



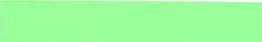
U.S. Citizenship  
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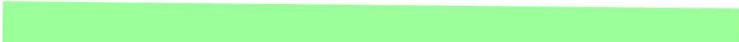


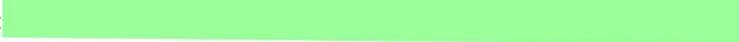
Date: **AUG 30 2013**

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 (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  
Chief, Administrative Appeals Office

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

The petitioner on the Form I-129, Petition for a Nonimmigrant Worker, describes its type of business as an "Employment Staffing Agency." The petitioner states that it was established in [REDACTED] currently employs 74 personnel in the United States, and reported a gross annual income of \$5,800,000 when the petition was filed. It seeks to continue the employment of the beneficiary as a clinical coordinator and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the petitioner had not provided evidence sufficient to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, Notice of Appeal or Motion, counsel's brief, and additional documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition.<sup>1</sup> Accordingly, the appeal will be dismissed, and the petition will remain denied.

### **Facts and Procedural History**

In the July 24, 2012 letter in support of the petition, the petitioner stated that it provides health care services and personnel. The petitioner noted that the "services of the Company are offered through provider contracts to hospitals, nursing homes, medical clinics, schools and other institutions." The petitioner asserted:

At this time, the Company requires the continued services of a Clinical Coordinator to conduct day-to-day management and support of a clinical team of field staff of the Company's client. It is essential that the Company continue to employ an individual as its Clinical Coordinator with at least a bachelor's-level degree in Nursing, Healthcare Administration, or a related discipline.

The petitioner stated that the beneficiary "is being offered temporary employment as a Clinical Coordinator with the Company on behalf of its client, [REDACTED] The petitioner then provided a lengthy, repetitive, and general overview of the beneficiary's duties as a clinical coordinator.

The petitioner provided a copy of its April 26, 2012 agreement entered into with [REDACTED] located in [REDACTED] The agreement called for the petitioner "to obtain such

<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). It was during this review that the AAO found additional grounds for denying the petition.

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healthcare personnel and other human resource requirements as and when the need arises." The agreement also indicated that [REDACTED] agreed to pay the petitioner for the hours it assigned the provided healthcare personnel to perform services. The record also includes the petitioner's August 28, 2012 employment agreement with the beneficiary. The employment agreement indicated the proffered position was titled "clinical coordinator" and noted that the employee shall perform duties as are customarily performed by one holding such a position as well as other unrelated duties as may be assigned to the employee. The initial record further included the required Labor Condition Application (LCA) which indicates that the occupational classification for the position is "Occupational Health and Safety Specialists," with the SOC (ONET/OES) Code 29-9011, at a Level 1 (entry-level) wage. 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).

Upon review of the initial record, the director requested additional information from the petitioner to demonstrate that the position's duties constitute the duties of a specialty occupation. The director noted that the occupation listed on the LCA submitted did not correspond to the duties described by the petitioner for the proffered position. The director requested a valid LCA that corresponded to the description of the proffered position. The director also requested additional evidence regarding the beneficiary's qualifications.

In response, the petitioner claimed that the job duties of the proffered position "encompass the knowledge of a theoretical and practical application of a body of highly specialized knowledge" and that "[i]n order to handle the analytical and technical duties required in this position, a candidate for the job of Clinical Coordinator must have an underlying educational background in Nursing, Healthcare Administration, or a closely related health care discipline." The petitioner concluded that the proffered position "is complex and specialized enough to require a baccalaureate degree in Nursing or Healthcare Administration" and thus it is a specialty occupation. The petitioner repeated the initial overview of the position and also specified six areas of duties and the time allocated to the duties as follows:

- Research and analysis – 15 percent.
- Devise and implement plans for delivery and management of health care services – 30 percent
- Implement and manage clinical healthcare programs – 25 percent
- Review and establish health care quality assurance policies and procedures – 10 percent
- Education and training – 10 percent
- Treatment and analysis review – 10 percent.

The petitioner also provided its "notice of job opportunity" which describes the duties of the proffered position as follows (bullets added):

- Plan delivery and management of health care services;
- Create plans for delivery of health care services;
- Research health care requirements, analyze health care needs, determine the most

- suitable means of assisting patients;
- Implement health care service plans;
  - Assign new patients to field staff;
  - Coordinate day-to-day activities of health care services including changes in level of care, prescription, or transfers;
  - Notify physicians/team members of a change in the plan of care;
  - Identify health education strategies, plan and direct member education, design and implement weight management programs, and direct the design and implementation of multi-disciplinary and health education programs to improve accessibility, enhance member satisfaction, improve health care outcomes, and control costs;
  - Plan, develop, implement, evaluate health programs including member education, nursing placement services, weight management programs;
  - Integrate services and programs with strategic organizational goals and objectives;
  - Direct health education programs/services projects;
  - Ensure programs are carried out effectively;
  - Interview personnel and patients to evaluate effectiveness of health programs and suggest improvements;
  - Revise health programs' policies and procedures;
  - Review quality assurance standards;
  - Establish standards for the delivery and management of health care services;
  - Interview personnel and patients to evaluate the effectiveness of quality assurance programs;
  - Review and determine needs of patients;
  - Identify and resolve delays and obstacles to the discharge of patients;
  - Manage discharge planning;
  - Coordinate with healthcare team members to determine if patient education is complete prior to discharge; and
  - Write quality assurance policies and procedures.

The petitioner further provided a professional position description authored by [REDACTED]

[REDACTED] repeated a portion of the initial description of the job duties of the proffered position and opined: "the position of 'Clinical Coordinator' is a specialty occupation requiring a bachelor's-level educational background in Nursing or Healthcare Administration, as well as the application of specialized knowledge in these fields." Dr. [REDACTED] added that the job duties required for the instant position necessitate that an individual be familiar with theoretical and academic concepts in healthcare administration, healthcare management, nursing, clinical medical care, medical science, program management, healthcare training and education, quality management, and related disciplines. Dr. [REDACTED] opined further: "it would not be possible to hold the subject position of Clinical Coordinator with a general educational background in Medical Science or any other general academic field." Dr. [REDACTED] indicated: "[a] background in Nursing or Healthcare Administration enables a candidate to identify health issues, conduct programming studies, identify problems in the delivery of programs, create public health plans based on analysis, supervise the execution of health care programs and manage the delivery of clinical healthcare programs." Dr. [REDACTED] concluded: "the educational requirements, calling for a

minimum of a specialized health care-related baccalaureate degree (in Nursing or Healthcare Administration), and the job duties of the proffered position clearly mark the position as a 'specialty occupation' requiring a degree in an appropriate analytical, clinical, and technical area of healthcare services."

In addition, the petitioner submitted two advertisements in support of its claim that a degree requirement is common to the industry in parallel positions among similar organizations. The advertisements are from: (1) [REDACTED] for a Clinical Coordinator which requires a BSN (Bachelor of Science degree in nursing); and (2) [REDACTED] for a clinical coordinator which also requires a BSN. The petitioner asserted that these facilities are both of comparable size and provide similar medical services as those of the client-facility.

Furthermore, the petitioner stated that it consistently hires individuals to serve in the position of its clinical coordinator who have at least a bachelor's degree in nursing, healthcare administration, or a related field. The petitioner provided evidence of one of its employees who held the position of clinical coordinator and the credential evaluation of his academic background showing he attained the equivalent of a bachelor's degree in nursing science. The petitioner also referenced past H-1B approvals by U. S. Citizenship and Immigration Services (USCIS) of its petitions for clinical coordinators and similar positions. The petitioner noted that not only had USCIS approved past petitions for other beneficiaries for similar positions but that USCIS had also previously approved the beneficiary for H-1B status for this same position.

The petitioner also claimed that it had not found an SOC (ONET/OES) occupation code for a clinical coordinator. The petitioner indicated that upon review of the Foreign Labor Certification Data Center it had determined that the SOC occupation title of "Occupational Health and Safety Specialist" is the most appropriate title for the proffered position to obtain a prevailing wage from the U.S. Department of Labor (DOL). The petitioner added that it had filed the petition for the position of clinical coordinator and that the "job duties of the proffered position are clearly somewhat similar to the job duties of the position of occupational health and safety specialist." The petitioner concluded that as there is no SOC code for a clinical coordinator and the job duties of the proffered position and the occupational health and safety specialist are somewhat similar, it had used the proper SOC Code on the LCA.

Upon review, the director determined that the petitioner had not established the proffered position is a specialty occupation.

On appeal, counsel for the petitioner submits the same information and assertions in support of the appeal as the petitioner submitted in response to the director's RFE.

### **Legal Framework**

The principal issue in this matter is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise

interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

As a preliminary matter and as recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.* The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

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**Analysis**

In this matter, the petitioner has provided its contract with [REDACTED] however, the contract does not identify [REDACTED] requirement for a clinical coordinator. Moreover, the contract does not include [REDACTED] requirements either in terms of duties or the educational level for the proffered position. The AAO observes, for example, that the contract in this matter states: "[t]he Facility [REDACTED] agrees to provide paid training, orientation and familiarization with regard to actual duties and responsibilities, company policies and procedures." Thus, it is not possible to ascertain the nature of the actual proposed duties of the proffered position as [REDACTED] has not provided a description of the actual duties and responsibilities it expects the beneficiary to perform. Although the petitioner has provided lengthy descriptions of the duties of the purported proffered position, the petitioner did not include evidence from [REDACTED] that the facility desires to hire a clinical coordinator who will perform the duties the petitioner sets out. 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)).

In addition, the record does not identify the nature of the end-client in detail. It appears that the end-client may be a nursing home facility, but the record did not include information as to the size of the end-client in terms of staff, patients, or income. Again the lack of information in the record regarding the nature of the end-client compounds the inability to ascertain the extent and nature of the beneficiary's actual duties. As the record is deficient in the responsibilities and requirements from the end-client ([REDACTED] with regard to the position the beneficiary would perform, the AAO is unable to determine what the beneficiary will actually be doing on a daily basis. Such lack of information precludes a determination that the proffered position is a specialty occupation. For this reason alone, the petition must be denied.

To reiterate, as the record of proceeding in this matter is devoid of sufficient probative information from the end-client, [REDACTED], regarding the specific job duties to be performed by the beneficiary for that company, the petitioner has not established the substantive nature of the work to be performed by the beneficiary. Such failure therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

### Additional Grounds of Ineligibility

Beyond the decision of the director, the petitioner has not established that it qualifies as an H-1B employer. The United States Supreme Court 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. 440, 445 (2003) (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)).

As such, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Although the petitioner provided both its agreement with the beneficiary and its agreement with the end-client facility in this matter, as noted above, the petitioner has not provided the end-client's description of duties for the work to be performed at the end-client's facility.

The petitioner has also failed to provide evidence that it will oversee and direct the beneficiary's day-to-day work, that it will provide the instrumentalities and tools for the beneficiary to use, and that it, not the end-client, will assign the beneficiary projects. To the contrary, the petitioner's agreement with [REDACTED] requires [REDACTED] "to provide paid training, orientation and familiarization with regard to actual duties and responsibilities, company policies and procedures" for any personnel who work at the [REDACTED]

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facility. Without full disclosure of all of the relevant factors, we are unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary. Accordingly, the petitioner has not established the requisite employer-employee relationship essential for approval of an H-1B petition and for this additional reason the petition must be denied. As observed above, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Beyond the decision of the director, even if the proffered duties as described by the petitioner would in fact be the duties to be performed by the beneficiary and even if those duties qualified the proffered position as a specialty occupation, the AAO finds an additional reason the petition may not be approved. Specifically, the petitioner in this matter has failed to submit a valid LCA that corresponds to its description of the duties of the position. Contrary to the petitioner's implication that the purpose of the LCA is to obtain the prevailing wage that fits within the salary parameters it wants to pay, 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]."). According to section 212(n)(1) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. See *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7<sup>th</sup> Cir. 2010). Accordingly, the prevailing wage obtained cannot be for an occupation wherein the job duties performed are "somewhat similar" to the job duties of the proffered position; rather the occupation identified in the LCA (and the accompanying prevailing wage) must be for the occupation identified in the petition which requires the same services to be performed at the same level certified in the LCA.

In this matter, the job title on the LCA submitted with the petition reads "Occupational Health and Safety Specialists," and it was certified for SOC (O\*NET/OES) Code 29-9011. DOL's *Occupational Outlook Handbook (Handbook)*<sup>2</sup> reports:

Occupational health and safety specialists analyze many types of work environments and work procedures. Specialists inspect workplaces for adherence to regulations on safety, health, and the environment. They also design programs to prevent disease or injury to workers and damage to the environment.

Accordingly, an occupational health and safety specialist's focus is on the workers and the environment in which they must work. In this matter, the focus of the proffered position as described by the petitioner is on patients and the delivery of their care. This is a significant distinction between the occupation described by the petitioner in its letter of support and the occupation listed on the LCA submitted in support of the petition. An additional distinction between these two occupations is the educational requirements for the two occupations. The *Handbook* reports generally that individuals in an occupational health and safety position

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<sup>2</sup> All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

typically need a bachelor's degree and that specialists are trained in the specific laws or inspection procedures through a combination of classroom and on-the-job training. Thus, if the petitioner intended to actually hire an occupational health and safety specialist, as described on the LCA, the *Handbook* does not report that a bachelor's degree in a specific discipline is required. The *Handbook* also lists a number of diverse degrees that may be acceptable to hold occupational health and safety specialists' positions, including degrees in occupational health, safety, or a related scientific or technical field, such as engineering, biology, or chemistry. The petitioner, however, has not established how any of these dissimilar degrees are closely related to its requirement of a particular degree in nursing or healthcare administration for its position of clinical coordinator.

Also contrary to the petitioner's claim that DOL's approval of the LCA is sufficient to establish its validity for the proffered position, DOL regulations specifically 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 (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. Further, 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.

Here the petitioner has submitted an LCA for an occupation that does not include the same duties as described by the petitioner and that does not require the same degree or degrees that the petitioner allegedly requires to perform the duties of the proffered position. Accordingly, the submitted LCA does not support the petition.

In addition to not supporting the petition as described above, the submitted LCA also undermines the petitioner's claim that the proffered position is a specialty occupation. First, as noted above the occupation identified on the LCA (Occupational Health and Safety Specialists) would not

qualify as a specialty occupation based on the information provided by the *Handbook*, and second, the LCA has been certified for a Level 1, entry-level position. 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. 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).

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. See *id.* 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. See *id.* 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. See *id.*

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

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

Thus the LCA's wage level supports a finding that the position is actually a low-level, entry position relative to others even within the non-specialty occupation position of an occupational health and safety specialist. This aspect of the LCA further weakens the credibility of the petition and, in particular, the credibility of the petitioner's assertions regarding the "complex" demands and higher-level 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).

To allow the petitioner to simply submit an LCA for a different occupation and at a lower prevailing wage than the position set out in the petition results in the petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). In this matter a review of the petitioner's description of the claimed duties of the proffered position reveals that several of the duties involve planning delivery of, as well as, establishing standards, and implementing, managing, evaluating, and revising health care services and programs. Such duties correspond to one of the primary duties of a medical and health services manager, the duty of working to improve the efficiency and quality of delivering healthcare.<sup>3</sup> Thus, at the very least, the petitioner should have recognized and submitted an LCA that lists the occupational classification of a medical health and services manager, SOC (O\*NET/OES) Code 11-9111.<sup>4</sup> Upon review of the totality of the record, the petitioner has failed to submit a valid LCA that has been certified for the proper occupational classification and wage level and thereby properly corresponds to and supports the petition. Accordingly, the petition must be denied for this additional reason.

As a final note, counsel asserts on appeal that USCIS approved other petitions that had been previously filed by the petitioner for "Clinical Coordinators and related positions." The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must

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<sup>3</sup> The *Handbook* reports generally that medical and health services managers plan, direct, and coordinate medical and health services and must be able to adapt to changes in laws, regulations, and technology. Moreover, the *Handbook* lists a primary duty of this occupation as working to improve efficiency and quality in delivering healthcare services, a duty emphasized in the petitioner's description of the proffered position. Furthermore, the *Handbook* reports that prospective medical and health services managers may have a bachelor's degree in health administration - a degree more closely aligned with the petitioner's claimed degree requirement for the proffered position.

<sup>4</sup> It is noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. *See generally* 8 C.F.R. § 214.2(h); 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, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

### Conclusion

In this matter, the petitioner has not established that the proffered position is a specialty occupation. Moreover, the petitioner has also failed to (1) establish that it would have the requisite employer-employee relationship with the beneficiary or (2) submit the requisite valid LCA that corresponds to the position and wage level as described in the petition. Accordingly, the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

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 at 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.

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.