioner's internal employee. Counsel contends that the contracts provided demonstrate that the petitioner has enough IT work to employ the beneficiary. Counsel also re-submits an April 8, 2011 letter<sup>2</sup> signed by a representative on behalf

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<sup>2</sup> Counsel initially submitted this letter separately from the petitioner's response to the RFE.

of [REDACTED] who states that the beneficiary will be assisting [REDACTED] on the GTM project and will be working as a programmer analyst. The [REDACTED] letter indicates: the beneficiary will not be its employee; the petitioner will be the beneficiary's employer; and the project is anticipated to last through April 2012 with the possibility of extensions. [REDACTED] describes the duties the beneficiary will perform as follows:

[The beneficiary] will be designing, developing, testing, and implementing client server applications using tools such as DataWarehouse/Oracle to develop interfaces using Java, HTML, DTHML, AJAX, JavaScript and Java Servlet.

The AAO reviewed the record in its entirety and concurs with the director's ultimate determination. The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

We note that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Upon review of the contracts provided, the petitioner has not provided documentary evidence that it had employment in a specialty occupation immediately available for the beneficiary when he entered the United States. The record of proceeding lacks sufficient documentation evidencing what exactly the beneficiary would do for the period of time requested or where exactly and for whom the beneficiary would be providing services. Given this specific lack of evidence, the petitioner has failed to establish who has or will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain the requisite employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

Although the petitioner claims that it will be in charge of the beneficiary's entire work product and will be the beneficiary's sole supervisor in charge of assigning him tasks, the contracts submitted provide contrary information. For example, the Cognitim agreement indicates that IBM has requested that Cognitim supply it consultants and specifically states that the client (IBM) will determine the method, details, and means of performing the work and the work location. The other contracts provided do not state the location of the work to be performed. The Centizen letter submitted on appeal, although stating that the beneficiary will be the petitioner's employee and will work remotely, does not indicate where the beneficiary will perform the generally described work and does not cover the entire period of requested employment. The speculation that the contract(s) will be extended is not supported by documentary evidence. Going on record without supporting documentary evidence is not

sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). There is insufficient evidence detailing where the beneficiary will work, the specific projects to be performed by the beneficiary, or for which company the beneficiary will ultimately perform these services for the duration of the requested employment. Therefore, the appeal must be dismissed and the petition must be denied for this reason.

However, not only does the record fail to show that the petitioner has work for the beneficiary for the requested period of employment, the record does not include a specific job description demonstrating that the proffered position falls within the purview of a specialty occupation. For the purposes of the instant H-1B adjudication, we look at the issue of the petitioner's proffer of employment within the context of the nature of the work and whether the petitioner has offered the beneficiary a position that is a specialty occupation position. To make this determination, the AAO turns to the record of proceeding.

Here, the record of proceeding is devoid of probative information from any of the petitioner's clients or their clients, regarding the specific job duties to be performed by the beneficiary. The petitioner provided a broad overview of the duties of the proffered position and that general description is repeated verbatim in a letter allegedly from one of the petitioner's clients. The description does not provide sufficient information regarding the substantive nature of the work to be performed by the beneficiary, and thus precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). It is the substantive nature of work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the appeal will be dismissed and the petition denied.

Nevertheless, assuming, *arguendo*, that the proffered duties as generally described by the petitioner would in fact be the duties to be performed by the beneficiary, the AAO will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns to the applicable statutes and regulations.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and [(2)] which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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 at 387. 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), 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 AAO reiterates that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In this matter, as observed above, the petitioner initially provided a broad overview of the duties of the proffered position and repeated that overview in response to the director’s RFE. It is not possible to discern from the information provided by the petitioner and/or its clients that the beneficiary’s assignment and actual day-to-day duties entail primarily H-1B caliber work. Further, even if the petitioner were to demonstrate, which it did not do, that the beneficiary will work as a programmer analyst for the duration of the requested employment period, the petitioner has failed to demonstrate that the proffered position is a specialty occupation.

The AAO recognizes the U.S. Department of Labor’s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>3</sup> It is noted that, even if the proffered position were established as being that of a programmer analyst, a review of the *Handbook* does not indicate that such a position categorically qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor’s or higher degree in a specific specialty or its equivalent for entry into the occupation of programmer analyst.<sup>4</sup> See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., “Computer Systems Analysts,” <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems->

<sup>3</sup> 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/>.

<sup>4</sup> The AAO observes that the director is incorrect if she meant to convey that a programmer analyst position categorically qualifies as a specialty occupation and in that regard her incorrect statement is withdrawn.

analysts.htm#tab-4, and “Computer Programmers,” <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited September 27, 2012).

Moreover, the petitioner indicates in its initial letter in support of the petition that it only requires its programmer analyst to possess at least a baccalaureate degree in Computer Science, Software Engineering, Mathematics, Physical Sciences or a related field. It must be noted that the petitioner’s claimed entry requirement of at least a bachelor’s degree in “one of a variety” of majors does not denote a requirement in a specific specialty. Furthermore, the claimed requirement of a degree in a major such as “Physical Sciences” without specialization is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of any degree with a generalized title, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm’r 1988).

As such, absent evidence that the position of programmer analyst satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

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 already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor’s degree in a specific specialty. The petitioner has not provided other evidence that a bachelor’s degree in a specific specialty is an industry-wide standard for a parallel position in organizations similar to the petitioner. There are no submissions from professional associations, individuals, or similar firms in the petitioner’s industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor’s degree in a specific specialty or its equivalent for entry into those positions.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “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.” The evidence of record does not refute the *Handbook*’s information to the effect that a bachelor’s degree is not required in a specific specialty to perform the duties of a programmer analyst. The

record lacks sufficiently detailed and consistent information to distinguish the proffered position as unique from or more complex than other generic programming analyst positions that can be performed by persons without a specialty degree or its equivalent. In addition, as observed above, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined.

Specifically, even though the petitioner claims that the proffered position's duties are complex so that a bachelor's degree is required, the petitioner failed to demonstrate how the duties of a programmer analyst as generally described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, 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 it claims are so complex and unique. The petitioner has failed to demonstrate how a specific and established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent are required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other programmer analyst positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for such positions, including associate degrees as well as degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than a programmer analyst or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of a programmer analyst is so complex or unique relative to other programmer analysts that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also fails to establish that it normally requires a bachelor's in a specific specialty. The record does not include specific information supported by documentation that the petitioner normally hires only individuals with specific degrees to perform the duties of the proffered position. The petitioner notes that it is a startup company and has not previously hired other employees. Accordingly, there is no evidence to review to establish that the petitioner has 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 its position's 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 finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties as generically described requires a higher degree of IT/computer knowledge than would normally be required of other information technology professionals not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The AAO, therefore, concludes that the

proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, we find an additional reason the petition may not be approved. The AAO finds that the petitioner failed to submit an LCA that corresponds to the petition. As noted above, the petitioner's LCA certified on September 21, 2010, is for a Level I (entry-level), programmer analyst SOC (ONET/OES) code 15-1021. When determining eligibility for H-1B classification, 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. The petitioner claims that the duties of the proffered position are complex and specialized. However, these duties when set against the contrary level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position.

That is, the petitioner's assertions regarding the proffered position are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. We observe that 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.<sup>5</sup> 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.<sup>6</sup> 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.

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<sup>5</sup> See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>6</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

The “Prevailing Wage Determination Policy Guidance” issued by DOL provides a description of the wage levels.<sup>7</sup> A Level 1 wage rate is described by DOL as follows:

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet- [http://www.foreignlaborcert.dol.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.dol.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). NPWHC\_Guidance\_Revised\_11\_2009.pdf

The petitioner claims that the duties of the proffered position require the successful incumbent to perform specialized and complex tasks; however, the AAO must question the level of complexity and 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 experience and skill necessary to perform the specialized and complex duties of the 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:

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<sup>7</sup> See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at [http://www.foreignlaborcert.dol.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.dol.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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

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

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

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. 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 additional reason the petition may not be approved.

The AAO finds that, fully considered in the context of the entire record of proceedings, including the requisite LCA, the petitioner failed to provide a consistent characterization of the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho, Supra*.

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 (9<sup>th</sup> 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 appeal will be dismissed and the petition denied 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.



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Section 291 of the Act, 8 U.S.C. § 1361. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Here, that burden has not been met.

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