



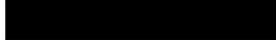
U.S. Citizenship
and Immigration
Services

D2



DATE **OCT 18 2012**

OFFICE: VERMONT 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:

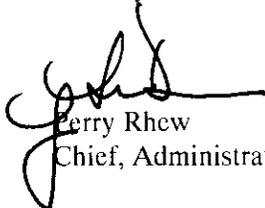


INSTRUCTIONS:

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on August 18, 2010. The petitioner stated on the Form I-129 that it is an importer/exporter/distributor of textiles and fabrics established in 2009 with 1 employee and a gross annual income of approximately \$156,000. The petitioner seeks to employ the beneficiary as a business manager 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 on March 17, 2011, determining that: (1) the petitioner failed to establish that it meets the regulatory definition of an intending United States employer, specifically that it failed to establish an employer-employee relationship with the beneficiary; and (2) the petitioner failed to establish the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director’s basis for denial of the petition 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 request for evidence (RFE); (3) the response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, with counsel’s brief and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO concurs with the director’s ultimate determination that the petitioner has not established eligibility for the benefit sought. Accordingly, the director’s decision will not be disturbed. The appeal will be dismissed. The petition will remain denied.

The first issue in the present matter is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, as the petitioner has satisfied the first and third prongs of the definition of United States employer, the remaining question is whether the petitioner has established that it will have “an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii).

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

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the

[Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

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

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

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

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

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

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

Neither the legacy Immigration and Naturalization Service (“INS”) nor United States Citizenship and Immigration Services (“USCIS”) defined the terms “employee” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being “employees” who must have an “employer-employee

relationship” with a “United States employer.” *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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

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

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

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

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

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

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

In this matter, the record shows that the petitioner has one employee who, according to counsel, is an individual who performs work in an administrative capacity while waiting for the approval of the petitioner’s H-1B petition on behalf of the beneficiary. The record also includes a January 6, 2011 printout from the New York Department of State, Division of Corporations, showing that the petitioner is a domestic limited liability company established April 7, 2008. The printout also lists the petitioner’s registered agent and notes that no information is available regarding the number of shares, type of stock and value per share as stock information is applicable to domestic business corporations. However, the record does include a copy of a stock certificate for 200 shares of stock issued by the petitioner to [REDACTED]. Evidence in the record also shows ownership of [REDACTED] a Hong Kong company, and that as of August 2, 2010 the allotment of [REDACTED] 8,000 shares was held by the petitioner’s mother-in-law (6,400) and his wife (1,600). The record also includes evidence that the beneficiary divested 1,000 shares of stock he held in the petitioner’s claimed parent company on August 3, 2010 by transferring the 1,000 shares to his mother-in-law. Counsel asserts on appeal that the beneficiary voluntarily gave up any interest he had in the petitioner and that he does not have a controlling interest in the petitioner. Counsel observes that the beneficiary has received a salary and has made decisions on behalf of the petitioner as its director and manager but that he did so in the capacity of an employee.

Upon review of the totality of the evidence in the record, the record includes limited information regarding the petitioner’s ownership. The petitioner, in its initial letter in support of the petition, claimed that it is a wholly owned subsidiary of [REDACTED] a corporation based in Hong Kong. Although the record includes a copy of a stock certificate issued to [REDACTED] in the amount of 200 shares, the record does not include the petitioner’s stock ledger, articles of organization, or other documents identifying the number of outstanding shares or delineating the ownership and control of the petitioner. 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)). We also note counsel’s assertion on appeal that the petitioner is a wholly owned subsidiary of [REDACTED] however, the record does not include documentation or other evidence confirming the petitioner’s ownership. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Again, although counsel asserts that the majority shareholder of [REDACTED] hired the beneficiary and that he acts only as the employee of the petitioner, which is allegedly wholly owned by [REDACTED] the record does not include an employment

agreement between [REDACTED] or the petitioner and the beneficiary. The petitioner did not submit an employment contract or any other document describing the beneficiary's current claimed employment relationship with the petitioner.¹ The record does not include evidence of instructions issued by the petitioner or its claimed parent company to the beneficiary establishing that the beneficiary is the petitioner's employee. There is insufficient documentary evidence demonstrating that the beneficiary is directed or supervised by anyone.

We recognize that an H-1B petitioner may file a visa petition for a beneficiary who is its sole or primary owner and when such a petitioner establishes that it has an "employer-employee relationship" with the beneficiary as understood by common-law agency doctrine, the petitioner has met the requirement of an employer-employee relationship. In this matter we reach the question of whether the common-law touchstone of "control" has been established because the petitioner has not established its ownership or its ability to control the beneficiary. *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)). We observe that the director upon review of the initial record questioned whether an employer-employee relationship between the petitioner and the beneficiary had been established and requested evidence regarding the ownership of the petitioner and evidence demonstrating that the petitioner had the right to control the beneficiary's actions. Although the petitioner was put on notice of questions regarding its ownership and the beneficiary's role as its employee, the petitioner failed to provide the documentary evidence establishing that the beneficiary would work for the petitioner as an employee. Counsel does not provide anything further on appeal regarding the petitioner's ownership and its relationship to the beneficiary. Again, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. We also find, upon review of the record, that there is no record of employment actions or any employment history for the petitioner that would establish that it ultimately controls the work of the beneficiary. Again there is no evidence that the petitioner through its claimed owners control the beneficiary's work. As the record does not include sufficient evidence of the petitioner's ownership, and based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

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

Second, the AAO affirms the director's determination that the petitioner failed to demonstrate that the proffered position is 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.

¹ The record includes October 2009 through June 2010 paystubs issued to the beneficiary by the petitioner; however, a paystub or a W-2 Form is insufficient to conclude that the beneficiary's actions are controlled by the petitioner and thus is the petitioner's employee.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one 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 term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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), 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 petitioner in this matter initially stated that it need a “qualified manager, business” at its Manhattan Branch Office and that the duties of the individual in the proffered position “will consist of managing the financial and business affairs of [its] U.S. operation and relations.” The petitioner stated that the beneficiary’s responsibilities encompassed a range of duties including:

- Making all major organizational policy decisions pertaining to corporate planning, management, and business expansion in the United States;
- Overseeing sales, marketing research and consultation activities;
- Establishing the organizations’ [sic] policies and objectives regarding business expansion in the United States;
- Reviewing financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement to determine areas needing cost reduction and program improvement;
- Monitoring the organization’s United States business operations to ensure that required tasks are efficiently and effectively performed within budgetary limits;
- Meeting and conferring with other executive personnel from the parent company to ensure that the organization’s business operations are conducted in accordance with stated goals and objectives;
- Directing and coordinating the organization’s finances and budget to fund operations, maximize investments and increase efficiency;
- Providing advice and guidance to other executive personnel regarding budget compliance and standards for service quality and developing positive client relationship; and
- Making all financial decisions regarding hiring and firing of personnel.

The petitioner stated that “[d]ue to the complex nature of the duties to be performed by [its] Manager, Business, the position requires the incumbent to possess at minimum a Bachelor’s degree in Business Administration or a related discipline.” The petitioner added: “[a]n appropriate business and financial background, such as Business Administration, is essential for [its] Manager, Business to accurately identify, conceptualize, report, explain, predict and strategize complex business concepts into appropriate plans of action and, ultimately, profit for [its] company.”

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of “Managers, All Others” - SOC (ONET/OES Code) 11-9199.² The LCA designated the wage as a Level 1 (entry level) wage.

Upon review, the director issued an RFE requesting additional detail regarding the beneficiary’s proposed duties and day-to-day responsibilities. In response, the petitioner through counsel provided the same general description as initially provided and added additional duties under each heading, as well as the percentage of time the beneficiary would spend on each of the duties. In each of the additional descriptions provided, the petitioner noted: “[t]his duty requires significant training, education, preparation, and intelligence to successfully carry out, including the attainment of a bachelor’s degree (or bachelors of science) in Business Administration, a closely related major, or the equivalent in professional experience.” The petitioner also submitted three job advertisements and two letters from business clients, as well as bank statements and invoices, all in support of the petition.

Based on the evidence provided, the director determined the proffered position is not a specialty occupation position.

On appeal, counsel for the petitioner contends that the proffered position is an offshoot of “business specialties,” a designation that is included in the regulatory definition of specialty occupation. Counsel avers that the proffered position falls within the purview of a “top executive” position and that the position “offered is so complex in nature that anyone with less than a degree in Business Administration or its equivalent would be unable to successfully complete the duties inherent therein.” Counsel asserts that the director failed to discuss the additional detail regarding the proffered position that was included in its response to the RFE as well as failed to make reference to the two important letters from the petitioner’s business clients. Counsel asserts that the job advertisements previously submitted are from businesses the petitioner competes with directly and that the petitioner has submitted hundreds of pages of documentation to demonstrate the success of the petitioner under the beneficiary’s leadership.³

Counsel’s contention that the proffered position is an offshoot of “business specialties,” and thus

² The petitioner’s LCA identifies the SOC (ONET/OES Code) as 11-9199.99 – Managers, All Others; however, the codes have been revised and the new SOC code for Managers, All Others is 11-9199.00.

³ The beneficiary was previously approved for and worked in the United States in L-1A nonimmigrant status, valid from June 1, 2009 until May 31, 2010 [REDACTED]. A subsequent petition to extend the beneficiary’s L-1A status was denied on June 29, 2010 [REDACTED].

is included in the specific list of professions that qualify as specialty occupations under 8 C.F.R. § 214.2(h)(4)(ii) is misguided. As stated above, 8 C.F.R. § 214.2(h)(4)(ii) reads as follows:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which 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.

Contrary to counsel's implication, the occupation of "manager, business" is not mentioned in the regulation. While highly specialized knowledge in business specialty fields is included in this section, this does not mean that a petitioner, merely stating that it requires at least a bachelor's degree in business administration, has demonstrated that the proffered position is a specialty occupation. The petitioner must also submit evidence that (1) the proffered duties entail the theoretical and practical application of a body of highly specialized knowledge and (2) the position requires at least a bachelor's degree in a *specific specialty* or its equivalent for entry into the occupation in the United States. *Id.*

Further, while 8 C.F.R. § 214.2(h)(4)(ii) lists "business specialties" as an example of a field in which the application of highly specialized knowledge may be required, the regulation does not state that an occupation in this field meets this first criterion by default. Even if it did, a general business administration degree without a concentration or specialization is not a business specialty. According to *Webster's New College Dictionary* 1085 (3rd ed. 2008), specialty means both "[a] special occupation, pursuit, aptitude, or skill. . . ." and "[a] special feature or characteristic." Of all the fields listed as examples in the regulation, only business has the word "specialties" written after it, which means that the regulation was not intended to include business generally as an example of those fields entailing a theoretical and practical application of a body of highly specialized knowledge. The AAO therefore disagrees with counsel that the term "business specialties" or that an occupation that is an "offshoot" of business specialties can be equated with the field of business administration generally. Instead, the AAO finds that the phrase "business specialties" in the regulation involves the necessity for a specialization or concentration in the field of business administration or other business related fields. The record in this matter does not include a position description that describes duties and tasks that demonstrate that the proffered position requires the theoretical and practical application of highly specialized knowledge, contrary to counsel's assertion, and, as such, the petitioner has failed to establish that the proffered position meets the first criterion of the statutory and regulatory definition of specialty occupation. § 214(i)(1)(A) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

With regard to the second criterion of the definition of specialty occupation, again the record fails to demonstrate that the petitioner requires at least a bachelor's degree or the equivalent in a *specific specialty*. The petitioner repeatedly states that a bachelor's degree in "business administration" or a related field is a sufficient minimum requirement for entry into the proffered position. However, such a claim is tantamount to an admission that the proffered position is not in fact 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 a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).⁴ The petitioner in this matter did not require at least a bachelor's degree or the equivalent in a business *specialty* or even demonstrate a nexus between the beneficiary's coursework taken towards his degree and the proffered duties; accordingly, the petitioner has also failed to demonstrate that the proffered position is a specialty occupation under the second part of the statutory and regulation definition of specialty occupation. § 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

Although the petitioner's failure to establish that the proffered position meets the statutory and regulatory definition of specialty occupation obviates the need to examine this issue further, for purposes of a complete and thorough analysis, the AAO will also review the additional requirements imposed by 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner stated that the beneficiary would be employed as its "manager, business" and that he is a "top executive." However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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

⁴ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

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 will first review the record of proceeding in relation to the criterion 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.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵

Although the petitioner references duties that relate to overseeing sales, marketing research, and directing and coordinating the organization's finances, the petitioner does not indicate that the proffered position requires at least a bachelor's degree or the equivalent in business administration with a concentration in business management, finance, and organization. The petitioner instead simply states that it requires at least a bachelor's degree in business administration without specifying any requirement of a concentration or specialization in that field. Moreover, the petitioner does not provide evidence that it has employees for the beneficiary to oversee or direct or to perform the general functions involved in marketing, sales, and finances.⁶ Again this is not the same as requiring at least a bachelor's degree in a specific specialty. The petitioner does not demonstrate a nexus between the proffered duties and a specific and precise course of study taken toward a bachelor's degree in a particular field of specialization.

Counsel's reference on appeal to the education and training for a top executive as set out in the *Handbook* is insufficient to establish the proffered position as a specialty occupation. Although the petitioner's initial job description corresponds quite closely to the description of duties for a top executive as indicated in the *Handbook*, the *Handbook* does not report that a bachelor's degree in a specific discipline is required to perform the duties of a top executive. Rather, the *Handbook* reports: "Although education and training vary widely by position and industry, many top executives have at least a bachelor's degree and a considerable amount of work experience." Under the section on Education, the *Handbook* states:

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

⁵ 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/>.

⁶ Although the petitioner has provided evidence that it employs an administrative assistant, the petitioner has not provided a complete job description of this individual's duties. There is no information that this sole employee performs sales, marketing, or financial functions, thus relieving the beneficiary to oversee and direct these functions. Realistically, it appears the beneficiary will, in fact, perform these functions.

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

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

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-2013 Edition*, Top Executives, on the Internet at <http://www.bls.gov/ooh/management/top-executives.htm> (last visited September 30, 2012).

Thus, the *Handbook* indicates that working as a top executive does not normally require a degree *in a specific specialty* and, in fact, it indicates that individuals in industries similar to that of the petitioner “may work their way up within the company” “without a college degree.” *Id.* Given this finding by DOL’s Bureau of Labor Statistics and given that the evidence of record does not distinguish the proffered position from the type of position that requires no more than a general bachelor’s degree in business administration without a particular specialization or concentration, the proffered position is, more likely than not, not a specialty occupation.

Counsel confuses the statement in the *Handbook’s* section on Top Executives that “many top executives have a bachelor’s or master’s degree in business administration, liberal arts, or a more specialized discipline. . . .” as indicating that at least a bachelor’s degree or the equivalent in a specific specialty is required for this occupation. As previously discussed at length, a bachelor’s degree or higher in the field of “business specialties” as stated under 8 C.F.R. § 214.2(h)(4)(ii) cannot be equated with a bachelor’s degree in business administration generally. Additionally, the wording in the *Handbook*, which discusses not only a degree in business administration as being acceptable for top executives, but also a degree in liberal arts “or a more specialized discipline,” means that the *Handbook* acknowledges that the fields of business administration and liberal arts are general and not specialized. Moreover, it is noted again that the *Handbook* states that some people without a college degree can also become Top Executives. This is not to say that certain positions falling under the Top Executive classification cannot qualify as specialty occupations. However, specialty occupations require both (1) the theoretical and practical application of a body of highly specialized knowledge and (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. Therefore, as the *Handbook* indicates that many Top Executive positions may only require a bachelor’s or higher degree in a general field, like business administration or liberal arts, and not a *specific specialty*, the mere demonstration that someone falls under the *Handbook’s* section on top executives is not sufficient in and of itself to prove that the position is also a specialty occupation.

In this same vein, the two letters from the petitioner’s business clients provided in response to the director’s RFE and referenced by counsel on appeal do not demonstrate that the proffered position is a specialty occupation position. Although both writers indicate they have worked with the beneficiary in his capacity as an “executive,” the title “executive” does not convey the

necessary information that demonstrates that the proffered position is a specialty occupation. Neither letter writer describes specific duties performed by the beneficiary that require both (1) the theoretical and practical application of a body of highly specialized knowledge and (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. Although the proffered position may require skills in sales and marketing when interacting with clients, such skills have not been demonstrated to require specialized knowledge at the level of a bachelor's degree in a specific discipline.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or its equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 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.

Again, 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 at 1165 (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* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The AAO has reviewed the three job announcements submitted in response to the director's RFE and the four job announcements submitted on appeal to assess their relevance in establishing whether a bachelor's degree, in a specific specialty, is common to the petitioner's industry for positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. Upon review, the advertisements provided do not evidence a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner. 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 advertisements submitted do not include sufficient information regarding the advertising organizations for an accurate comparison. In addition, the petitioner does not provide independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Furthermore, the majority of the advertisements provided does not list a

requirement of a bachelor's degree in a specific discipline but rather they indicate generally that a bachelor's degree is required while listing a preference for the degree to be in a variety of disciplines including business administration, accounting, marketing, communications, journalism, economics, logistics, or a related field, if a bachelor's degree is required at all. Additionally, the advertisements do not provide data sufficient to establish that the advertised positions are indeed parallel to the proffered position. Upon review of these documents, the AAO finds that they do not establish that requiring a bachelor's degree, in a specific specialty, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

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 few 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”).

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 petitioner has also not satisfied 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.” Neither the petitioner nor its counsel has provided evidence to distinguish the proffered position as unique from or more complex than a manager/top executive position, such as those as described in the *Handbook*, which can be performed by persons without a specialty degree or its equivalent. Moreover, as will be discussed below the LCA for the proffered position indicates the proffered position is a low-level, entry position relative to others within the occupation. Based upon the wage-level proffered, the beneficiary is only required to have a basic understanding of the occupation. The record does not sufficiently demonstrate how the duties of the proffered position 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. As discussed previously, the field of business administration, without a demonstrated concentration or specialization, does not constitute a *specific specialty*.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions 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 AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer 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 when considering this criterion.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, 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. In the instant matter, the petitioner notes that the beneficiary previously held this position as an L-1A manager/executive but that a petition for an L-1A status extension was denied. As the record demonstrates that the beneficiary's degree is in the general field of business administration, the petitioner has not established that only individuals with a bachelor's degree in a specific discipline have held the proffered position.

Moreover, 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 this matter, if the petitioner's past requirement for the proffered position included only the requirement that the individual in the proffered position have a bachelor's degree or a bachelor's degree in a generalized discipline, such evidence would demonstrate that the petitioner did not require a bachelor's degree in a specific specialty for the proffered position. Upon review, the petitioner has not established that it 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).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a

specific specialty. Moreover, again as will be discussed below, the designation of the proffered position on the LCA as a low, entry-level position relative to others within the occupation precludes any argument that the proffered position is one with specialized and/or complex duties, as such a position would likely be classified at a higher-level, requiring a significantly higher prevailing wage. The petitioner has not provided sufficient probative 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 in a specific discipline. Again, the petitioner's acceptance of a degree in a generalized field of study only confirms that the proffered position is not a specialty occupation. 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).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the additional, supplemental requirements 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. Thus, the appeal will be dismissed and the petition denied for this additional reason.

Beyond the decision of the director, the AAO finds that even if the petitioner overcame the basis for the director's denial of the petition (which it has not), the petition must still be denied.⁷ Specifically, the AAO finds that the petitioner failed to submit an LCA that corresponds to the petition. For this additional reason, which is considered as an independent and alternative basis for the denial of the petition, the petition may not be approved.

In this matter, the petitioner stated that it seeks the beneficiary's services as a "manager, business" at an annual wage of \$70,000. The LCA submitted in support of the instant H-1B petition designates the proffered position as SOC (ONET/OES Code) 11-9199 – the occupational classification of "Managers, All Others" and specifies the prevailing wage is at a Level 1 (entry level) wage. 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. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

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 require special knowledge and that the individual in the proffered position would make major organization decisions, would oversee sales and marketing research, would establish policies and objectives regarding business

⁷ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). It was in this review that the AAO observed an additional ground for denial of the petition, which, although not noted by the director, nevertheless precludes approval of this petition.

expansion, would monitor the organization's operations, would direct the organization's finances and budget, and would provide advice and guidance to other executive personnel. However, these duties and the level of responsibility inherent within the description 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. As previously mentioned, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of "Manager, All Others" - SOC (ONET/OES Code) 11-9199, at a Level 1 (entry level) wage.

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.⁸ 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.⁹ The 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.¹⁰ A Level 1 wage rate is described by DOL as follows:

⁸ 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.

⁹ 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.

¹⁰ 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

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. May 9, 2005), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf

The petitioner claims that the duties of the proffered position require the successful incumbent to exercise a high level of responsibility including providing advice and analysis; 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 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. 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.

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*. For this additional reason the petition may not be approved.

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 remains denied.