



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **JAN 11 2013** OFFICE: VERMONT 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:

[Redacted]

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 filed a Petition for Nonimmigrant Worker (Form I-129) with the Vermont Service Center on September 14, 2010. In the Form I-129 visa petition, the petitioner describes itself as insurance law attorneys. In order to employ the beneficiary in what it designates as a foreign legal consultant 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 November 2, 2010, finding that the petitioner failed to establish that the beneficiary is qualified for the classification requested or, more specifically, that the beneficiary is not licensed as a foreign legal consultant in Florida. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the beneficiary is not required to be licensed to work as a foreign legal consultant in Florida.

Upon review of the documentation, the AAO found the evidence of record insufficient to establish eligibility for the benefit sought and issued a request for evidence (RFE) on October 3, 2012. In the RFE, the AAO noted that the petitioner filed a Labor Condition Application (LCA) for the occupational category "Lawyers"-SOC (ONET/OES) Code 23-1011.00 for a Level II position in support of the Form I-129. However, the AAO found that the prevailing wage level for the alleged occupational classification in the area of intended employment is \$43.58, which is higher than the petitioner's proffered wage of \$41.44. The AAO requested that the petitioner submit a valid LCA with the correct wage certified on or before the date the Form I-129 was filed. The AAO also noted that counsel claims that the proffered position does not require licensure. The AAO stated that if the proper occupational category for the proffered position is not "Lawyers," then it must submit a valid LCA for the correct, corresponding occupational category (e.g. Paralegals or Legal Assistants.)

Counsel for the petitioner responded to the RFE on October 31, 2012 with a brief and additional documentation.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's RFE; (3) the response to the RFE; (4) the director's denial letter; (5) the Form I-290B and supporting documentation; (6) the AAO's RFE; and (7) the response to the AAO's RFE. 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's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address an additional independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to establish that the

beneficiary would be paid the prevailing wage if the petition were granted. For this additional reason, the petition may not be approved.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a foreign legal analyst to work on a part-time basis for 20 hours per week. With the Form I-129 petition, the petitioner provided a letter of support dated September 2, 2010, which included a description of the proffered position. The petitioner stated that the beneficiary "will be responsible for rendering professional services by providing advice in the areas of foreign political risk, conflicts of foreign laws, international tax rules (and exemptions), extraterritorial application of foreign laws and compliance with foreign laws and treaties." More specifically, the petitioner provided the following description of proposed duties:

- Advise [senior] staff on international laws relating to the legality of contract clauses;
- Draft agreements for commercial, banking, real estate, and other transactions to comply with Venezuelan laws and regulations;
- Analyze contracts governed by Venezuelan laws and regulations and provide feedback, analysis and recommendations regarding their enforceability;
- Provide historical prospective as to government, banking, oil and agricultural laws;
- Monitor and keep abreast of changes in Venezuelan laws and regulations to ensure that our clients who have business interest in Venezuela are complying with import/export, currently exchange and tax laws;
- Perform legal research on Venezuelan laws an[d] what impact these laws would have on commercial and personal transactions; and,
- Confer with senior staff and explain ambiguities, inaccurate statements, omissions of essential terms and potential conflicts of law and unenforceability issues under Venezuelan law.

The petitioner stated that "the position of Foreign Legal Consultant is a specialty occupation requiring an individual with a minimum of a Juris Doctor[s] Degree or its equivalent." Further, the petitioner submitted an LCA in support of the instant H-1B petition. As already noted, the LCA designation for the proffered position corresponds to the occupational classification of "Lawyers" – SOC (ONET/OES Code) 23-1011, at a Level II (qualified) wage of \$41.44 per hour.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 22, 2010. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested the petitioner submit the license or evidence that a license is not required for the position.

Counsel for the petitioner responded to the RFE by submitting a brief and additional evidence. In the brief dated October 21, 2010, counsel claimed that the proffered position does not require

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

licensure in the State of Florida.

The director determined that the beneficiary does not qualify for the classification, and denied the petition on November 2, 2010. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

Having laid out the factual and procedural history of this case, the AAO will now review the director's finding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation. The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States

baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In the instant matter, the proffered position is a foreign legal consultant. As mentioned the petitioner filed the supporting LCA for the occupational classification "Lawyers" – SOC (ONET/OES Code) 23-1011. In response to the AAO's RFE, counsel confirmed that the occupational category of "Lawyers" was the "most appropriate category given the specialized nature" of the position and maintained that the proffered position does not require certification by the Florida Bar.

To determine the licensure requirement for the proffered position, the AAO turns to the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational/license requirements of the wide variety of occupations that it addresses.² The AAO reviewed the chapter of the *Handbook* entitled "Lawyers" and finds that the position of a "Lawyer" does require a license. The subchapter of the *Handbook* entitled "How to Become a Lawyer" states the following about this occupational category:

Licenses

Becoming licensed as a lawyer is called being "admitted to the bar" and licensing exams are called "bar exams."

To practice law in any state, a person must be admitted to its bar under rules established by the jurisdiction's highest court. The requirements vary by individual

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

states and jurisdictions. For more details on individual state and jurisdiction requirements, visit the National Conference of Bar Examiners.

Most states require that applicants graduate from an ABA-accredited law school, pass one or more written bar exams, and be found by an admitting board to have the character to represent and advise others. Lawyers who want to practice in more than one state must often take separate bar exams in each state.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Lawyers, on the Internet at <http://www.bls.gov/ooh/legal/lawyers.htm#tab-4> (last visited December 20, 2012).

As previously mentioned, both the petitioner and counsel indicate that the classification "Lawyer" is the most appropriate occupational category for the proffered position. A review of the *Handbook* indicates "to practice law in any state, a person must be admitted to its bar under rules established by the jurisdiction's highest court." *Id.* Therefore, as counsel claims that the proffered position is most akin to a "Lawyer," and that the beneficiary will be working in the State of Florida, then according to the *Handbook*, the beneficiary would normally be required to be admitted to the Florida bar under the rules established by its highest court.

However, the petitioner titled the proffered position as "foreign legal consultant." Further, in response to the RFE dated October 21, 2010, counsel submitted a copy of Florida Bar Rule 16-1.1 pertaining to foreign legal consultants, and claimed that a certification is not required for the proffered position. Specifically, counsel states that Rule 16-1.1 "authorizes an attorney licensed to practice law in one or more foreign countries to render services in this state as a legal consultant regarding the laws of the country in which the attorney is admitted to practice." Counsel explains that the beneficiary "is an attorney admitted to practice in Venezuela" and "is coming to the US to work as a Foreign Legal Consultant and provide an assessment on issues related to laws and regulations in Venezuela." However, counsel claims that the beneficiary "will not be engaged in the practice of law in the United States, nor will he be giving advice or providing opinions on any issues related to US Federal or state laws." Further, counsel stated that the beneficiary "shall not render an opinion to anyone other than the employees of [the petitioner.]" Counsel asserts that "the State of Florida does not require certification as a condition precedent to performing the aforementioned job duties."

The AAO reviewed the Florida Bar Rule, Chapter 16, Foreign Legal Consultancy Rule, which "allows a foreign attorney to advise clients on the laws of the country under which the attorney is admitted to practice," and finds that the Florida Bar requires a foreign legal consultant to be certified.

First, as noted in the *Handbook*, "to practice law in any state, a person must be admitted to its bar under rules established by the jurisdiction's highest court." Likewise, the Florida Bar states that a person "must be a member of The Florida Bar in order to practice law in Florida."³ The State of

³ For more information about the Florida Bar and requirements to practice law in Florida, see the Florida

Florida, however, has limited exceptions established by rule or law, one of which is discussed under Chapter 16, Foreign Legal Consultancy Rule.

Rule 16-1.1, states the following regarding the purpose of Chapter 16:

The purpose of this chapter is to permit a person who is admitted to practice in a foreign country as an attorney, counselor at law, or the equivalent to act as a foreign legal consultant in the state of Florida. This chapter authorizes an attorney licensed to practice law in 1 or more foreign countries to be certified by the Supreme Court of Florida, without examination, to render services in this state as a legal consultant regarding the laws of the country in which the attorney is admitted to practice.

As stated above, the Florida Bar's Chapter 16 authorizes a foreign attorney to be certified to render services as a legal consultant without examination, thereby providing an exception to becoming a member of the Florida Bar in order to practice law in Florida. In response to the RFE, counsel repeatedly emphasizes that the beneficiary's services will be limited to Venezuelan law and that the beneficiary will not render services directly to the petitioner's clients but only to the petitioner and its employees. Counsel claims that the beneficiary "will not be engaged in the practice of law in the United States, nor will he be giving advice or providing opinions on any issues related to US Federal or state laws" and "shall not render an opinion to anyone other than the employees of [the petitioner]." Further, counsel asserts that the beneficiary "will not provide advice, render any legal judgment or opinion to any clients, but rather, will perform research regarding issues of Venezuelan law and based on his findings and experience in practicing law in Venezuela, will provide [redacted] the managing partner of the firm, an assessment/analysis of the issues he is asked to research." Counsel then concludes that "Florida does not require certification as a condition precedent to performing the aforementioned job duties."

However, the AAO finds that the definition of "foreign legal consultant" requires those employed in such positions in the state of Florida to possess a certification. The Rule 16.1-2 defines a foreign legal consultant as:

A foreign legal consultant is any person who:

- (a) has been admitted to practice in a foreign country as an attorney, counselor at law, or the equivalent for a period of not less than 5 of the 7 years immediately preceding the application for certification under this chapter;
- (b) has engaged in the practice of law of such foreign country for a period of not less than 5 of the 7 years immediately preceding the application for certification under this chapter and has remained in good standing as an attorney, counselor at law, or the equivalent throughout said period;
- (c) is admitted to practice in a foreign country whose professional disciplinary system for attorneys is generally consistent with that of The Florida Bar;

(d) has not been disciplined for professional misconduct by the bar or courts of any jurisdiction within 10 years immediately preceding the application for certification under this chapter and is not the subject of any such disciplinary proceeding or investigation pending at the date of application for certification under this chapter;

(e) has not been denied admission to practice before the courts of any jurisdiction based upon character or fitness during the 15-year period preceding application for certification under this chapter;

(f) has submitted, pursuant to requirements determined by the Supreme Court of Florida, an application for certification under this chapter and the appropriate fees;

(g) agrees to abide by the applicable Rules Regulating The Florida Bar and submit to the jurisdiction of the Supreme Court of Florida for disciplinary purposes;

(h) is over 26 years of age;

(i) maintains an office in the state of Florida for the rendering of services as a foreign legal consultant; and

(j) has satisfied, in all respects, the provisions of rule 16-1.4.

Under Rule 16.1-2(f), a foreign legal consultant is defined in part as a person who "has submitted an application for certification." Thus, this rule implicitly requires that a person must be certified as meeting this as well as each and every requirement above in order to render services as a foreign legal consultant in Florida.

In this way, the purpose of the Foreign Consultancy Rule makes it clear that foreign legal consultants are those who are "admitted to practice in a foreign country as an attorney" who "render services" "regarding the laws of the country in which the attorney is admitted to practice" which is precisely what counsel claims are the beneficiary's duties. As pointed out by counsel, the beneficiary is "an attorney admitted to practice in Venezuela" and "is coming to the US to work as a Foreign Legal Consultant and provide an assessment on issues related to laws and regulations in Venezuela." Thus, if counsel's claim is that the proffered position does not require certification, then the proffered position is not a foreign legal consultant but rather that of a non-judicial law clerk or paralegal.⁴

⁴ For purposes of determining the proper occupational classification of the position and whether that position requires certification, it is irrelevant to whom the beneficiary will provide his services. In other words, simply because the beneficiary will provide his services as in-house counsel as opposed to providing services directly to the firm's clients does not change the duties material to determining whether the proffered position is a foreign legal consultant or paralegal. Thus, based on the petitioner and counsel's claims and the job description provided, it appears more likely than not that the proffered position would be that of a foreign legal consultant, notwithstanding the internal nature of the services provided.

In any event, even if certification or an application for certification was not required for the proffered position, the AAO finds that the petitioner has not established that the beneficiary meets any of the other requirements outlined under Rule 16.1-2 and thereby does not appear qualified to render services as a foreign legal consultant in Florida. For example, the petitioner failed to establish that the beneficiary has "engaged in the practice of law of such foreign country for a period of not less than 5 of the 7 years immediately preceding the application for certification under this chapter and has remained in good standing as an attorney, counselor at law, or equivalent throughout said period" under Rule 16.1-2(b). While the record of proceeding contains a certified, translated copy of a document from [REDACTED] that granted the beneficiary the title of "Attorney" on October 2, 1992, the record does not indicate that the beneficiary has engaged in the practice of law since being granted that title and that he has maintained good standing as an attorney. The petitioner also does not claim that the beneficiary is admitted to practice in a foreign country whose professional disciplinary system for attorneys is generally consistent with the Florida bar in compliance with Rule 16.1-2(c). Further, the petitioner did not establish that the beneficiary has not been disciplined, is not subject to a disciplinary proceeding or investigation under Rule 16-1.2(d), and has not been denied admission to practice before the courts of any jurisdiction during the 15 year period under Rule 16-1.2(e).

On appeal, counsel emphasizes that the beneficiary "will not provide advice, render any legal judgment or opinion to any clients, but rather, will perform research regarding issues of Venezuelan law" to advise the petitioner's managing partner, and "will not deal with any clients directly." However, while the beneficiary may not meet with clients directly, the beneficiary would be "rendering services" as a legal consultant regarding the laws of Venezuela to the petitioner's managing partner and, thus, his legal services would be governed by the Florida Bar's Foreign Legal Consultancy.

Therefore, the AAO concludes that a certification is required for the proffered position as a foreign legal consultant. Accordingly, the AAO finds that the beneficiary does not qualify to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C) since there is no evidence in the record that he possesses the required certification authorizing him to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

On appeal counsel requested to remand the petition to the Vermont Service Center if the certification is necessary, and to request to "approve this petition for a period of validity of one year to allow the beneficiary to apply for certification." Counsel enclosed a copy of an e-mail from [REDACTED] of the Florida Bar, which states that the Committee reviewing applications for Foreign Legal Consultant Certification "looks for a visa that will allow the applicant to stay in the State of Florida" and that "the review committee will require that visa before they will vote on the applicant's request for certification."

However, 8 C.F.R. § 214.2(h)(4)(v)(A) states the following regarding the license requirement:

If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found

qualified to enter the United States and immediately engage in employment in the occupation."

The AAO further notes that 8 C.F.R. § 214.2(h)(4)(v)(C) offers an exception under certain criteria, but the petitioner has not demonstrated that the proffered position and the beneficiary meet the criteria. Specifically, 8 C.F.R. § 214.2(h)(4)(v)(C) provides:

In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

In this matter, the petitioner failed to submit evidence that the state of Florida would allow the beneficiary to practice as a foreign legal consultant under the supervision of licensed attorney without certification and/or that the beneficiary was eligible for certification but for the approval of the instant petition. Therefore, since the petitioner failed to establish that the beneficiary possessed a certification to practice as foreign legal consultant or an exemption from the state under 8 C.F.R. § 214.2(h)(4)(v)(C), the AAO finds that the beneficiary does not qualify for the proffered position.

In the instant case, the proffered position of a foreign legal consultant requires state certification to fully perform its duties, but the beneficiary did not have the required certification. Therefore, the beneficiary failed to establish qualification for the proffered position, and the case will not be remanded to the Vermont Center. In other words, there is insufficient evidence to indicate that the service center director erred in denying the petition such that there would be any basis to remand the matter for further action to correct such an alleged error. This does not mean, however, that the petitioner is in any way prejudiced in filing a new petition on behalf of the beneficiary in this matter.

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that the beneficiary would be paid the prevailing wage if the petition were granted.

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).

As noted in the RFE, the AAO finds that the proffered wage of \$41.44 per hour for the occupational category "Lawyers"-SOC (ONET/OES) Code 23-1011 at Level II was lower than the prevailing wage in the area of intended employment at the time the LCA was filed. Specifically, the prevailing

wage for "Lawyers" at Level II for Miami Dade County, Florida was \$43.58 per hour when the LCA was filed on August 18, 2010.⁵

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level 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 her work, as required under the Act, if the petition were granted. Thus, even if it were determined that the petitioner overcame the director's sole ground for denying the petition (which it has not), for this reason also the H-1B petition cannot be approved.

In response to the AAO's RFE, counsel claims that the FEIN verification process on this case began on March 25, 2010. Counsel states that "[s]hortly after the Department of Labor verified the petitioner's FEIN number, counsel for the petitioner obtained an online wage survey for the occupational category of 'Lawyers' which reflected that the Level 2 wage for the position offered was \$41.44." Counsel submitted a copy of an e-mail from the LCA Business Verification Team dated March 25, 2010 that the petitioner's FEIN has been verified as valid. In addition, counsel also submitted a printout from the Online Wage Library for the occupational category "Lawyers" for the area of intended employment dated April 8, 2010 that the prevailing wage at Level II was \$41.44 per hour.

However, as noted above, the LCA was filed on August 18, 2010. The AAO notes that the database counsel had selected to determine the prevailing wage was for "07/2009 - 06/2010" and was no longer valid at the time of filing the LCA. Since the LCA was filed more than a month after June 2010, counsel should have used the database for 07/2010-06/2011, which would have rendered the correct prevailing wage at that time of \$43.58 per hour for Level II "Lawyers."

In response to the AAO's RFE, counsel claims that the iCERT portal system through which the LCA is filed, has the "ability to recognize when a wage entered is lower than prevailing wage for the occupational category being used." Counsel asserts that this "recognition process results in the system creating a flag or warning that alerts the user that there is a potential for denial of the LCA." Further, counsel emphasizes that "the Department of Labor ultimately certified the petitioner's LCA." In support of its claim, counsel submitted a copy of Table 4 from the iCERT Portal-Prevailing Wage External User Guide. However, Table 4 is a "Glossary of Terms." Under the term "prevailing wage," it states the "iCERT Portal System incorporates a prevailing wage search feature that requires user to enter a state/district/territory, data series and source, area based on, occupation/keyword, and then search to retrieve the prevailing wage for a particular occupation." The evidence submitted does not support counsel's assertion that the iCERT portal system has a

⁵ For more information about prevailing wage for "Lawyers" in Miami-Dade County, Florida, see the All Industries Database for 7/2010 - 6/2011 for Lawyers, General at the Foreign Labor Certification Data Center, <http://www.flcdatabase.com/OesQuickResults.aspx?code=23-1011&area=33124&year=11&source=1> Online Wage Library on the Internet at (visited December 20, 2012).

"recognition process" which creates "a flag or warning that alerts the user that there is a potential for denial of the LCA." Rather, it states that it is the user that enters information, such as "data series and source," which would provide an incorrect prevailing wage if the user enters the wrong information. No further documentation was submitted. Thus, the AAO finds that counsel did not substantiate its claim that the iCERT portal system would detect the error and create a warning. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).⁶

Further, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

In response to the AAO's RFE, counsel further states that "the Service had an opportunity to raise the issue of the difference in the prevailing wage noted in the beneficiary's petition and the current prevailing[;] however, neither the Service's request for additional evidence nor the denial on this case ever made any reference to the LCA or the prevailing wage used." Moreover, counsel asserts

⁶ It is noted that the Secretary of Labor must provide the certified LCA within seven days of the date the application is filed "[u]nless the Secretary finds that the application is incomplete or obviously inaccurate." § 212(n)(1)(G)(ii), 8 U.S.C. § 1182(n)(1)(G)(ii). Here, instead of marking "OES" as the wage source, the petitioner marked "Other," despite the fact that the provided wage rate was from the OES. Therefore, even if the iCERT portal system has an automatic "recognition process" as claimed by counsel, this inaccurate information provided by the petitioner on the LCA may have prevented DOL's systems from determining whether there were any obvious errors in the prevailing wage rate provided on the LCA. Therefore, only a manual, individual review combined with an active search of the then current prevailing wage rate would have revealed that the prevailing wage rate provided was below that required by the Act. In other words, it is likely that the LCA was simply certified as no obvious error was detected by DOL in its review of this LCA, in part due to the petitioner's own failure to accurately inform DOL of the wage source used.

"[h]ad the Service raised this issue in its request for additional evidence or even in its denial, the petitioner could have cured the prevailing wage issue by obtaining a new certified LCA and submitting a new H1B petition, a very realistic option given the fact that H1B quota numbers still remained on November 26, 2010 when the petitioner's H1B petition was denied."

However, the AAO notes that there is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. Title 8 C.F.R. § 103.2(b)(8) clearly permits the director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director. In any event, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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 1043, *aff'd*, 345 F.3d 683; *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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 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.