



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **DEC 24 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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:

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,

N. Rosenberg
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner, through counsel, submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on January 3, 2013. On the Form I-129 visa petition, the petitioner describes itself as a company providing “Automated Point of Sale Systems – Hardware and Software” with four employees that was established in 1999. In order to employ the beneficiary in what it designates as a “market research analyst” 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 May 30, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, submitted an appeal of the decision. 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. In support of this assertion, counsel submits a brief and supporting documentation.

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 petitioner’s response to the RFE; (4) the director’s notice denying the petition; and (5) the petitioner’s 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 record as currently constituted does not establish 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.

Based on its *de novo* review, however, the AAO will first address additional, independent grounds, not identified by the director’s decision, that the AAO finds also preclude approval of this petition.¹ As a preliminary matter and beyond the decision of the director, the AAO finds that the petition cannot be approved because the petitioner failed to establish that the beneficiary is exempt from the six-year limitation contained in section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), pursuant to section 104(c) of the “American Competitiveness in the Twenty-First Century Act” (AC21) as claimed in the petition. *See* Pub. L. No. 106-313, § 104(c), 114 Stat. 1251 (2000).

The AAO notes that, in general, section 214(g)(4) of the Act provides that: “[T]he period of authorized admission of [an H-1B nonimmigrant] may not exceed 6 years.” However, section 104(c) of AC21 removes the six-year limitation on the authorized period of stay in H-1B nonimmigrant visa status for certain aliens whose applications for lawful permanent residence remain pending due to the unavailability of immigrant visa numbers for the specific classification sought, allowing for

¹ The AAO conducts its review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

extensions of the aliens' H-1B status until the aliens' applications for adjustment of status have been processed and approved or denied.

Section 104(c) of AC21 reads in pertinent part:

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who --

(1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and

(2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,

may apply for, and the [Secretary of Homeland Security] may grant, *an extension of such nonimmigrant status* until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. at 1253 (emphasis added).

The record shows that the beneficiary, an Austrian citizen, has an approved Form I-140, Immigrant Petition for Alien Worker (LIN 07 258 57609), filed pursuant to the third employment-based preference for "Skilled Workers, Professionals, and Other Workers" (EB-3) classification, and assigned a priority date of December 26, 2006.² As noted above, the petitioner filed the instant Form I-129 on January 3, 2013. The U.S. Department of State's "Visa Bulletin for January 2013" indicated that visa numbers were available for EB-3 petitions, in "All Chargeability Areas," whose priority date was earlier than February 1, 2007.³

In counsel's letter dated January 2, 2013, counsel asserted the following:

As of the most recent Visa Bulletin the cut-off date for [an] EB-3 petition for "All Chargeability Areas" is November 22, 2006. Because, as of the date of submitting this H-1B petition, [the I-140 petitioner's] priority date is not current[,] [the beneficiary] is eligible for continuing H-1B status pursuant to Section 104(c) of AC21.

² This Form I-140 (LIN 07 258 57609) was filed by a different petitioner on behalf of the beneficiary. As such, it may have been abandoned as the beneficiary is no longer employed by that petitioner and there is no evidence in the record that indicates that that petitioner still intends to permanently employ the beneficiary in the United States.

³ The U.S. Department of State's "Visa Bulletin for January 2013," Number 52, Volume IX, is available on the Internet at http://www.travel.state.gov/visa/bulletin/bulletin_5834.html (last accessed on Dec. 20, 2013).

In the letter dated January 2, 2013, counsel also stated that “[the beneficiary] is currently in Austria and does not hold H-1B status.”

Contrary to counsel’s assertion, upon review of the Visa Bulletin for January 2013, the AAO finds that an immigrant visa number was available to the beneficiary for an I-140 petition filed pursuant to an EB-3 classification in “All Chargeability Areas,” on the date the instant H-1B petition was filed. Thus, since an immigrant visa number was available to the beneficiary at the time this H-1B petition was filed, the beneficiary was not eligible at that time for an exemption to section 214(g)(4) of the Act pursuant to section 104(c) of AC21.

The beneficiary was also ineligible for this exemption as he was not a nonimmigrant at the time the H-1B petition was filed. Section 101(a)(15) of the Act defines “immigrant” as “every alien except an alien who is within one of the following classes of nonimmigrant aliens,” and lists different categories of nonimmigrants. Here, as the beneficiary was not in the United States on a nonimmigrant visa at the time the instant petition was filed, the beneficiary was not classified as a nonimmigrant under section 101(a)(15) of the Act. Thus, at the time the petition was filed, the beneficiary was considered to be an immigrant under the Act. Therefore, since the beneficiary was an “immigrant alien” under the Act, the beneficiary did not qualify for “an extension of such nonimmigrant status” pursuant to section 104(c) of AC21, because he does not have a nonimmigrant status to extend.⁴ The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

This non-discretionary basis for denial renders the remaining issue in this proceeding moot. The petition will be denied and the appeal dismissed.

However, the AAO will note that, in any event it reviewed the record of proceeding and, based upon that review, hereby endorses the director's determination that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. That is, the AAO agrees with director's finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this

⁴ By its very terms, section 104(c) applies only in cases where a petitioner is seeking to extend the H-1B nonimmigrant status of the beneficiary. In such a situation, 8 C.F.R. § 214.2(h)(14) further mandates that this “request for a petition extension may be filed only if the validity of the original petition has not expired.” In this matter, the petitioner clearly indicated on the Form I-129 that it was filing this request as a petition for new employment and *not* as a continuation of previously approved employment without change with the same employer, i.e., a petition extension. Even if it had filed such a request, however, as the beneficiary’s most recently approved H-1B petition expired on March 24, 2011 and as the instant petition was filed on January 3, 2013, almost two years after that petition’s expiration, 8 C.F.R. § 214.2(h)(14) would require that the extension petition be denied. As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension.

regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable 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), United States Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *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.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services in a position entitled "market research analyst" to work on a full-time basis at a rate of pay of \$50,000 per year.

The petitioner 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 "Market Research Analysts and Marketing [Specialists]" - SOC (ONET/OES) Code 13-1161, at a Level II (qualified) wage.

In a support letter dated November 6, 2012, the petitioner stated that the proffered position involves the following duties:

- Compile and analyze data relating to research in international markets to determine potential sales;
- Research and design policies to provide economic solutions to problems arising from the production and distribution of goods in the U.S., Canada and Mexico;
- Interpret economic and statistical data regarding international trade between the United States, Canada and Mexico (And other international markets); and;
- Devise methods and procedures for collecting and processing international data, and to prepare detailed reports interpreting the data that he collects.

In the letter of support, the petitioner also stated that the minimum educational requirement for the proffered position is “at least a bachelor's degree in business administration or a related marketing degree.” In addition, the petitioner provided a document dated July 8, 1997, entitled “Evaluation Report” prepared by the Credential Evaluation Center stating that the beneficiary’s foreign degrees are the “U.S. equivalent [of] Bachelor[’s] and Master[’s] degrees both [sic] in Business Administration with emphasis on [sic] Economics.” The petitioner submitted copies of uncertified English translations of the beneficiary's Austrian diplomas and transcripts.⁵

Upon review of the documentation, the director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on February 6, 2013. The petitioner was asked to submit, among other things, probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the evidence to be submitted.

On April 24, 2013, counsel responded to the director's RFE and submitted, among other things, (1) a letter from counsel dated April 17, 2013; (2) a letter from the petitioner dated April 17, 2013, regarding the beneficiary’s job duties; and (3) additional evidence.

In the letter in response to the RFE dated April 17, 2013, the petitioner provided a revised description of the duties of the proffered position and the percentage of time that the beneficiary will spend performing each duty on a weekly basis, as follows:

DUTIES	% OF TIME
Implementing and testing marketing methods.	10%
Finding distribution channels.	15%
Hiring employees for each project and segment.	10%
Focus group research in local markets.	20%
Consumer testing.	15%

⁵ Because the petitioner did not submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Development of business plans for establishing offices in the key markets.	10%
Financial analysis.	10%
Financial structuring.	10%

The director reviewed all of the information in the record of proceeding. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties 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 director denied the petition on May 30, 2013. Counsel for the petitioner submitted a timely appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. The AAO, however, will first make some preliminary findings that are material to the determination of the merits of this issue on appeal.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. 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. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

Thus, a crucial aspect of this matter is whether the petitioner has sufficiently described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge obtained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

The record contains two generic and distinct job descriptions for the proffered position that do not adequately establish the substantive nature of the work that the beneficiary is expected to perform in order to establish eligibility for H-1B classification.

The AAO notes that the revised description of the duties of the proffered position that was provided in the letter in response to the RFE dated April 17, 2013 is different than the original job duties that were provided in the support letter dated November 6, 2012. In its response to the RFE, the petitioner expanded the beneficiary's duties, adding items such as: (1) "Hiring employees for each

project and segment”; (2) “Consumer testing”; (3) “Development of business plans for establishing offices in the key markets”; (4) “Financial analysis”; and (5) “Financial structuring.” In addition, in the support letter, the petitioner indicated that the beneficiary’s duties would mainly focus solely on “[c]ompil[ing] and analyz[ing] data relating to research in international markets to determine potential sales”; “[r]esearch[ing] and design[ing] policies to provide economic solutions to problems arising from the production and distribution of goods in the U.S., Canada and Mexico”; and “[i]nterpret[ing] economic and statistical data regarding international trade between the United States, Canada and Mexico (And other international markets).” In contrast, in the letter in response to the RFE dated April 17, 2013, the petitioner’s revised description of the duties of the proffered position did not reference international markets, but rather only mentioned local markets. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm’r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director’s RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

Moreover, the generalized level of information provided about the proffered position and its constituent duties is exemplified by the petitioner’s assertion that the beneficiary’s duties would include “[i]mplementing and testing marketing methods” and “[f]inding distribution channels,” as well as those duties listed in the previous paragraph. The petitioner provided no explanation as to what tasks these duties would actually entail. The duties could cover a range of activities, and without further information, do not provide any insight into the beneficiary’s day-to-day work. The petitioner’s description of the proffered position fails to illuminate the substantive application of knowledge involved in the proposed duties or any particular educational attainment associated with such application.

While the petitioner has identified its proffered position as that of a market research analyst, the description of the beneficiary’s duties, as provided by the petitioner, lacks the specificity and detail necessary to support the petitioner’s contention that the position is a specialty occupation. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner’s business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds that the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position’s actual work would require the theoretical and practical application of any particular

educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

Upon review of the record of proceeding, the AAO finds that the overall responsibilities for the proffered position contain insufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their daily performance. Furthermore, although the petitioner submitted general documentation regarding its business operations, the petitioner did not provide sufficient documentation to establish and substantiate the actual job duties and responsibilities of the proffered position. Moreover, the petitioner did not submit sufficient evidence to establish the beneficiary's specific role within its business operations and how the beneficiary would be relieved from performing non-qualifying duties.

Furthermore, the AAO observes that the petitioner's claimed minimum educational requirement for the proffered position entails "at least a bachelor's degree in business administration or a related marketing degree." The petitioner's statement indicates that the duties of the proffered position can be performed by an individual with a bachelor's degree in business administration. A degree in business administration for the proffered position, without specialization, is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the duties and responsibilities of 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 demonstrate 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. As discussed above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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 at 147.⁶

⁶ 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*

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. As such, even if the substantive nature of the work had been established, the director's decision must therefore be affirmed and the petition denied on this basis alone.

Nevertheless, for the purpose of performing a comprehensive analysis, the AAO will now discuss in detail the applicable statutory and regulatory provisions for determining whether the proffered position qualifies as a specialty occupation. Based upon a complete review of the totality of the evidence in the record of proceeding, the AAO again notes that it agrees with the director that the evidence in the record fails to establish that the position as described constitutes a specialty occupation.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO now turns to the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 normally the minimum requirement for entry into the particular position that is the subject of the petition.

As previously noted, on the Form I-129, the petitioner stated that the beneficiary would be employed in a market research analyst position. 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 position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

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.⁷ As previously discussed, the petitioner asserts in the LCA that the

Assoc., 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.

Id.

⁷ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available

proffered position falls within the occupational category "Market Research Analysts and Marketing [Specialists]."

The AAO reviewed the chapter of the *Handbook* entitled "Market Research Analysts," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that these positions comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become a Market Research Analyst" states the following about this occupational category:

Market research analysts need strong math and analytical skills. Most market research analysts need at least a bachelor's degree, and top research positions often require a master's degree.

Education

Market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have a background in business administration, one of the social sciences, or communications. Courses in statistics, research methods, and marketing are essential for these workers; courses in communications and social sciences—such as economics, psychology, and sociology—are also important.

Many market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics, marketing, or a Master of Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Market Research Analysts," available on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-4> (last visited Dec. 20, 2013).

The *Handbook* does not report that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. This passage of the *Handbook* reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields. The *Handbook* states that employees typically need a bachelor's degree in market research or a related field, but the *Handbook* continues by indicating that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, other market research analysts have a background in fields such as business

online.

administration, one of the social sciences, or communications. The *Handbook* notes that various courses are essential to this occupation, including statistics, research methods, and marketing. The *Handbook* states that courses in communications and social sciences (such as economics, psychology, and sociology) are also important.

The AAO notes that, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent), unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties."⁸ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that a bachelor's or higher degree is "typically" required, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields, i.e., social science and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." As noted above, 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 at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a standard, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, the *Handbook* does not support the proffered position as being a specialty occupation.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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

⁸ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

perform are in a specialty occupation." 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner provided a copy of the Occupational Information Network (O*NET) OnLine "Summary Report for: 13-1161.00 - Market Research Analysts and Marketing Specialists," to support its assertion that the proffered position qualifies as a specialty occupation. The AAO reviewed the O*NET Summary Report but finds that the petitioner's reliance on the Job Zone rating is misplaced. That is, O*NET assigns this occupation a Job Zone Four rating, which groups it among occupations that are described as follows: "[m]ost of these occupations require a four-year bachelor's degree, *but some do not* (emphasis added)." See O*NET Summary Report for "Market Research Analysts and Marketing Specialists" - SOC (ONET/OES Code) 13-1161, available on the Internet at <http://www.onetonline.org/link/summary/13-1161.00> (last visited December 20, 2013). O*NET does not report that for those occupations with an academic degree requirement, that such a degree must be in a *specific specialty* directly related to the occupation. As previously discussed, 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 duties and responsibilities of the position. Further, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent.⁹ Notably, O*NET indicates that some of these occupations do not require a four-year bachelor's degree.

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This first alternative prong calls for a petitioner to establish that a

⁹ The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of such positions require a four-year bachelor's degree, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner, which as previously noted has been designated on the LCA as a Level II (qualified) position. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common in the petitioner's industry for 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 AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Specifically, the petitioner failed to demonstrate how the market research analyst duties described require the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The petitioner designated the proffered position as a Level II (qualified level) position on the LCA.¹⁰

¹⁰ 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 requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

The wage levels are defined in the U.S. Department of Labor (DOL) "Prevailing Wage Determination Policy Guidance."¹¹ A Level II wage rate is described by DOL as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, in designating the proffered position at a Level II wage, the petitioner has indicated that the proffered position is a comparatively low position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to perform "moderately complex tasks that require limited judgment."

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹²

The AAO observes that the petitioner has indicated that the beneficiary's educational background and marketing experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized

¹¹ 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. 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.

¹² For additional information regarding wage levels as defined by DOL, 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.

area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner did not demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, 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 third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices for the proffered position, as well as information regarding employees who previously held the position. Here, while it appears that the petitioner has previously employed the beneficiary, the petitioner did not submit evidence that it has previously employed other individuals in the proffered position.

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 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 the performance requirements of the position.

While a petitioner may believe or otherwise assert that a proffered position requires a specific 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 petitioner 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 at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulations any other way would lead to absurd results:

if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Upon review of the record, the petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of 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 specialty, or its equivalent.

Upon review of the record of the proceeding, the AAO finds that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. There is insufficient evidence in the record to establish that the duties of the proffered position require 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 AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level II wage-rate designation in the LCA. That is, that the proffered position's Level II wage designation is indicative of a low-level position relative to others within the occupational category and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that a Level II designation is appropriate for "moderately complex tasks that require limited judgment."

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the duties of the position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner did not satisfy the criterion 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 criteria 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. The appeal will be dismissed and the petition denied for this reason.

Finally, on appeal, counsel asserts the following:

[USCIS] has adjudicated thousands of H-1B visa petitions for Market Research Analysts and it is a well-established principle that marketing positions are specialty occupations. . . .

The record contains six different Form I-797 approval notices for H-1B visa petitions submitted by four different petitioners (including the petitioner in the instant case) on the beneficiary's behalf. Nevertheless, 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). If the previous nonimmigrant petitions were approved based on the same description of duties and assertions that are contained in the current record, they would constitute material and gross error on the part of the director. It would be absurd to suggest that USCIS or any agency must 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 nonimmigrant petitions on behalf of a 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).

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's

enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, 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. The petition is denied.