



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAY 20 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:

SELF-REPRESENTED

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 May 11, 2012. In the Form I-129 visa petition, the petitioner describes itself as a law firm established in 2004. In order to employ the beneficiary in what it designates as an international service coordinator 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 23, 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, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it 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 response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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

Later in this decision, the AAO will 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 his work if the petition were granted; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. For these additional reasons, the petition may not be approved, with each considered as an independent and alternative basis for denial.<sup>1</sup>

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as an international service coordinator to work on a full-time basis at a rate of pay of \$45,000 per year. In a support letter dated May 4, 2012, the petitioner stated, in part, the following regarding the duties and requirements of the proffered position:

[E]xpanding and maintaining Japanese client base is a significant aspect in the continued development and expansion of our firm, to assure that we continue to offer our Japanese clients the most professional level services and therefore remain competitive in our field. To ensure our continued success in establishing our firm in

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

this Japanese market and expanding into new markets, it is vitally important that we utilize the services of an individual who has the ability to understand complex American Jurisprudence and who is fluent in both Japanese and English, and understands the customs and laws of both countries. The position requires such various skills such as legal research, client and case management, translation of documents, and interpretations. The position requires an individual who possesses at least a LL.B. Degree in Japan, and LL.M. Degree in the U.S. and one years of work experience at a law firm. In particular, the duties for the International Service Coordinator will include:

1. Performing ordinary legal staff tasks such as researching facts, researching law, communicating with clients, drafting documentation.
2. Translating legal documents from Japanese to English and English to Japanese.
3. Provide interpretation between other lawyers and Japanese clients.
4. Teaching other lawyers and staff Japanese law affecting the case at hand.
5. Explaining the American legal process in general to Japanese clients and also how the legal process will affect their own case or situation.
6. Supervising and teaching staff members and staff basic Japanese language and customs.

(Errors in original.) The petitioner stated that the beneficiary is well qualified to perform the duties of the proffered position as he graduated from [REDACTED] in Tokyo, Japan with a Bachelor of Law and received a Master of Laws (L.L.M) from the [REDACTED]

[REDACTED] In support of this assertion, the petitioner provided copies of the beneficiary's academic credentials. The petitioner submitted an academic transcript issued by [REDACTED] and a copy of a diploma from [REDACTED] with specialization in Environmental Law. Further, the AAO notes that the record contains a certificate from the Japan Federation of Bar Associations stating that the beneficiary is registered as a practicing attorney in Japan, and a copy of certificate from the State of New York Supreme Court, Appellate Division, stating that the beneficiary was admitted to practice law in the State of New York.

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 "Paralegals and Legal Assistants" - SOC (ONET/OES) code 23-2011, at a Level II (qualified) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 15, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to

establish that the proffered position qualifies as a specialty occupation.

On October 16, 2012, the petitioner responded to the director's RFE by providing a revised description of the proffered position and additional evidence. Specifically, the petitioner indicated that the beneficiary would perform the following duties in the international service coordinator position:

1. Direct communication with clients regarding Japanese laws and Japanese legal system (20% of time to be spent)

Give clients legal advices based on his proper judgment under law to the extent permitted by law. Give clients explanations of Japanese laws and Japanese legal system. Answer clients' questions regarding Japanese laws and Japanese legal system using his legal knowledge and skills. This duty requires the beneficiary to have knowledge and skills to interpret, make proper judgments of, apply, and logically explain Japanese laws and legal system, which clearly requires at least baccalaureate level of education.

Sometimes this duty should be conducted with reference to or in comparison with American laws and legal system, and this is why this duty also requires American legal education and practical experience.

2. Internal discussion regarding Japanese laws and Japanese legal system (20% of time to be spent) and conflict of law issues

Provide his own legal opinion regarding Japanese laws and conflict of law issues based on his legal knowledge and skills. Explain the opinion to other members of [the] firm. Have internal discussions with attorneys in [the] firm regarding the opinions. This duty requires the beneficiary to have the skills to discuss with attorneys regarding Japanese laws on an equal basis, which clearly requires at least baccalaureate level of education.

Sometimes this duty should be conducted with reference to or in comparison with American laws and legal system, and this is why this duty also requires American legal education and practical experience.

3. Marketing, Case Management, and Maintenance of Japanese clientele (20% of time to be spent)

The beneficiary will assist [the petitioner] in marketing to Japanese clients and maintaining preexisting client's needs. This involves participating in intake discussion with [the petitioner], ascertaining client's needs, figuring out legal services to be offered, managing cases, coordination with paralegals, associates, and subcontractors, handling client complaints, and closing cases. This involves communication with clients, attorneys, and staff.

4. Advanced paralegal duties (40% of time to be spent)

The beneficiary will occasionally help attorneys to do advance level paralegal jobs under U.S. law. Advance legal paralegal tasks would be those legal tasks normally not handled by mere paralegal but those at a law clerk level (i.e. law school or law school graduate level). Please note that as opposed to legal secretary, law clerks are normally be required to have Bachelor degree and basic understanding of law. Advanced high level paralegal jobs include explaining legal and factual aspects of cases to clients in Japanese, researching facts and laws, drafting documentation, translating legal documents from Japanese to English and English to Japanese, supervising and teaching staff members basic Japanese language and customs. Such work would be normally done by law clerks.

(Errors in original.) The director reviewed the information provided by the petitioner. 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 November 23, 2012. The petitioner 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 will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

The AAO finds that there are significant discrepancies in the record of proceeding with regard to the proffered position. The AAO will now highlight an aspect of the petition that undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect is the discrepancy 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. Notably, these material conflicts, when viewed in the context of the record of proceeding, undermine the claim that the proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

In the support letter submitted with the Form I-129, the petitioner indicated that the beneficiary's duties include "performing ordinary legal staff tasks such as researching facts, researching laws, communicating with clients, drafting documentation," "translating legal documents," and "provid[ing] interpretation between other lawyers and Japanese clients." In response to the RFE, the AAO notes that the beneficiary's duties have been significantly revised. For example, the petitioner indicated that the beneficiary "will be responsible [sic] for his legal interpretation, judgments, opinions, and advice [sic]" and that he will assist "in the management of supervising

cases which involves comprehensive understanding of law and relevant facts and legal tasks which would be needed to be processed and assign those to the right attorneys or subcontracting attorneys." The beneficiary will "give clients legal advice [sic] based on his proper judgment under law," "[g]ive clients explanation [sic] of Japanese laws and Japanese legal system," "answer clients questions regarding Japanese laws and Japanese legal system using his legal knowledge and skills," and "provide his own legal opinion regarding Japanese laws and conflict of law issues based on his legal knowledge and skills."

Furthermore, the AAO also observes that the petitioner has provided inconsistent information as to the occupational category for the proffered position. In the initial submission, the petitioner classified the proffered position under the occupational category "Paralegals and Legal Assistants." In the appeal, the petitioner states "[n]othing in the OOH [*Handbook*] suggests that a Paralegal/Legal Assistant gives advice to clients and other attorneys based on his/her own legal opinion and judgment on his/her own responsibility" (which is a job function that the petitioner claims the beneficiary will perform). The petitioner continues by claiming that "this duty is beyond the capacity of one without enough legal education." The petitioner asserts that "ideally this duty should be performed by a licensed attorney." The petitioner also states that the proffered position requires the beneficiary "to provide advice in Japanese law or the Japanese legal system" and further asserts that a "Paralegal/Legal Assistant as described in the OOH would not qualify" to perform this task. The petitioner also reports that the beneficiary "will also occasionally help attorneys to do advance legal paralegal jobs under U.S. law" and that "advance legal paralegal tasks would be those legal tasks normally not handled by mere paralegal but those at a law clerk level (i.e. law school or law school graduate level)."

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 submitting an appeal), a petitioner cannot offer a new position to the beneficiary, or materially change a position's 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 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 relates to the particular employer. To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (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."

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.

The AAO further notes that the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Paralegals and Legal Assistants" - SOC (ONET/OES) code 23-2011. The petitioner stated in the LCA that the wage level for the proffered position was a Level II (qualified) position, with a prevailing wage of \$43,472 per year. The LCA was certified on May 3, 2012 and signed by the petitioner on the same day.

However, as previously noted, the petitioner indicated in response to the RFE that the "[l]evel of responsibility is higher than paralegal or legal assistant but lower than that of a licensed attorney in terms of legal tasks" and that the beneficiary would perform "advanced high level paralegal jobs" which "would be normally done by law clerks." Further, the petitioner stated the following:

Regarding the nature of the position, as discussed above, the duties of the proffered position include legal explanations and advice [sic] to clients and internal legal discussions with attorneys. Performing these duties requires proper interpretations and applications of Japanese laws based on proper judgment under law. He takes the responsibility of his judgment under law. These duties are closer to those of attorneys though they are limited to the extent permitted to non-attorneys to take. On the other hand, normal paralegal or legal assistant assists lawyers by following lawyers' orders faithfully. Making judgments under law or having discussions with attorneys are not within the scope of their work. In short, the expected level of understanding of laws to the proffered position is much higher than that of normal paralegal or legal assistant.

Again, on appeal, the petitioner claims that the "duties of the proffered position requires specialized skills greater than the duties of a Paralegal/Legal Assistant" as listed under the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. In support of the assertion, the petitioner states that a "major component and requirement of the proffered position is to give legal advice to clients and other attorneys **based on his own legal opinion and judgment on his own responsibility** (emphasis in the original)" and "nothing in the [*Handbook*] suggests that a Paralegal/Legal Assistant gives advice to clients and other attorneys based on his/her own legal opinion and judgment on his/her own responsibility."

In the instant case, while the petitioner claims that level of responsibilities required for the proffered position is higher than paralegal or legal assistants and more akin to the duties of attorneys or law

clerks, the petitioner filed the LCA for the occupational category of "Paralegals and Legal Assistants" - SOC (ONET/OES) code 23-2011. 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 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 U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

A search of the Foreign Labor Certification Data Center Online Wage Library reveals that the prevailing wage for "Lawyers" – SOC (O\*NET/OES) Code 23-1011 for Honolulu County (Honolulu, Hawaii) is \$60,632 per year for a Level I and \$83,990 per year for a Level II.<sup>2</sup> If the petitioner believed its position was a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational category for *the highest paying* occupation, in this case "Lawyers." Instead, the petitioner chose the occupational category for *the lowest paying* occupation. The petitioner's offered wage to the beneficiary of \$45,000 per year is below the prevailing wage for the occupational classification of "Lawyers" in the area of intended employment.

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 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

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<sup>2</sup> For more information regarding the prevailing wage for Lawyers in Honolulu County, see the All Industries Database for 7/2011 - 6/2012 for Lawyers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=23-1011&area=26180&year=12&source=1> (last visited May 10, 2013).

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 an adequate salary for the beneficiary's work as required under the Act, if the petition were granted. Thus, for this reason as well, the H-1B cannot 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>3</sup>

It is important to note that prevailing wage determinations start with an entry level wage (Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>4</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 indicated by the job description.

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

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<sup>3</sup> For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>4</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.

would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

DOL guidance further indicates that a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Paralegals and Legal Assistants," has been assigned an O\*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O\*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level II position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be to require "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O\*NET Job Zone 3. However, in the instant case, the petitioner stated that it requires "a LL.B. Degree in Japan, and LL.M. Degree in the U.S. and one years [sic] of work experience at a law firm," as well as fluency in English and Japanese.<sup>5</sup>

The AAO incorporates by reference its earlier discussion regarding the petitioner's claim that "the expected level of understanding of laws to the proffered position is much higher than that of normal paralegal or legal assistant" and its assertion that the position involves duties that are more akin to those performed by an attorney. Furthermore, the AAO notes that the petitioner claims that the position is complex, unique and/or specialized. Moreover, the petitioner claims that since the firm deals with "cross border issues involving both Japan and the U.S. " that "the level of understanding of comparative law which would be required in [the] firm is distinctive." The petitioner states references the "skills of original and creative interpretations and applications of Japanese laws to complex situations based on his proper judgment under law are necessary." The petitioner further claims that the firm is "targeting almost exclusively Japanese clients," "handl[ing] [a] wide range of laws" and that its "client[s] often expect explanation [sic] and advice [sic] of various Japanese laws," which is distinctive of its firm. On appeal, the petitioner asserts that "knowledge in Japanese Law and practicing law in Japan is so complex and unique such that only an individual with a degree in law from Japan could perform the proffered position."<sup>6</sup>

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<sup>5</sup> The petitioner claims that knowledge of the Japanese language is required for the position. A language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers. In the instant case, the petitioner has not established that the foreign language requirement has been reflected in the wage-level for the proffered position.

<sup>6</sup> In the appeal, the petitioner states that the "learned professional exemption" under 29 C.F.R. §541.301(e)(7)

The AAO notes that a petitioner may distinguish its proffered position from others within the occupation through the proper wage level designation to indicate factors such as 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. That is, through the wage level, the petitioner is able to reflect the job requirements, experience, education, special skills/other requirements and supervisory duties.

However, the AAO observes that the designation of the proffered position under the occupational category "Paralegals and Legal Assistants" at a Level II wage level is an indication that beneficiary will be required to perform moderately complex tasks that require limited judgment in comparison to others within the occupational category. Notably, the petitioner's assertions that the duties require a significant level of responsibility and expertise, as well as the petitioner's stated requirements for the position, do not appear to be reflected in the wage level chosen by the petitioner on the LCA for the proffered position. The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position, as well as the requirements, appear to be materially inconsistent with the certification of the LCA for a Level II position. This conflict undermines the overall credibility of the petition. 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.

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. . . .

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

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is relevant in this matter. However, the AAO finds no merit to the petitioner's assertion. The petitioner cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of H-1B specialty occupation petitions provide for the approval of a petition on the grounds suggested by the petitioner, or even indicate that the exemption is relevant to USCIS adjudications of H-1B petitions.

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 . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

The statements regarding the claimed level of complexity, independent judgment, understanding and requirements necessary for the proffered position are materially inconsistent with the certification of the LCA under the occupational category "Paralegals and Legal Assistants" at a Level II position. This conflict undermines the overall credibility of the petition. 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 level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still 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, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

As 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.