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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: APR 04 2014

OFFICE: VERMONT SERVICE CENTER

FILE

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron
Michael T. Kelly
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center ("the director"), denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an "Export Company." The petitioner states that it was established in 2001, and employs 15 personnel in the United States. It seeks to employ the beneficiary in a position to which it assigned the job title Operations Management Analyst on a full-time basis and 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 determining that the petitioner had not provided evidence sufficient to establish that the proffered position is a specialty occupation.

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, Notice of Appeal or Motion, counsel's letter, and additional documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition.¹ Accordingly, the appeal will be dismissed and the petition will remain denied.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner identified the proffered position as an "Operations Management Analyst" on the Form I-129, and attested on the required Labor Condition Application (LCA) that the occupational classification for the position is an "Operations Research Analyst," SOC (ONET/OES) Code 15-2031, at a Level II (qualified) wage.² The LCA was certified on March 22, 2012, for a validity period from September 15, 2012 to September 15, 2015.

The petitioner identified the DOT (Dictionary of Occupational Titles) code on the Form I-129 H-1B Data Collection Supplement, Part A, Question 5 as 161 "Budget and Management Systems Analysis Occupations." See U.S. Dep't of Homeland Security, U.S. Citizenship and Immigration Services, "Form M-746, I-129 Dictionary of Occupational Titles (DOT) Codes," <http://www.uscis.gov/files/form/m-746.pdf> (accessed March 11, 2014).

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

² 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.

The petitioner also listed the North American Industry Classification System (NAICS) Code on the Form I-129 H-1B Data Collection Supplement, Part A, Question 6 as 237120, "Oil and Gas Pipeline and Related Structures Construction." The NAICS entry for "Oil and Gas Pipeline and Related Structures Construction" states:

This industry comprises establishments primarily engaged in the construction of oil and gas lines, mains, refineries, and storage tanks. The work performed may include new work, reconstruction, rehabilitation, and repairs. Specialty trade contractors are included in this group if they are engaged in activities primarily related to oil and gas pipeline and related structures construction. All structures (including buildings) that are integral parts of oil and gas networks (e.g., storage tanks, pumping stations, and refineries) are included in this industry.

U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "237120 Oil and Gas Pipeline and Related Structures Construction," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed March 11, 2014).

The petitioner attached a one-page job description for the position of "Operations Manager" in support of the petition. This document ascribed 24 separate duties to the proffered position.

The petitioner also provided an April 16, 2009 evaluation of the beneficiary's foreign degree indicating the beneficiary had obtained the equivalent of a bachelor's degree in mechanical engineering from a regionally accredited college or university in the United States. The petitioner further included an approval notice showing [REDACTED] an unrelated company, had obtained H-1B status for the beneficiary valid from June 18, 2010 to November 11, 2012.

Upon review of the initial record, the director requested additional evidence to establish that the proffered position qualifies for classification as a specialty occupation. The director outlined the specific evidence to be submitted.

In an unsigned response dated January 18, 2013 on the petitioner's letterhead, the petitioner indicated that it sells, distributes and exports "appliance parts, refrigeration and condition equipment." The petitioner also indicated its desire to hire "an operations manager" who "would coordinate our corporate offices with our distribution centers in Panama, Costa Rica and Venezuela." The petitioner stated: "[b]ecause of the sophisticated and complex job requirements, the minimum education for this job is a bachelor's degree." The petitioner also included the same job description as initially submitted adding only that the individual in the proffered position would also provide: "[a]nalysis of key performance indicators for supply chain and storage."

Also in response to the director's RFE, the petitioner submitted a January 30, 2013 opinion prepared by [REDACTED] Professor Emeriti Management and Information Systems, Former Dean of the School of Business & Economics [REDACTED] identified the proffered position as the petitioner's "project manager" and offered his opinion

regarding the educational requirements to perform the duties of the position. Dr. [REDACTED] repeated the information in the petitioner's January 18, 2013 response regarding the nature of its business as well as the petitioner's description of the proposed job duties submitted in response to the director's RFE. Dr. [REDACTED] opined that the described "duties require a high level of business and personal communication skills, plus performance as both an individual and team contributor across multiple cultures and languages." Dr. [REDACTED] further opined that "[t]he duties are complex and specialized such that the equivalent of a Bachelor's Degree in Operations Management, Management, Business Administration, or a related field, is a prerequisite for entry into the position." Dr. [REDACTED] also listed a number of skills needed to perform the duties of the petitioner's "project manager" position including: supply chain, international business, human relations, operations, information systems, accounting, research methods, psychology, quantitative methods, project management, systems thinking, problem solving, leadership, organizational behavior, etc. Dr. [REDACTED] concluded that the petitioner's position of "project manager" is a specialty occupation and that it is an industry standard for domestic and global distribution firms to recruit and employ only individuals with the equivalent of a Bachelor's Degree in Operations Management, Management, Business Administration, or a related field for such a position.

The petitioner also submitted printouts from its website, copies of the beneficiary's undergraduate coursework and his [REDACTED] Master of Business Administration degree, and evidence of the beneficiary's previous employment in H-1B status with [REDACTED]

Upon review of the record, the director denied the petition. The director determined that the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel for the petitioner asserts:

A Bachelor's degree (a Master's is preferred), is required for entry into the position of Operations/Project Manager. A Bachelor's degree is the industry standard for similar positions. The nature of the job duties are specialized and complex and a Bachelor's degree (a Master's is preferred) is required to perform the duties.

Counsel re-submits Dr. [REDACTED] January 30, 2013 opinion letter as well as Dr. [REDACTED] August 18, 2009 opinion letter written for [REDACTED] a producer of honeycombed panels and building materials for the construction industry.³ In the August 18, 2009 opinion letter, Dr. [REDACTED] provided a broad overview of the duties of [REDACTED] project manager position and stated that the duties required knowledge and skills for the position including: project and practice management; project accounting; project financial management; change management; a high level of communications skills; technical understanding of the project details' team leadership; client management; project

³ [REDACTED] petitioned for this beneficiary in 2009, the petition was initially approved; however, on January 5, 2010, a revocation notice was sent.

risk assessment and management; and process improvement. Dr. [REDACTED] concluded that the industry standard's educational requirements for a parallel position required "a Bachelor's Degree in Business Administration, Engineering, or related field."

Counsel also submits a May 14, 2010 opinion letter prepared by [REDACTED] Ph.D., a professor of Mechanical and Industrial Engineering and former Associate Dean of Engineering for Academic Affairs and Administration. Dr. [REDACTED] provided an opinion on the position of project manager at [REDACTED] a remodeling, renovating, and real estate services company, and the beneficiary's previous U.S. employer. Dr. [REDACTED] provided an overview of the duties of [REDACTED] project manager position associated with its remodeling and renovating projects and opined that the position required at least a bachelor's degree in engineering or a related field.

Counsel also submitted a number of advertisements for various positions and a summary of his review of the advertisements. Counsel attached his statement making the following findings:

Researching on current job postings equivalent to the proposed position with the same duties, in companies within the same field. For example: [REDACTED] (Plant controller), Supply Chain Business Analyst I & II, sourcing Manager) a bachelor's degree and MBA was a required qualification. A bachelor's degree was also required with minimum of 3-7 years of experience for [REDACTED] (Material Planning Engineer, Unit Manager); [REDACTED] (Purchasing Manager) minimum requirement a bachelor's degree or equivalent at least 8 years relevant experience, [REDACTED] (District General Manager/HVAC Distribution), a bachelor's [d]egree in a related field or equivalent combined education and experience. Master's Degree preferred and also Bachelor's degree for [REDACTED] (Sr. Inventory Control Analyst) was required.

For other companies in a related field where the job duties are the same, shows that for example: [REDACTED] (Purchase Manager) requires a Bachelor's degree with minimum 8 years of experience, [REDACTED] (Supply Planner), [REDACTED] (Supply Chain Planning Engineer), [REDACTED] (Purchase Manager) minimum requirement of bachelor's degree was required. A Bachelor's degree plus MBA preferred is required for [REDACTED] (Supply Chain Business Analyst), [REDACTED] (Sr. Supply Chain Planner), [REDACTED] (Senior Supply Chain Specialist), [REDACTED] (Distribution Center Manager), [REDACTED] (Supply Chain Buyer/Planner II), [REDACTED] (Corporate Purchasing Manager), [REDACTED] (Purchase Manager), [REDACTED] (Purchasing Manager), a bachelor's degree was also require[d] with minimum 5-8 years of experience. A bachelor's degree was also required for [REDACTED] (Product Manager).

Also in this industry Consulting companies and staff recruiter's job posts, for similar positions, for example [REDACTED] (Purchase manager), [REDACTED]

(Purchasing Manager), (Purchasing Manager), (Purchasing Manager), (Supply Chain Manager Purchase to pay), (Purchasing/Supply Chain Manager), (Purchasing Manager), (Purchasing Manager) are looking for professionals with a bachelor's degree as a minimum level and at least more than 5 years of experience in related field.

Counsel also summarized his findings for other companies advertising for positions that included titles such as operations manager and operations management analyst. Counsel noted that many of these advertisements required a bachelor's degree and/or a master's degree to perform the duties of the position. In addition to copies of the job postings upon which counsel based his findings, counsel provided the resumes of a number of individuals seeking employment in the operations/project management field. Counsel also references an unpublished decision issued by the AAO in 2006 remanding that matter as the director had not made a determination on whether the position proffered in the matter qualified as a specialty occupation.

II. LAW

The issue in this matter is whether the 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 following 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 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, United States Citizenship and Immigration Services (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.

III. ANALYSIS

A. Failure to Establish the Substantive Nature of the Position

As a preliminary matter, we observe, along with the apparent inconsistencies of the petitioner's assertions about the proffered position which we shall discuss below, that record also contains an apparent inconsistency about the industry to which the petitioner belongs. We note that the petitioner describes itself as an export company that sells, distributes and exports "appliance parts, refrigeration and condition equipment." However, by the NAICS code that it provided in the appropriate space in the Form I-129, the petitioner identified its industry as "Oil and Gas Pipeline and Related Structures Construction." While we do not find this to be a material discrepancy, it suggests a lack of concern for details which we also find reflected in the generalized 24-item list of duties that the petitioner ascribes to the proffered position.

Speaking of those duties, we will now address why we just-above referred to the 24-duties list as generalized in character, although it has two-dozen items. That list of duties reads as follows:

- 1) Maintain records of goods ordered and received.
- 2) Locate vendors of materials, equipment or supplies, and interview them in order to determine product availability and terms of sales.
- 3) Prepare and process requisitions and purchase orders for supplies and equipment.
- 4) Control purchasing department budgets.
- 5) Interview and hire staff, and oversee staff training.
- 6) Review purchase order claims and contracts for conformance to company policy.
- 7) Analyze market and delivery systems in order to assess present and future material availability.
- 8) Develop and implement purchasing and contract management instructions, policies, and procedures.
- 9) Participate in the development of specifications for equipment, products or substitute materials.
- 10) Resolve vendor or contractor grievances, and claims against suppliers.
- 11) Represent companies in negotiating contracts and formulating policies with suppliers.

- 12) Review, evaluate, and approve specifications for issuing and awarding bids.
- 13) Direct and coordinate activities of personnel engaged in buying, selling, and distributing materials, equipment, machinery, and supplies.
- 14) Prepare bid awards requiring board approval.
- 15) Prepare reports regarding market conditions and merchandise costs.
- 16) Administer on-line purchasing systems.
- 17) Arrange for disposal of surplus materials.
- 18) Check and verify shipping records, handle questions or concerns of shipping shortages or overages and address problems with inventory control.
- 19) Organize to service each business division while maintaining and improving overall operational and departmental efficiencies.
- 20) Oversee day-to-day operations of finished goods and raw material warehouse. Directs the operations of the warehouse team to achieve objectives.
- 21) Develop and maintain a productive work team via training and career development.
- 22) Consistently promote a strong corporate culture, quality and high performance work teams.
- 23) Promote continuous improvement including strategic reviews for the warehouse related functions utilizing quality process and participation in high performance and self[-]directed work teams.
- 24) Keep stock control systems up to date and planning future capacity requirements.
- 25) Ensure proper compliance and adherence to Export/Import Administration Regulations.
- 26) Oversees warehousing activities to ensure processes and procedures are understood and followed; oversees warehouse compliance for inventory management, cycle counting, product handling, and other services as required.
- 27) Drives costs savings with a focus on Visibility, Variability and Velocity[.]
- 28) Provides direction for systems improvements and changes to operational requirements[.]

By way of some fairly representative examples from the list above, we will explain why we find little substantive information in the above descriptions.

With regard to item number 4 –"Control purchasing department budgets" – the record of proceeding does not establish the amounts of, or any intricacies involved with, the referenced budgets. Nor does the evidence of record establish what measures constitute the "control" that the holder of the position exerts.

Reviewing the record with regard to item 7, - "Analyze market and delivery systems in order to assess present and future material availability" – we see no substantive elaboration or supportive

evidence to illuminate what performance of the referenced analysis would involve in a practical sense or in terms of particular applications of highly specialized knowledge in any specific specialty.

Likewise, we find no evidence of record explaining in any substantial sense what specific tasks and associated knowledge requirements would engage the beneficiary in performing item 13 – "Direct and coordinate activities of personnel engaged in buying, selling, and distributing materials, equipment, machinery, and supplies" or any of the other duties. So too, we are left to speculate about what substantive work and associated applications of specialized knowledge would be required to "[p]repare reports regarding market conditions and merchandise costs" (item 15), to "[o]verse[] warehousing activities to ensure processes and procedures are understood and followed; to oversee[] warehouse compliance for inventory management, cycle counting, product handling, and other services as required (item 26), or to "[d]rive[] costs savings with a focus on Visibility, Variability and Velocity."

Also, neither the duty descriptions nor any credible evidence in this record of proceeding identifies whatever methodologies, applications, or analytical tools the beneficiary would have to employ that would necessitate the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty.

Thus, the AAO finds that the content of this record of proceeding fails to provide sufficiently detailed and substantive information about the actual work and associated elements of highly specialized knowledge that the duties ascribed to the proffered position would involve in their actual performance. In reaching this determination, we have considered the totality of the evidence – including the documents submitted for consideration as expert testimony - weighing each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence.

Having considered the number and content of the duty descriptions provided in the record, we find that they each describe a general function that the petitioner ascribes to the proffered position, but that the evidence of record does not develop any of those functions in sufficient detail to show the substantive nature of the work that their performance would involve, the performance requirements of such work, and a correlation between those requirements and the need for at least a bachelor's degree in a specific specialty.

Additionally, it is not even clear to the AAO what type of position in what occupational category the beneficiary would actually perform if this petition were approved. In this regard we note that the petitioner has not conveyed the relative percentages of time that would be spent on the various duties nor has the petitioner otherwise established the prominent duties and work of the position so as to establish the proper occupational category to which the position belongs.

Further, in light of the lack of the above-discussed lack of substantive information with regard to the actual work and performance requirements that the proposed duties would entail, we find that the record's descriptions of the proffered position and its proposed duties fail, on their own merits,

to establish that the proffered position would require at least a bachelor's degree level of any body of highly specialized knowledge in any specific specialty.

We also note significant variances and inconsistencies in the information provided in the record.

The petitioner submitted an LCA that had been certified for use with a job prospect within the "Operations Research Analysts" SOC (O*NET/OES) classification. As already noted, however, the petitioner's RFE-response letter indicated that the object of the petition was to obtain someone to serve as an "operations manager" to "coordinate with our distribution centers in Panama, Costa Rica, and Venezuela." Framing the position as an operations manager who is focused upon management and coordination of various offices indicates that the petitioner may be using the petition to fill a position within the General and Operations Managers occupational classification (SOC (O*NET/OES) Code 11-1021, which the *Handbook* addresses as a subgroup of the "Top Executives" occupation.

Still further, we see that counsel submits as relevant to the merits of the petition a professor's letter that evaluated another firm's position as being that of a "Project Manager" who would be focused upon project management, project accounting, project financial management for a company described as a "projected oriented manufacture." We note, too, that the business, business-operations context, and focus of the evaluated position - as described in the evaluation - appears markedly different than any aspect of the proffered position as stated in the matter now before the AAO - which does not appear to have any such project-management emphasis.

Further obscuring the nature and occupational type of the position for which the petition was filed is the fact that, while the petitioner attests by the LCA that it submitted that the proffered occupation is an "Operations Research Analyst," SOC (O*NET/OES) Code 15-2031, the duties as described in the petition do not comport with those generally ascribed to that occupational group. This fact is clear upon comparing the duties that the petition lists for the proffered position, on the one hand, and information in the O*NET Summary Report for Operations Research Analysts. In particular, we note that the O*NET reports the following as the general duties of operations research analysts:

- Formulate mathematical or simulation models of problems, relating constants and variables, restrictions, alternatives, conflicting objectives, and their numerical parameters.
- Collaborate with senior managers and decision makers to identify and solve a variety of problems and to clarify management objectives.
- Collaborate with others in the organization to ensure successful implementation of chosen problem solutions.
- Prepare management reports defining and evaluating problems and recommending solutions.
- Study and analyze information about alternative courses of action to determine which plan will offer the best outcomes.
- Specify manipulative or computational methods to be applied to models.

- Perform validation and testing of models to ensure adequacy and reformulate models as necessary.
- Define data requirements and gather and validate information, applying judgment and statistical tests.
- Analyze information obtained from management to conceptualize and define operational problems.
- Observe the current system in operation and gather and analyze information about each of the parts of component problems, using a variety of sources.

U.S. Dep't of Labor, Occupational Information Network (O*NET) Summary Report for 15-2031- Operations Research Analysts, <http://www.onetonline.org/link/summary/15-2031.00> (accessed March 11, 2014).

The petitioner does not describe the actual proffered position as including any of the above generally described duties of operations research analysts. Consequently, the petitioner's attestation on the LCA that the proffered position is an operational research analyst materially conflicts with the petitioner's description of the proffered position's actual duties.⁴

Additionally, we note that many of the proposed duties as described correspond with those associated with other types of positions than the one the petitioner specified as the subject of this petition.

We note, for instance, that many of the proposed duties as generally described in the record correspond closely to that of a "Purchasing Managers," position - SOC (ONET/OES) Code 11-3061. The broadly described duties of a purchasing manager include:

- Represent companies in negotiating contracts and formulating policies with suppliers.
- Direct and coordinate activities of personnel engaged in buying, selling, and distributing materials, equipment, machinery, and supplies.

⁴ This aspect of the petition would preclude approval of the petition if the duties as described in this petition were sufficient to establish the proffered position as a specialty occupation. In other words, even if it were determined that the duties of the proffered position require at least a bachelor's degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to the "area of employment" certified for the job classification. The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. See *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010). Thus, the petitioner must provide a certified LCA that corresponds to the duties described in the petition.

- Interview and hire staff, and oversee staff training.
- Locate vendors of materials, equipment or supplies, and interview them to determine product availability and terms of sales.
- Prepare and process requisitions and purchase orders for supplies and equipment.
- Develop and implement purchasing and contract management instructions, policies, and procedures.
- Maintain records of goods ordered and received.
- Participate in the development of specifications for equipment, products or substitute materials.
- Analyze market and delivery systems to assess present and future material availability.
- Resolve vendor or contractor grievances, and claims against suppliers.

U.S. Dep't of Labor, Occupational Information Network (O*NET) Summary Report for 11-3061- Purchasing Managers, <http://www.onetonline.org/link/summary/11-3061.00> (accessed Mar. 11, 2014). The petitioner in this matter has used the exact same phrases from the "Purchasing Managers" description in O*NET to describe some of the duties of its proffered position.

We further note that the petitioner's descriptions of the proffered position and its duties also include elements of the "Transportation, Storage and Distribution Manager" occupational group SOC (ONET/OES) code 11-3071. See U.S. Dep't of Labor, Occupational Information Network (O*NET) Summary Report for 11-3071, <http://www.onetonline.org/link/summary/11-3071> (accessed Mar. 11, 2014).

Furthermore, there is a material inconsistency in the record is between the petitioner's indication that "the minimum education to perform the duties for this job is a bachelor's degree" and the opinion prepared by [REDACTED] who uses the same description of duties as submitted by the petitioner, labels the position a project manager, and opines: "[t]he duties are complex and specialized such that the equivalent of a Bachelor's Degree in Operations Management, Management, Business Administration, or a related field, is a prerequisite for entry into the position." This aspect of the record further clouds the actual nature of the proffered position.

Consequently, the record also fails to provide a sufficient factual foundation to support a determination that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) and the overarching requirements of a specialty occupation, as specified at section 214(I)(i) of the Act, to which the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(A) are supplementary and subordinate.

In any event, the petitioner has not shown that either iteration of the claimed entry requirements denote a requirement in a specific specialty. The petitioner accepts a general bachelor's degree as sufficient to perform the duties of the proffered position. Dr. [REDACTED] opinion reflects that the proffered position may be performed by an individual with a variety of degrees, including the general degree of business administration.

Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration to perform the duties of an occupation is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Here, the petitioner, who bears the burden of proof in this proceeding, states that a general bachelor's degree is sufficient to perform the duties of the proffered position while also submitting an opinion letter that claims that a degree in Operations Management, Management, Business Administration, or a related field is a prerequisite to enter into the position. As the record fails to establish a minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the occupation, it does not support that the proffered position is a specialty occupation and, in fact, supports the opposite conclusion. For this reason also, the petition must be denied, because, by acknowledging the acceptability of a generalized degree in business administration without further specification, the petitioner has, in effect, acknowledged that the proffered position does not actually require a degree – or degree equivalency - in a specific specialty.

The record does not include sufficient substantive evidence to discern the actual position the petitioner proposes the beneficiary will occupy. Accordingly, the AAO here finds that for that reason alone, and independent of the other issues on appeal, this petition may not be approved.

B. Documents Submitted for Consideration as Expert Opinions

The August 18, 2009 opinion letter prepared by [REDACTED] for [REDACTED], is not relevant to the matter at hand. First, [REDACTED] is a producer of honeycombed panels and building materials for the construction industry. The petitioner claims that it is an export company. In addition, Dr. [REDACTED] provided a broad overview of the duties of [REDACTED] project manager position. The petitioner has not provided evidence that its proffered position is similar to the proposed [REDACTED] position. In addition, Dr. [REDACTED] concluded that the industry standard's educational requirements for a parallel position to that of the [REDACTED] position required "a Bachelor's Degree in Business Administration, Engineering, or related field." Dr. [REDACTED] did not explain why the

██████████ position did not require a degree in Operations Management or Management or why the proffered position did not require a degree in engineering. Moreover, as explained above, a general bachelor's degree, such as a degree in business administration, does not establish a position as a specialty occupation. Further, Dr. ██████████ listed different skills needed for the ██████████ position and the proffered position; differences that suggest the positions are not actually parallel. Finally, as footnoted above, the petition for which Dr. ██████████ provided his August 18, 2009 opinion appears to have been revoked. Neither counsel nor the petitioner has presented any evidence that the ██████████ position and the petitioner's proffered position are the same or similar positions, the only commonality between the two positions appears to be the beneficiary himself. However, the facts of a beneficiary's background only become an issue after it is found that the position in which the petitioner intends to employ him falls within the parameters of specialty occupation. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988).

Similarly, the May 14, 2010 opinion letter prepared by ██████████ Ph.D., is not relevant to the matter at hand. The opinion letter is provided for the beneficiary's previous employer, a remodeling, renovating, and real estate services company, not an export company. Moreover, Dr. ██████████ only provided an overview of the duties of ██████████ project manager position and opined that the position required at least a bachelor's degree in engineering or a related field. In this matter, the petitioner does not claim that the proffered position requires a degree in engineering and the petitioner has not presented any substantive evidence that the beneficiary's position for his previous employer and the petitioner's proffered position are parallel.

Furthermore, as we have no independent evidence of the substantive nature, performance requirements, and associated minimal educational requirements of the positions addressed in the aforementioned evaluations from Dr. ██████████ and Dr. ██████████ there is an insufficient factual foundation for us to assess their accuracy and reliability. For this reason, too, the evaluations merit no probative weight.

In sum, the AAO accords no probative weight to either of the two evaluations discussed above..

Next the AAO will discuss why it accords no probative value to the January 30, 2013 letter that the petitioner submitted from Dr. ██████████

Dr. ██████████ (1) describes the credentials he asserts qualify him to opine upon the nature of the proffered position; (2) provides the same description of duties as the petitioner submitted in response to the RFE; (3) identifies the petitioner as a firm that sells, distributes, and exports appliance parts, and refrigeration and conditioning equipment; and (4) states his belief that the petitioner's project manager requires a bachelor's degree in operations management, management, business administration or a related field.

At the outset, we accord no evidentiary weight to the Dr. ██████████ unsubstantiated claim that he "is considered a recognized authority according to USCIS."

The regulation at 8 C.F.R. § 214.2(h)(4)(ii)(Definitions) identifies the requirements for establishing a person as a "recognized authority" within the H-1B specialty occupation context as follows,

Recognized authority means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

- (1) The writer's qualifications as an expert;
- (2) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;
- (3) How the conclusions were reached; and
- (4) The basis for the conclusions supported by copies or citations of any research material used.

Dr. [REDACTED] does not provide "specific instances" of his opinions being accepted by USCIS "as authoritative."

Dr. [REDACTED] submission does not discuss the duties of the proffered position in any substantive detail. The difference in font sizes suggests that the list of duties were merely cut-and-pasted into his letter from a document supplied by the petitioner. In any event, Dr. [REDACTED] simply listed the duties numerically with no substantive analysis of how they translated into his conclusions about the academic studies that their performance would require. As a result, the extent to which Dr. [REDACTED] analyzed these duties prior to formulating his letter is not evident, nor is whatever substantive analysis, if any, Dr. [REDACTED] employed in reaching his findings and conclusions. The AAO finds that this deficiency fatally undermines the value of Dr. [REDACTED] letter for the AAO in reaching its decision on the merits of the appeal.

Next, the letter is not accompanied by, and does not expressly state the full content of, whatever documentation and/or oral transmissions upon which it may have been based. For instance, Dr. [REDACTED] does not indicate whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the list of duties he cited would actually require. Nor does Dr. [REDACTED] letter articulate whatever familiarity he may have obtained regarding the particular content of the work products that the petitioner would require of the beneficiary. In short, while there is no standard formula or "bright line" rules for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than Dr. [REDACTED] has done here. Reciting the petitioner's description and providing a pro forma statement of courses that the duties allegedly require does not include the necessary analysis indicating why the duties require such courses.

Nor does Dr. [REDACTED] reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. Not only does this shortfall materially undermine the value of Dr. [REDACTED] opinion as a practical matter, but it also reflects that Dr. [REDACTED] has not substantiated the reliability of his submission by, in the words of the fourth part of the "recognized authority" definition, by providing copies or citations of any research material used.

In addition, Dr. [REDACTED] description of the position upon which he opines does not indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA that was certified for an operations research analyst position at a wage-level that is only appropriate for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. *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. Dr.

Furthermore, Dr. [REDACTED] finds that a range of degrees, including a general-purpose bachelor's degree – i.e., a bachelor's degree in business administration – would adequately prepare an individual to perform the duties of this position. That statement, however, is tantamount to a conclusion that the proffered position is not in fact a specialty occupation. As discussed above, the petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). Therefore, Dr. [REDACTED] submission actually weighs against the purpose for which it was submitted.

For these reasons, the AAO finds that Dr. [REDACTED] letter does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, the AAO finds that the letters submitted as expert opinions are not probative evidence towards satisfying any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). For economy's sake, the AAO hereby incorporates the above discussion and findings into its analysis of each of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

C. Job Postings

The AAO also finds that the petitioner's reliance upon the job vacancy advertisements is misplaced. In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submits copies of numerous advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the distribution and export industry. The advertisements provided, however, establish at best that, among those firms advertising, a bachelor's degree was generally required for the advertised positions, but not at least a bachelor's degree in a *specific specialty* or its equivalent.

In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required for the advertised positions, the petitioner fails to establish that the submitted advertisements are relevant, in that the posted job announcements are not for parallel positions in similar organizations in the same industry. For instance, the advertisements included are from a wide range of employers and for a wide range of positions. Counsel provides advertisements for both purchasing managers and for operations management managers. However, as discussed in detail above, these are different positions. If the petitioner is requiring the individual in the proffered position to perform duties relating to both occupations, the petitioner must detail the amount of time that would be devoted to each position.

Moreover, the petitioner must attest that it will pay the prevailing wage for the occupation that requires the highest wage. Further, again as discussed above, the petitioner did not attest that on the LCA that the proffered position is either a purchasing manager or an operations management manager, but rather an operations research analyst. Also, in light of the earlier-discussed uncertainty as to the substantive nature of the proffered position, it is not possible to conclude that any of the advertised jobs are in fact parallel to that of the proffered position.

For all these reasons, the record does not include probative evidence establishing that organizations similar to the petitioner, and within its industry, commonly require at least a bachelor's degree in a specific specialty or its equivalent for positions parallel to the one proffered here.

The resumes of individuals searching for positions in the operations/project management field, submitted by counsel on appeal are also not relevant to establishing a position as a specialty occupation. Again, it is not the background of an individual seeking employment that establishes that a position is a specialty occupation, but whether the position itself requires a bachelor's degree in a specific discipline.

D. Unpublished Decision

Counsel further refers to an unpublished decision in which the AAO remanded the matter to the director in order for the director to enter a decision on the issue of specialty occupation. The AAO did not make a determination that the proffered position in the unpublished decision submitted by counsel was a specialty occupation. Moreover, counsel has furnished no evidence

to establish that the facts of the instant petition are analogous to those in the unpublished decision. Finally, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

E. The Specialty Occupation Issue

We here incorporate by reference our earlier comments and findings regarding our conclusion that the evidence of record fails to establish the substantive nature of the proffered position, the specific occupational category by which the position should be assessed, and the educational requirements for the proffered position. We will now elaborate further on these aspects of the record.

In this matter, the petitioner has identified the proffered position as an operations research analyst (on the LCA), as an operations management analyst (on the Form I-129), as a project manager (in the January 30, 2013 opinion submitted by Dr. [REDACTED], and as budget and management systems analyst (on the Form I-129 H-1B Data Collection Supplement, Part A, Question 5). In addition, we also note that the petitioner has submitted a description of duties which includes a majority of duties that correspond most closely to that of a purchasing manager and a storage and distribution manager. As these occupational titles require the performance of significantly different duties, the petitioner has not identified with specificity the actual occupation it will require the beneficiary to perform.

Now we also find that the petitioner neither claims nor establishes that the performance of proffered position would require attainment of at least a bachelor's degree in a specific discipline. The petitioner claims that the proffered position can be performed by an individual with a general bachelor's degree. On appeal, counsel confirms that the petitioner requires only a general bachelor's degree to perform the duties of the position. Although counsel indicates that a master's degree may be preferred, preference is not synonymous with the requirement of a degree. Moreover the requirement of a degree whether at the bachelor's or master's degree level is not indicative of a degree in a specific discipline.

Thus, based upon a complete review of the record of proceeding, the AAO finds that the evidence in this record of proceeding has not established: (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the relative level of complexity, uniqueness and/or specialization that may reside in the proffered position or its constituent duties; or (4) a correlation between the proffered position's work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this precludes 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.

Based upon a complete review of the record of proceeding, the AAO concludes that the evidence of record fails to establish that the position as described more likely than not constitutes a specialty occupation. The petitioner has not established 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. Accordingly the director's decision must be affirmed and the petition denied on this basis.

F. The Beneficiary's Prior Approvals

Counsel on appeal asserts that the Vermont Service Center has approved this case on two prior occasions. It appears that counsel is relying on the approval of the beneficiary's H-1B classification by two other employers. This record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at 6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, as discussed above, the petitioner has not provided evidence that the beneficiary's previous H-1B positions are similar to the proffered position.

Furthermore, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

Finally, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved

nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

G. The Health of the Beneficiary's Wife

On appeal, counsel references the beneficiary's wife health status suggesting that we should consider the "H-4 collateral damage[:] wife is 37 weeks pregnant." Unfortunately, however, those circumstances are beyond the scope of the appeal.

Of course, such "collateral damage," as counsel puts it, is not a factor for consideration under the statutes and regulations governing adjudication of H-1B specialty-occupation petitions. Further, the AAO has no power to apply an equitable remedy here. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to adjudicate equitable considerations that may be involved in our dismissal of this appeal. Further, it should be noted that denials of H-4 status are not appealable to the AAO.

H. LCA Issue

Finally, beyond the decision of the director, the petition must also be denied because the record of proceeding does not establish that the LCA that was submitted to support this petition corresponds to whatever occupational classification best encompasses the proffered position. Specifically, although the job title on the LCA submitted with the petition reads "Operations Research Analyst," and it was certified for SOC code 15-2031," the job as described by the petitioner also has elements of the SOC code 11-3061 - "Purchasing Managers" occupational group and of the occupational group SOC code 11-3071 - "Transportation, Storage and Distribution Manager." As the two-dozen proposed duties are not discussed in terms of percentages-of-work-time or otherwise distinguished from one another, or grouped, by prominence or by the relative emphasis the beneficiary would invest in the various duties, the petitioner has not established the particular occupational group for which the LCA should have been certified if it were to correspond to this particular petition. Further, the record provides no confidence that the petitioner has submitted an LCA that covers the highest-paying occupational group that encompasses the proffered position. *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 (noting that the highest paying occupation should be used for positions involving duties of more than one occupation).

In this regard we, note that if the actual performance of the proffered position includes, for instance, a purchasing manager, the petitioner would have been required to provide at the time of filing an LCA certified for SOC code 11-3061, not 15-2031, in order for it to be found to

correspond to the petition. We note that the LCA submitted – i.e., for a Level II Operations Research Analyst – translates into a significantly lower Prevailing Wage rate than a Level I position within the Purchasing Managers occupational group.

We observe that the prevailing wage for a Level I purchasing manager in the Miami-Miami Beach-Kendall, FL Metropolitan Division area is \$36.60 per hour and a Level II purchasing manager is \$49.67 per hour. *See* U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Purchasing Manager," accessed on the Internet at <http://flcdatacenter.com/OesQuickResults.aspx?code=11-3061&area=33124&year=13&source=1> (last visited Mar. 11, 2014).

We also note that the prevailing wage for a Level I transportation, storage and distribution manager in the same Miami-Dade area is \$28.75 and a Level II prevailing wage is \$39.07. *See* U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Transportation, Storage and Distribution Manager," accessed on the Internet at <http://flcdatacenter.com/OesQuickResults.aspx?code=11-3071&area=33124&year=13&source=1> (last visited Mar. 11, 2014).

The petitioner indicates on the LCA that it will pay the beneficiary only \$23.62 per hour, a Level II wage for an operations research analyst. However, this wage is significantly lower than the wage for a purchasing manager or even a transportation, storage and distribution manager in the Miami-Dade area. Thus, the attested salary of \$23.62 per hour on the LCA and \$920 per week on the Form I-129 falls well below that required by law for the position of purchasing manager or a transportation, storage, and distribution manager.

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

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

To allow the petitioner to submit an LCA for a different occupation and at a lower prevailing wage than the occupation petitioned for permits the petitioner to pay a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports, or corresponds with, the H-1B petition filed on behalf of the beneficiary. Here, the

evidence of record is simply not sufficient to establish that the petitioner submitted an LCA that that had been certified for the appropriate occupational classification.

III. CONCLUSION

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.

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 must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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