



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUN 26 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

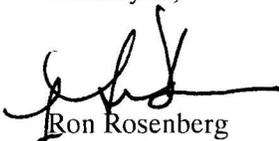
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 remain denied.

On the Form I-129 visa petition and supporting documents, the petitioner describes itself as a business intelligence consultancy firm established in 2007. In order to employ the beneficiary in what it designates as a statistical analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).¹

The director denied the petition, 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, and that the petitioner has specialty occupation work for the beneficiary to perform for the entire duration of his stay in H-1B status. On appeal, counsel for the petitioner 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 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's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will remain denied.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the 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

¹ It must be noted for the record that the Form I-129 petition and the Labor Condition Application (LCA) indicates that the job title of the proffered position is "Statistical Analyst." However, counsel indicates in his letter dated April 18, 2012, that the proffered position is entitled "Solutions Architect." Further, in the letter, counsel refers to the proffered position as "[S]upport Engineer I." No explanation for the variance was provided.

equivalent) as a minimum for entry into the occupation in the United States.

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

In the petition signed on April 5, 2012, the petitioner indicates that it is seeking the beneficiary's services as a statistical analyst on a full-time basis at the rate of pay of \$58,600 per year.² In the April 3, 2012 letter of support, the petitioner provides the proffered position's duties and responsibilities as follows:³

THE JOB: To provide technical support to [the petitioner's] consultant teams on client sites on various projects. The support is primarily focused in areas related to;

- Predictive analytics and modeling based on customer provided reports.
- Using business intelligence for clients.
- Analyze customer data and buyer trends.
- Understanding which technology needs to be implemented by analysis of the

² The AAO notes that the Form I-129 petition and the LCA indicates that the beneficiary rate of pay is \$58,600 per year. However, in the December 28, 2011 offer of employment letter, submitted with the initial petition, the petitioner indicates that the beneficiary will be compensated at the rate of pay of \$55,000 per year. No explanation for the variance was provided.

³ It must be noted for the record that the letter of support was not signed by the petitioner's HR Manager, [redacted] where indicated.

context.

* * *

Customer Focus:

- Assist the [petitioner's] Consulting Customer Solutions Architect, Channel Solution Strategist, and/or BU aligned Solution Strategist and sales team in technically qualifying solutions and their benefits to customers and/or Partners.
- Work closely with the account team and the customer or Partner to obtain a deep understanding of the customer's technology needs or Partner's offerings and architect a solution to meet them.
- Build relationships across customer's or Partners IT silos and offering to understand, build, document and share our knowledge of their infrastructure, challenges and potential technical impact of planned projects.
- Understand and act as a valued resource early and often within the customer's decision making process (e.g.: during the idea or conceptual stages).
- Execute complex product integration demonstrations and proofs of concept, customizing the demonstrations as necessary to address the customer's specific needs and environment.
- Maintain a deep technical knowledge of the products developed by the business unit.
- Provide technical specifications and requirements documentation as necessary to support the proposed solution.
- Effectively position and present the benefits of [the petitioner's] solutions and specifically how our solutions will support the client's technical and functional requirements.
- Provide technical leadership and oversight during Trials, POCs, complex demos, etc., as warranted.
- Ensure technical requirements required by the proposed solutions are clearly communicated to and understood by the client and meet the client's expectations.
- Effectively communicate [the petitioner's] key competitive differentiators, by solution as defined by the business unit.
- Foster and build relationships with customers and partners to develop references.
- Strive to constantly improve the quality of all customer interactions.

Project responsibilities:

- Provide technology oversight to the project[.]
- Work with other solution architects on interface designs[.]
- Work with the Information Center of Excellence on OMA requirements[.]

- Review detail designs to ensure they conform to the solution architecture[.]
- Maintain the architecture checklist for the life of the project[.]
- Submit the architecture or security exception when the solution can not comply with established standards.
- Ensure appropriate exceptions receive approvals through the standard exception process.
- Participate in:
 - Analysis and requirements gathering
 - Disaster recovery planning
 - Development of testing strategies
 - Infrastructure planning
 - Initial IT PMO Review
 - Pre-Build PMO Review
 - Other reviews, technical guidance, issue resolution of the life of the project.
 - Implement the approved design/solution using technical expertise/experience around the SAP – Business Objects suite of Products.
- Review project detail design and construction, assuring conformance to the solution architecture.
- Escalate design and technical issues that are not resolved to the system architect responsible for the area in which the solution is being developed.
- Provide review feedback for proposed enhancements to assigned systems to aid the project governance process in decision making.
- Develop and maintain the technical and business knowledge and working relationships to perform the above duties.

[The petitioner's] Internal Business Processes:

- Coordinate internal / external resources to effectively pursue opportunities.
- Disseminate feedback to business units gained from client experience and issues to facilitate product improvements or enhancements.
- Proposal development[.]
- Solution Architecture Overview[.]
- Using SAP Business Objects toolsets build Proof Of Concept applications to assist clients decide on proposed Solution Architecture options.
- [The petitioner's] need-based Sales Methodology[.]
- Using SAP Business Objects toolsets build demo applications to assist [the petitioner's] sales team with pre-sales opportunities.
- Provide support in [the petitioner's] lab for development and enhancement of the established project.
- Contribute constructive feedback for improvement and enhancement of above processes.
- Assist in the Partner Enablement process (partner selection, technical training

- and opportunity engagement).
- Marshal appropriate[ly] [the petitioner's] resources to effectively execute partner-led opportunities.
- Understand and adhere to Compliance requirements and Code of Ethics.

REQUIREMENTS: Bachelor of Marketing Research or related field

With the initial petition, the petitioner submitted a copy of the beneficiary's Master of Marketing Research degree and transcript from [REDACTED] in Illinois. The degree was awarded on December 16, 2011.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Statisticians" – SOC (ONET/OES Code) 15-2041, at a Level II wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 21, 2011. The petitioner was asked to submit (1) documentation to establish that a specialty occupation position exists for the beneficiary; (2) evidence to establish that an employer-employee relationship exists between the petitioner and the beneficiary; and (3) evidence to establish that there is sufficient specialty occupation work for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to submit 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, and level of responsibility, etc.

On September 14, 2012, counsel responded by submitting further information regarding the proffered position and additional evidence. Specifically, counsel submitted, in part, (1) organizational charts; (2) a copy of the petitioner's promotional materials; (3) job vacancy announcements; (4) a list of the petitioner's employees, along with the academic credentials and pay statements of two employees; (5) a copy of the petitioner's job posting for a senior SPSS analyst position from its website; and (6) a letter from [REDACTED].

In addition, counsel submitted a document, which included a revised description of the duties of the proffered position, along with the percentage of time that the beneficiary will spend performing each duty. Specifically, the document indicates the following:

Specific Responsibilities – Revised

- Conduct custom analytical studies in their entirety, from project inception and design through preparation and delivery of reports and presentations
- Integrating data from various sources (Transactional, 3rd party such as Nielsen, comScore) to drive action for clients
- Must have hands on experience in building statistical and predictive models using real-world data in SAS/SPSS/WPS

- Be able to use database software skills like SQL to manage, query and manipulate large amount of customer transactional data
- Apply data mining and statistical analysis techniques like hypothesis testing, CHAID, segmentation, trend analysis, and modeling to analyze customer data using statistical software packages (SAS/WPS/SPSS) to develop best and most efficient solution
- Ensure work is disciplined and adheres to quality control procedures
- Provide support in collection and validation from multiple sources and present analytical results in the form of Dashboard and PowerPoint to internal and external clients
- Translating complex analysis to draw insights and offer actionable recommendation that drives incremental value
- Build relationships with key internal and external clients
- Identify opportunities for insight innovation or efficiency improvements

In addition, the document indicates that the position requires a "Bachelors [sic] or Master's Degree in statistics or another relevant quantitative discipline such as mathematics, industrial engineering, quantitative analysis or marketing research."

The document also indicates the following:

Job duty	*% of time	**Level of responsibility
Apply data mining and statistical analysis techniques like hypothesis testing, CHAID, segmentation, trend analysis, and modeling to analyze customer data using statistical software packages (SAS/WPS/SPSS) to develop best and most efficient solution	50%	3
Data Manipulation, data integration, summarization of large datasets	20%	3
Creating Reports, Dashboards, Powerpoint Presentations	10%	2
QA process, preparing documentation, proposals	10%	2
Client ad-hoc analysis, support, build relationships [sic]	10%	2

*% of time is based on 2000 hours per year

****Key-Level of responsibility**

5=Requires PhD and min 10 yrs

4=Requires masters, Ph.D preferred, min 5 yrs of experience [sic]

3=Requires masters, 3 years of experience [sic]

2=Requires masters, no experience [sic]

1=Requires bachelors, No experience

The AAO observes that the petitioner does not provide the percentage of time the beneficiary will spend on all the duties outlined in the document.

The director reviewed the information provided by counsel to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation capacity, 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 September 20, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. With the Form I-290B, counsel submitted a brief and additional evidence.⁴

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. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a

⁴ With regard to the documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of such evidence submitted for the first time on appeal.

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."

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 statements 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 errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.⁵

For example, in the letter of support, the petitioner indicated that the proffered position required a bachelor's degree in marketing research or a related field. However, the revised job description, submitted in response to the director's RFE, indicated that the proffered position required a "Bachelors [sic] or Master's Degree in statistics or another relevant quantitative discipline such as mathematics, industrial engineering, quantitative analysis or marketing research." Further, the table included with the revised job description indicated that some of the proffered position's duties required a master's degree with no experience, and a master's degree, plus 3 years of experience. No explanation for the variance was provided. The petitioner did not submit probative evidence establishing the educational requirement for the proffered position.

Furthermore, the AAO observes that in the revised job description (submitted in response to the RFE), the petitioner expanded the beneficiary's duties, adding items such as: conducting custom analytical studies in their entirety, from project inception and design through preparation and delivery of reports and presentations; integrating data from various sources (Transactional, 3rd party such as Nielsen, comScore) to drive action for clients; and applying data mining and statistical analysis techniques like hypothesis testing, CHAID, segmentation, trend analysis, and modeling to analyze customer data using statistical software packages (SAS/WPS/SPSS) to develop best and most efficient solution. Further, as noted above, the revised job description indicated an academic requirement different from the petitioner's requirement for the proffered position in the initial petition.

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, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's RFE

⁵ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

did not simply clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description and changed the academic requirements for the proffered position.

Furthermore, based upon a review of the record of proceeding, the AAO finds that there are additional discrepancies and inconsistencies with regard to the proffered position that preclude the approval of the petition. For instance, there are discrepancies between what the petitioner claims about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

As previously stated, the petitioner submitted an LCA in support of the instant petition that designated the proffered position to corresponding occupational category of "Statisticians" - SOC (ONET/OES) code 15-2041. The wage level for the proffered position in the LCA corresponds to a Level II. The prevailing wage source is listed in the LCA as the OFLC (Office of Foreign Labor Certification) Online Data Center.⁶ The LCA was certified on March 30, 2012. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (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.⁷

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

⁶ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

⁷ For additional information regarding prevailing wages, 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.

duties.⁸ The U.S. Department of Labor (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.

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

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

See 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.

In the instant case, the petitioner and counsel claim that the duties of the proffered position are complex, unique and/or specialized.⁹ For instance, in the April 3, 2012 letter of support, the

⁸ 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.

⁹ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." Level III and a Level IV wage rates are described as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV (fully competent) wage rates are assigned to job offers for competent employees

petitioner stated that the beneficiary will be responsible for "[e]xecut[ing] complex product integration demonstrations and proofs of concept, customizing the demonstrations as necessary to address the customer's specific needs and environment." In addition, the petitioner stated that the beneficiary will be responsible for "[p]roved[ing] technical leadership and oversight during Trials, POCs, complex demos, etc., as warranted." The petitioner further stated that the beneficiary will "[i]mplement the approved design/solution using technical expertise/experience around the SAP – Business Objects suite of Products." Additionally, in the September 11, 2012 brief, counsel claimed that the duties of the proffered position are specialized and complex. Furthermore, the revised job description, submitted in response to the RFE, stated that the beneficiary will be responsible for "[t]ranslating complex analysis to draw insights and offer actionable recommendation that drives incremental value." The table included with the revised job description also indicated that some of the duties of the proffered position require a master's degree with no experience, and a master's degree, plus 3 years of experience.

The AAO notes that this characterization of the position and the claimed duties, responsibilities and requirements conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low-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 attained, either through education or experience, a good understanding of the occupation. Furthermore, he will be expected to perform moderately complex tasks that require limited judgment.

The AAO finds that the claimed level of complexity, independent judgment and understanding is materially inconsistent with the LCA certification for a Level II position. Given that the LCA submitted in support of the petition is for a Level II wage, it must therefore be concluded that the LCA does not correspond to the petition.

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

who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

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.

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:

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.*

[Italics added]. 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 of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level II position. This conflict, along with the discrepancies in the educational requirement and duties, undermines the overall credibility of the petition. The petitioner failed to provide any explanation for the inconsistencies in the record with regard to wage level for the proffered position in the LCA submitted with the petition, or the material changes in the offered position in response to the RFE. 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 petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

As the petitioner has not presented a cohesive account of the duties and responsibilities that the beneficiary would perform as its "Statistical Analyst" it has failed to meet its burden of demonstrating that the proffered position is a specialty occupation. Consequently, the AAO need

not examine whether the petitioner will have speciality occupation work for the beneficiary to perform for the requested period of stay in H-1B status.

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

The petition will remain 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 remains denied.