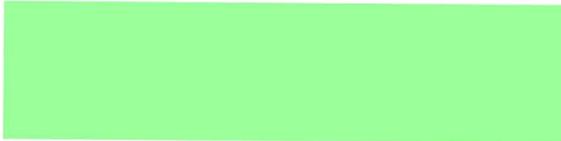
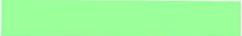


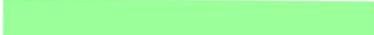


U.S. Citizenship  
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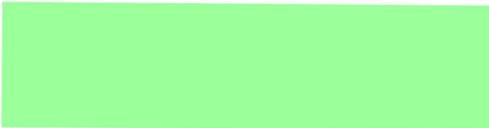


DATE: JAN 11 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

  
  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on June 21, 2011. In the Form I-129 visa petition, the petitioner describes itself as an international and domestic freight forwarder established in 1996. In order to employ the beneficiary in what it designates as an international trade specialist position, the petitioner seeks 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 on January 26, 2012, 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. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

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

Later in the decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that it would pay the beneficiary an adequate salary for her work if the petition were granted; and (2) failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for these reasons as well, with each ground considered as an independent and alternative basis for denial.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as an international trade specialist to work on a part-time basis (30 hours per week). In a letter dated May 17, 2011, the petitioner provided the following description of the duties of the proffered position:

Study global economic and statistical data specific to the company's international freight forwarding activities; devise methods and procedures for collecting and processing data; prepare forecasts to help predict supply and demand problems, custom regulations and foreign exchange issues; compile, analyze and organize information related to international trading practices; make recommendations and propose plans to aid in market interpretation and sales problems; conduct targeting

studies and participate in the development and implementation of promotional strategies for the company's products.

Further, the petitioner stated that due to the "specialized and complex nature of the duties to be performed, [the petitioner] requires the services of an individual who possesses at least a bachelor's degree or equivalent qualification in International Trade or Business."

Moreover, the AAO notes that the petitioner referred to the beneficiary as "a temporary employee of distinguished merit and ability." Based upon the petitioner's statement, it is not clear that it understands the applicable statutory and regulatory provisions for H-1B classification. More specifically, prior to April 1, 1992, the H-1B category applied to persons of "distinguished merit and ability." The standard of "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions or who is prominent in his or her field." On October 1, 1991, the *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description; however, the implementation of this change was delayed until April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 12, 1991, restored the standard of "distinguished merit and ability" to the H-1B category, but only as the qualifying standard for fashion models. There is no evidence in the record of proceeding that the proffered position is for a fashion model.

In addition, the petitioner submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Market Research Analysts" – SOC (ONET/OES Code) 19-3021. The petitioner designated the proffered position as a Level I (entry) position.<sup>1</sup>

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 30, 2011. The director outlined the specific evidence to be submitted.

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<sup>1</sup> The "Prevailing Wage Determination Policy Guidance" issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

The AAO notes that the director specifically requested the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the RFE, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc.

Counsel for the petitioner responded to the RFE by providing a revised description of the duties of the proffered position and additional evidence. In a letter dated November 17, 2011, counsel stated that the beneficiary would perform the following duties, and provided the percentage of time that she would spend performing each of the duties:

Compile and analyze shipment processing data and monitor operations with a goal towards cost reduction, process and productivity improvements (15%); interpret information on logistics elements such as availability, reliability, maintainability, supply chain management, strategy sourcing and distribution (10%); analyze and organize data related to logistics, transportation costs, transit times, and receiving, storage and distribution activities at warehouse facilities, to be used for route planning and transportation network modeling (20%); perform ongoing analysis in areas such as foreign exchange rates, customs issues, transportation costs, methods and timing, most up to date routings and regulatory issues, and current market conditions (20%); make recommendations and propose plans to aid in market interpretation and sales problems (15%); provide support in the development and implementation of marketing strategies (15%); evaluate systems to ensure that pricing structures adequately reflect operational costs and competitive market rates (5%).

Further, counsel added the following regarding the proffered position:

This position involves research and analysis in the field of international trade, including U.S. and foreign customs, transportation, logistics, insurance and financing. Responsibilities include analyzing international routes, tariffs and regulations that affect the company's services, contracts, import/export and other business activities in foreign countries. It involves the interpretation of international regulations to determine requirements for regulatory compliance, and incorporating restrictions as to type or quantity of goods (e.g. quotas, licensing issues, perishable goods, prohibited or dangerous materials restrictions, tariffs and classification issues, international standards of operations) into the negotiation of contract terms such as price, transportation and cargo specifications, scheduling, warehousing, and other logistical issues.

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 January 26, 2012. Counsel submitted an 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. The AAO will first discuss some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

As a preliminary matter, the AAO notes that counsel's expanded description of the duties of the proffered position submitted in response to the RFE is not probative evidence as the description was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In addition, the AAO observes that in response to the RFE counsel states that "this is a highly specialized position, focusing primarily on logistics, the heart of the freight forwarding business." Counsel claims that "the job duties are similar to those of contract administrators and management analysts, both occupations requiring at least a bachelor's degree in a specialized area (please see the Department of Labor's Occupational Outlook Handbook)." Counsel continued by stating that "contract administration generally require at least a bachelor's degree in business or finance" and claimed that the *Occupational Outlook Handbook (Handbook)* supports such a conclusion.<sup>2</sup>

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<sup>2</sup> The *Handbook* classifies contract administrators under the occupational category "Administrative Services Managers." Specifically, the *Handbook* provides, in pertinent part, the following information:

The following are examples of types of administrative service managers:

**Contract administrators** handle buying, storing, and distributing equipment and supplies. They also oversee getting rid of surplus or unclaimed property.

**Facility managers** oversee buildings, grounds, equipment, and supplies. Their duties fall into several categories, including overseeing operations and maintenance, planning and managing projects, and dealing with environmental factors.

See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Administrative Services Managers, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-2> (last visited January 9, 2013).

Counsel also asserts that "[m]anagement analysts normally must have a degree in either management or the particular area of specialization in which they are employed."

As noted above, the proposed duties have been revised in response to the RFE. The revised duties now involve "analyzing international routes, tariffs and regulations," as well as interpreting "requirements for regulatory compliance, and incorporating restrictions as to type or quantity of goods into the negotiation of contract terms." The AAO also observes that the petitioner and counsel have provided inconsistent information as to the proper occupational category for the proffered position. That is, the petitioner classified the proffered position under the occupational category "**Market Research Analysts**" in the LCA submitted in support of the H-1B petition. However, in response to the RFE counsel claimed that "the job duties are similar to those of **contract administrators and management analysts**." (Emphasis added.) Notably, on appeal, counsel stated that, "although sharing similar analytical duties with market research analysts, [the proffered position] is more closely related to the occupation of **Logistics Analyst**." (Emphasis added.)

The AAO also observes that in the support letter dated May 17, 2011, the petitioner states that it "requires the services of an individual who possesses at least a bachelor's degree or equivalent qualification in International Trade or Business." In the appeal brief, counsel claims that the "type of training necessary to perform the duties of the offered position, when analyzed properly, can be equated with nothing less than a bachelor's degree in international trade, logistics, or a closely related field." No explanation for the variance in requirements was provided.

The information provided by counsel did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Additionally, counsel attempted to alter the occupational category and requirements for the proffered position. The AAO notes that the purpose of the request for evidence 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 a request for evidence (or submitted an appeal), a petitioner or counsel 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 and counsel must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation position. *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.

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

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Moreover, the AAO observes that contrary to counsel's assertion, the *Handbook* further indicates that a "high school diploma or a General Educational Development (GED) diploma is typically required for someone to become an administrative services manager." See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Administrative Services Managers, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-4> (last visited January 9, 2013).

relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks 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."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

The AAO finds that, as reflected in the descriptions of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that 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 by the petitioner, the AAO finds, 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 three-year 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 demands of the proffered position.

The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (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. The petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not supported by the job description or substantive evidence.

Moreover, the petitioner claimed in its letter of support dated May 17, 2011 that it "requires the services of an individual who possesses at least a bachelor's degree or equivalent qualification in International Trade or Business." The AAO notes that the petitioner's assertion that a bachelor's degree in international trade or business is a sufficient minimum requirement for entry into the proffered position 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 to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To 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. U.S. Citizenship and Immigration Services (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, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).<sup>3</sup>

Again, the petitioner in this matter 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. This assertion is tantamount to an admission that the proffered position is not in fact a specialty

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<sup>3</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* the following:

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

*Id.*

occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.<sup>4</sup>

Moreover, the record of proceeding contains discrepancies between what the petitioner claims about the occupational category, duties the beneficiary will perform and level of responsibility inherent in the proffered position set against the stated occupational category and level of responsibility conveyed by the petitioner in the LCA submitted in support of petition.

More specifically, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Market Research Analysts" - SOC (ONET/OES) code 19-3021. The petitioner stated in the LCA that the wage level for the proffered position was a Level I (entry) position, with a prevailing wage of \$18.30 per hour. The LCA was certified on May 18, 2011 and signed by the petitioner on June 7, 2011. As previously mentioned, in response to the RFE counsel claimed that "the job duties are similar to those of contract administrators and management analysts." Thereafter, on appeal, counsel stated that, "although sharing similar analytical duties with market research analysts, [the proffered position] is more closely related to the occupation of Logistics Analyst."

With respect to the LCA, the U.S. Department of Labor (DOL) provides clear guidance for selecting the most relevant Occupational Information Network (O\*NET) classification code. The "Prevailing Wage Determination Policy Guidance" states the following:

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

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<sup>4</sup> The AAO observes that record of proceeding contains a list of the petitioner's employees, along with a brief description of their academic credentials. Notably, although the director requested the petitioner submit supporting documentation to establish its recruiting and hiring practices for the proffered position, the petitioner elected not to provide such evidence. That is, the record of proceeding does not contain supporting documents regarding the petitioner's employees, such as copies of diplomas, transcripts, work records, etc.

The list of employees indicates the job titles for some individuals, but for others the petitioner simply stated the department (i.e., import department, export department). The document reports that the petitioner currently employs four individuals in the import and export departments. However, the petitioner did not explain how the beneficiary's role is similar or differs from the existing employees who serve in the import and export departments. Further, the AAO notes that the education listed for these employees ranges from a high school diploma to a master's degree in business administration.

As mentioned above, the petitioner stated that a bachelor's degree in business is sufficient for the proffered position. The petitioner's list of employees and their educational credentials further suggests that the petitioner accepts a degree in business administration as an acceptable academic credential. However, 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. The petitioner's assertion that a bachelor's degree in "business" is a sufficient minimum requirement for entry into the proffered position is tantamount to an admission that the proffered position is not in fact a specialty occupation.

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

The AAO observes that contract administrators are classified by DOL under the occupational category "Administrative Services Managers."<sup>5</sup> A search of the Foreign Labor Certification Data Center Online Wage Library reveals that the prevailing wage for "Administrative Services Managers" – SOC (O\*NET/OES) Code 11-3011 for Los Angeles County (Los Angeles, California) is \$26.17.<sup>6</sup> The prevailing wage for "Management Analysts" – SOC (O\*NET/OES) Code 13-1111 for Los Angeles County (Los Angeles, California) is \$24.67.<sup>7</sup> Further, the prevailing wage for "Logisticians" – SOC (O\*NET/OES) Code 13-1081 for Los Angeles County (Los Angeles,

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<sup>5</sup> As previously mentioned, the *Handbook* states, in pertinent part, the following regarding contract administrators:

The following are examples of types of administrative service managers:

**Contract administrators** handle buying, storing, and distributing equipment and supplies. They also oversee getting rid of surplus or unclaimed property.

**Facility managers** oversee buildings, grounds, equipment, and supplies. Their duties fall into several categories, including overseeing operations and maintenance, planning and managing projects, and dealing with environmental factors.

See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Administrative Services Managers, on the Internet at <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-2> (last visited January 9, 2013).

<sup>6</sup> For more information regarding the prevailing wage for Administrative Services Managers in Los Angeles County, see the All Industries Database for 7/2010 - 6/2011 for Administrative Services Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?area=31084&code=11-3011&year=11&source=1> (visited January 9, 2013).

<sup>7</sup> For more information regarding the prevailing wage for Management Analysts in Los Angeles County, see the All Industries Database for 7/2010 - 6/2011 for Management Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1111&area=31084&year=11&source=1> (visited January 9, 2013).

California) is \$18.91.<sup>8</sup> Thus, if the petitioner believed its position was a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for *the highest paying* occupational category, in this case "Administrative Services Managers." Instead, the petitioner chose the occupational code for *the lowest paying* occupational category.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The petitioner's offered wage to the beneficiary of \$18.30 per hour is below the prevailing wage for the occupational classification of "Administrative Services Managers" in the area of intended employment. The Level I prevailing wage for the occupational category of "Administrative Services Managers" in the area of intended employment was \$26.17 per hour at the time the petition was filed in this matter. The petitioner stated in the Form I-129 that the beneficiary would be paid \$18.30 per hour and work 30 hours a week. The difference in salary would \$7.87 per hour, equating to over \$12,275 per year.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. Thus, for this reason as well, the H-1B cannot be approved.

Moreover, the general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petitioner, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission. . . .

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<sup>8</sup> The AAO notes that this wage, designated for Business Operation Specialists, All Others, SOC (O\*NET/OES) Code 13-1199, applies also to Logisticians, SOC (O\*NET/OES) Code 13-1081. For more information regarding the prevailing wage for Logisticians in Los Angeles County, see the All Industries Database for 7/2010 - 6/2011 for Financial Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?area=31084&code=13-1199&year=11&source=1> (visited January 9, 2013).

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from DOL in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with DOL when submitting the Form I-129.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

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

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (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) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. In the instant case, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA for the proper occupational category and prevailing wage that applied at the time the petition was filed. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B) by providing a certified LCA that corresponds to the instant petition. For this reason also, the petition may not be approved.

Moreover, based upon a review of the record of proceeding, the AAO finds the wage level for the proffered position questionable. Wage levels should be determined only after selecting the most relevant O\*NET occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific

vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>9</sup>

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>10</sup> DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

As previously mentioned, the wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

Throughout the record of proceeding, counsel for the petitioner claims that the proffered position involves complex, unique and/or specialized duties. For example, in the support letter dated May 17, 2011, the petitioner states that a bachelor's degree or equivalent qualification in International

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<sup>9</sup> For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

<sup>10</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

Trade or Business is required due to the "specialized and complex nature of the duties to be performed." Additionally, in describing the position, counsel asserts that the position involves international trade which "is particularly complex" and "highly regulated." Counsel continues by claiming that the proffered position "is a highly specialized position, focusing primarily on logistics, the heart of the freight forwarding business."

The AAO must question the level of complexity, independent judgment and understanding required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As previously discussed, 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. 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.

The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. A review of the enclosed LCA indicates that the information provided does not correspond to the claimed occupational category, duties, level of work and requirements that the petitioner ascribed to the proffered position. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial (which it has not), the petition could not be approved for this reason.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed 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. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

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 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 stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *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.

The petitioner stated that the beneficiary would be employed in an international trade specialist 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 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 previously discussed, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, these material conflicts preclude a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under 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 entry into 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions. In this regard, the AAO here refers back to, and hereby incorporates by reference, its earlier analysis, comments, and findings with regard to the discrepancies in the record, and the lack of evidence substantiating the duties and responsibilities of the position. As described, the AAO finds, they do not provide a sufficient factual basis to convey a persuasive basis to discern the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, such that they persuasively support any claim in the record of proceeding that the work that they would generate would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). The AAO finds that 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.

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

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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