

(b)(6)

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



U.S. Citizenship  
and Immigration  
Services

[Redacted]

DATE: **AUG 01 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner:  
Beneficiary:

[Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 10, 2012. In the Form I-129 visa petition, the petitioner describes itself as a "[c]onsumer mobile app and website" business established in 2011. In order to employ the beneficiary in what it designates as a lead software engineer position, the petitioner seeks 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 December 14, 2012, finding that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition in accordance with the applicable regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it 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 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address an additional, independent ground not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to establish that it would pay the beneficiary an adequate salary for his work if the petition were granted. For this additional reason, the petition may not be approved, and is considered an independent and alternative basis for denial.<sup>1</sup>

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a lead software engineer to work on a full-time basis at a rate of pay of \$60,000 per year. In a support letter dated April 9, 2012, the petitioner stated the proffered position includes the following responsibilities:

- Managing and overseeing development of [the petitioner's] mobile and web products
- Developing [the petitioner's] mobile and web applications, starting with a mobile application for iPhone, using Python, Django, HTML, and Javascript

---

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

- Developing and maintaining supporting systems for mobile and web applications, using Amazon Web Services, Heroku, and MySQL
- Creating and maintaining a detailed product development timeline with milestones
- Contributing to [the petitioner's] product vision and identifying innovative ways to integrate technology into the product
- Contributing to UX design and usability of applications
- Contributing to the sourcing and hiring of exceptional candidates to join [the petitioner's] team

In its letter of support accompanying the initial I-129 petition, the petitioner indicated that the minimum education requirement for the proffered position is a bachelor's degree in computer science, engineering, or a related field, or its equivalent. The petitioner stated that the beneficiary is qualified to perform the duties of the proffered position by virtue of his U.S. Bachelor of Science in electrical engineering and computer science and Master of Engineering degree in electrical engineering and computer science. In support of this assertion, the petitioner provided, *inter alia*, a copy of a transcript in the beneficiary's name from [REDACTED] indicating that the beneficiary was awarded both degrees.

In support of the instant H-1B petition, the petitioner submitted an LCA designating the proffered position as corresponding to the occupational classification "Web Developers" - SOC (ONET/OES) code 15-1099.04 at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 15, 2012. The director outlined the evidence to be submitted. The AAO notes that the director notified the petitioner that the LCA did not appear to correspond to the proffered position, and requested that the petitioner either submit an LCA that was certified prior to the date of filing of the instant petition that corresponds to the duties of the proffered position, or probative evidence to establish that the LCA provided indeed corresponds to the proffered position.

On November 2, 2012, the petitioner and counsel responded to the director's RFE by providing letters and additional evidence. Counsel and the petitioner asserted in their respective letters that the LCA filed in support of the Form I-129 petition corresponds to the proffered lead software engineer position.

In a letter dated October 24, 2012, the petitioner provided the following revised description of the duties of the proffered position:

- Managing and overseeing development of [REDACTED] mobile and web products (20% of time)
  - The Lead Software Engineer will be the highest-ranking software engineer/developer in the company, reporting to the CEO as indicated in the attached Organizational Chart. We currently employ three university-educated software engineers/developers working from abroad, and [the beneficiary] as Lead Software Engineer directly

supervises them and will continue to do so in this H-1B position. As [the petitioner] grows (we anticipate hiring ten additional software engineers/developers in the next two years), [the beneficiary's] role in this leadership position as Lead Software Engineer will continue to be critical to our company's success.

- As Lead Software Engineer, [the beneficiary's] technical responsibilities in overseeing product development will include:
  - Carrying out code reviews to certify and maintain high code quality (focusing on scalability, maintainability, clarity, and application of best software practices).
  - Making decisions on which software libraries and platforms to use, using knowledge and understanding of computer systems engineering.
  - Using knowledge of API design principles to oversee and design RESTful APIs that are backwards compatible.
- Creating and maintaining a detailed product development timeline with milestones (10% of time)
  - The Lead Software Engineer is responsible for creating a detailed product development timeline over the next three years, which will include the following major milestones:
    - Year 1:
      - Developing [the petitioner's] mobile app for iOS.
      - Integrating 3<sup>rd</sup> party social media platforms such as Facebook, Twitter, and Open Social with [the petitioner's] technologies and content platform.
      - Planning conversations using Split (Bucket) Testing, Multi Variant Testing, and choice modeling.
      - Adopting user QA testing processes like Hall Intercept Testing, Remote User Testing, and focus groups.
      - Experimenting with social viral growth by encouraging Facebook sharing of particular pictures and movies.
      - Expanding the software engineering team by 1-3 people.
    - Year 2:
      - Expanding [the petitioner's] market by developing a mobile version for Android.
      - Designing and developing a tablet version of [the petitioner's application] for iOS.
      - Creating a digital version photo books to encourage sharing and viral growth through Facebook, Twitter, other social platforms.
      - Expanding the software engineering team by 3-5 people.

Year 3:

- Developing a smart advertisement suggestion platform based on content that users are generating on [the petitioner's application].
  - Expanding internationally and translating products into different languages (starting with Chinese, Japanese, Portuguese, French, etc.)
  - Integrating with a global printing partner.
  - Designing and developing a tablet version of [the petitioner's application] for Android.
  - Expanding the software team by 5-10 people.
- The Lead Software Engineer will assign and prioritize tasks to Software Engineers that are most impactful to the success of the product, using software development experience to gauge the difficulty and length of time required for each technical milestone.
  - The Lead Software Engineer will use product management and software development experience to outline task requirements and clarify product specification ambiguities.
- Developing [the petitioner's] mobile and web applications, starting with a mobile application for iPhone, using Python, Django, HTML, and Javascript (30% of time)
    - The Lead Software Engineer will develop server side code that is maintainable, scalable, efficient and makes use of software engineering best practices. In performing this task, he will draw on experience with Python and the Django framework.
    - The Lead Software Engineer will develop client side code using HTML, CSS, Javascript and related libraries (jQuery, Backbone, Bootstrap) and using experience and understanding of user interface design and implementation techniques.
    - The Lead Software Engineer will improve code efficiency using knowledge of algorithmic techniques and data structures.
    - The Lead Software Engineer will develop automated tests that assess code correctness using Test Driven Development techniques and best practices.
    - The Lead Software Engineer will apply knowledge of client-server design to achieve good code modularity and clean system integration.
  - Developing and maintaining supporting systems for mobile and web applications, using Amazon Web Services, Heroku, and MySQL (5% of time)
    - The Lead Software Engineer will write scripts that interact with Amazon S3, Amazon RDS and Heroku, using an understanding of database structures and SQL.
    - The Lead Software Engineer will develop database migration scripts

and certify database integrity, using knowledge of the Unix file system and commands as well as the South migration framework.

- Contributing to the [petitioner's] product vision and identifying ways to integrate technology into the product (10% of time)
  - The Lead Software Engineer will design product experiments that can be developed, run and adapted quickly, using high-level software libraries such as Bootstrap and jQuery.
  - The Lead Software Engineer will advise the CEO and other senior management on new technologies to integrate and upcoming technological trends that could benefit the company.
  
- Contributing to UX design and usability of applications (20% of time)
  - The Lead Software Engineer will design intuitive user interfaces using user interface prototyping principles and techniques. These techniques include "Wizard of Oz," which is a type of research experiment where users interact with interfaces that are partially operated by humans behind the scenes. They will also include low-fidelity paper/static prototyping, which is a low commitment usability testing method to quickly gather feedback and iterate on interfaces.
  
- Contributing to the sourcing and hiring of exceptional candidates to join [the petitioner's] team (5% of time)
  - The Lead Software Engineer will be a key participant in building [the petitioner's] technical team over the next three years. This will include:
    - Designing interview questions that assess mastery of software engineering principles and best practices, using knowledge of algorithm design and run-times, algorithm paradigms, and data structures.
    - Assessing excellent quality code and identifying superior technical candidates.
    - Making final decisions on which candidates are most qualified for software engineering positions.

(Errors in original.) Among the additional evidence provided in response to the RFE, the petitioner submitted an organizational chart, and printouts from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*'s chapters entitled "Software Developers" and "Information Security Analysts, Web Developers, and Computer Network Architects."

In their respective letters submitted in response to the RFE, both the petitioner and counsel assert that although the proffered position involves some web developer duties, the proffered position substantially consists of software engineering duties. In support of this assertion, the petitioner provided the above described printout of the *Handbook*'s chapter entitled "Software Developers."

The director reviewed the information provided by the petitioner, and determined that the petitioner failed to provide a valid LCA that corresponds to the instant petition as required by the regulations. The director denied the petition on December 14, 2012. Counsel submitted an appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner submitted an LCA that corresponds to the instant petition. For the reasons discussed below, the AAO agrees that the LCA provided by the petitioner does not correspond to the instant petition.

As previously stated, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category "Web Developers" - SOC (ONET/OES Code) 15-1099.04. The petitioner stated in the LCA that the wage level for the proffered position was Level I (entry level) and claimed that the prevailing wage in Santa Clara County (Palo Alto, CA) for the proffered position was \$55,411 per year. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.<sup>2</sup> The LCA was certified on April 3, 2012, and signed by the petitioner on April 6, 2012.

In the instant case, the petitioner and counsel have repeatedly claimed that the proffered position falls under more than one occupational category. Specifically, in a letter dated October 24, 2012, the petitioner stated that "the duties of [the proffered position] include architecting and developing a web platform, as well as mobile and web products that integrate within the web platform." Based on these job duties of the proffered position, the petitioner believes its "selection of the Web Developer wage source on the LCA was reasonable for this H-1B position." However, the petitioner goes on to clarify that "the DUTIES of [the proffered position] as outlined in detail [in response to the RFE] clearly involve *software engineering* and are not limited to what appears in the O\*NET as the job duties corresponding to the Web Developer wage source." In a letter dated November 1, 2012, counsel reiterates the petitioner's statement, and further asserts, "The [proffered position] is clearly what it sounds like: *a software engineering position.*" In support of this assertion, the petitioner and counsel provided a printout from the *Handbook's* chapter on software developers.

When the duties of the proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant O\*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the nature of the job offer, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational

---

<sup>2</sup> The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the SWA should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available 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).

Thus, as the petitioner believed the proffered position is best described as a combination of occupations, according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation. Notably, the prevailing wage for "Web Developers" is significantly lower than the prevailing wage for "Computer Software Engineers, Applications" – SOC (ONET/OES Code) 15-1031.

The Online Wage Library lists the prevailing wage for "Web Developers" as \$55,411 per year at the time the petition was filed in this matter, for a Level I position in the area of intended employment.<sup>3</sup> The prevailing wage for "Computer Software Engineers, Applications" is listed as \$82,930 per year.<sup>4</sup> The prevailing wage for "Web Developers" is less than the prevailing wage for "Computer Software Engineers." Thus, according to DOL guidance, if the petitioner believed its position was a combination of the occupations "Web Developers" and "Computer Software Engineers," it should have chosen the relevant occupational code for the highest paying occupation – in this case "Computer Software Engineers." However, the petitioner selected the occupational category for the lowest paying occupational category for the proffered position on the LCA.

Moreover, the AAO observes that the LCA was certified at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant O\*NET 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

---

<sup>3</sup> For additional information regarding the prevailing wage for web developers in Santa Clara County (Palo Alto, CA), see the All Industries Database for 7/2011 - 6/2012 for Web Developers (Computer Occupations, All Other) at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=15-1799&area=41940&year=12&source=1> (last visited July 31, 2013).

<sup>4</sup> For additional information regarding the prevailing wage for software engineers in Santa Clara County (Palo Alto, CA), see the All Industries Database for 7/2011 - 6/2012 for "Computer Software Developers, Applications" at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=15-1132&area=41940&year=12&source=1> (last visited July 31, 2013).

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 a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) 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> 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 as indicated by the job description.

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

**Level I** (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 U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available 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).

The AAO observes that the petitioner has classified the proffered position at a Level I wage, which

---

<sup>5</sup> For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available 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.

is appropriate for a position requiring only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." However, the petitioner has indicated that the proffered position requires a "sophisticated understanding" of subjects such as software engineering, logic design, and computer architecture, among others. The duties of the proffered position, as described by the petitioner in response to the RFE, indicate that the beneficiary will be "the highest-ranking software engineer/developer in the company," and will directly supervise three software engineers working abroad. The petitioner has also stated that, in addition to his product development duties, the beneficiary will be "a key participant" in hiring additional technical staff for the petitioner. Specifically, the beneficiary will be responsible for "designing interview questions that assess mastery of software engineering principles and best practices," and "[m]aking final decisions on which candidates are most qualified for software engineering positions." Thus, it appears that the proffered position involves much more knowledge of the occupation (i.e., software engineering) than that which would be appropriate for a Level I entry-level position. Here, instead of having a "basic understanding of the occupation," the beneficiary is required to possess a "sophisticated understanding" of the occupation such that he can supervise others in the occupation, and evaluate others' understanding of the occupation.

Further, the petitioner's designation of the proffered position at a Level I wage-rate indicates that the beneficiary will be expected to "perform routine tasks that require limited, if any, exercise of judgment." However, the duties of the proffered position, as described by the petitioner in its October 24, 2012 letter, indicate that the beneficiary is responsible for the development of the petitioner's primary product. Notably, the beneficiary will be "[m]anaging and overseeing development of [the petitioner's] mobile and web products, including "making high-level system design decisions," and "making decisions on which software libraries and platforms to use." The petitioner also stated that the beneficiary will "[carry] out code reviews" and "develop server side codes . . . drawing on experience with Python and the Django framework." Further, the petitioner indicated that the beneficiary will "assign and prioritize tasks to Software Engineers" that will have the greatest impact on the success of the project, using his "software development experience to gauge the difficulty and length of time required for each technical milestone." Thus, it appears that instead of performing "routine tasks" requiring "limited, if any, exercise of judgment," as would be appropriate for a Level I position, the beneficiary will be required to exercise extensive independent judgment in the proffered position.

In addition, the petitioner has indicated that the duties of the proffered position entail "[c]reating and maintaining a detailed product development timeline with milestones," "[d]eveloping [the petitioner's] mobile and web applications," "[m]aking final decisions on which candidates are most qualified for software engineering positions," and "advis[ing] the CEO and other senior management on new technologies to integrate and upcoming technological trends that could benefit [the petitioner]." Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," the petitioner is relying on the accuracy of the beneficiary's work for the success of the petitioner's business operations.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7<sup>th</sup> Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The AAO notes that the prevailing wage of \$55,411 per year on the LCA corresponds to a Level I position for the occupational category of "Web Developers" (Computer Occupations, All Others) for Santa Clara County (Palo Alto, CA).<sup>7</sup> Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been \$77,210 per year for a Level II position, \$98,987 per year for a Level III position, and \$120,786 per year for a Level IV position.<sup>8</sup>

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the *correct occupational category and wage level* in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category and wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. Thus, for this reason, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

---

<sup>7</sup> For additional information regarding the prevailing wage for Web Developers in Santa Clara County (Palo Alto, CA), see the All Industries Database for 7/2011 - 6/2012 for Web Developers (Computer Occupations, All Other) at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1799&area=41940&year=12&source=1> (last visited July 31, 2013).

<sup>8</sup> The AAO here reiterates that the certification of the proffered position under the prevailing wage for "Web Developers" at a Level I wage rate is inconsistent with the petitioner's claims regarding the nature and requirements for the proffered position as the petitioner has represented that the position includes duties that pertain to a higher-paying occupation, i.e., software engineering. Notably, the prevailing wage for a Level I software developer position in Palo Alto, CA during the relevant period is \$82,930 per year, \$99,653 per year for a Level II position, \$116,355 per year for a Level III position, and \$133,078 per year for a Level IV position. See the All Industries Database for 7/2011 - 6/2012 for "Software Developers, Applications" at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1132&area=41940&year=12&source=1> (last visited July 31, 2013).

Moreover, this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. 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 [DOL] 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 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 (emphasis added):

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.

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 and requirements of the proffered position, that is, specifically, that corresponds to the proper occupational category, as well as the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations. Accordingly, the director's decision will not be disturbed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.