



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 21 2014 OFFICE: CALIFORNIA SERVICE CENTER

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)

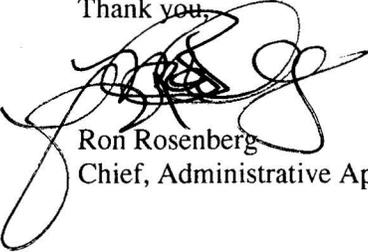
ON BEHALF OF PETITIONER:

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 Rosenberg
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 a Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2013. In the Form I-129 visa petition, the petitioner describes itself as a wholesale bakery that was established in 1996.¹ In order to employ the beneficiary in what it designates as a general manager 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 July 16, 2013, finding that (1) the petition was filed after the H-1B cap for FY 2012 had been reached; and (2) the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the appeal will be dismissed. Furthermore, later in the decision, the AAO will also address several additional, independent grounds, not identified by the director's decision, that also preclude approval of this petition. Thus, the petition cannot be approved for these reasons as well.²

I. Factual and Procedural History

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a general manager on a full-time basis. The petitioner provided the following description of the duties of the proffered position:

[The beneficiary's] duties will consist of supervising staff that performs various support services and supervise mid-level managers. On the other hand, his responsibilities include developing marketing plans and departmental plans, set goals and deadlines, implement procedures to improve productivity and customer service, and define the responsibilities of supervisory-level managers, as well as the hiring

¹ On the Form I-129, the petitioner stated that it has 23 employees.

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

and dismissal of employees. [The beneficiary] will oversee the preparation, analysis, negotiation, and review of contracts related to the purchase or sale of equipment, materials, supplies, products, or services. A Bachelor degree in Business Administration is required.

Moreover, the petitioner stated that the beneficiary qualifies for the position based on his Bachelor Degree in Business Administration from [REDACTED]. The petitioner submitted a copy of diploma from [REDACTED] showing that he received a Bachelor of Science on December 15, 2007.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated on the LCA that the proffered position corresponds to the occupational category "Administrative Services Managers" – SOC (ONET/OES Code) 11-3011, at a Level I (entry level) wage.

Within the submission, the petitioner provided inconsistent information regarding the dates of intended employment and the wages to be paid to the beneficiary. No explanation was provided for the discrepancies.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 18, 2013. The director outlined the specific evidence to be submitted.

The petitioner and counsel responded to the RFE by submitting additional evidence in support of the H-1B petition. The response included the following documentation:

- An excerpt (page 1) of the petitioner's unsigned 2001 and 2012 tax returns. Both tax returns indicate that the petitioner's officers were compensated (line 7), but that there were no salaries or wages paid to employees (line 8).
- An internal job posting for a general manager position.
- The beneficiary's academic transcripts. The documentation indicates that he received a Bachelor of Science in Business Administration in 2007, and a Master of Business Administration in 2011.
- Form I-129 (pages 1-7) with revisions.
- A copy of the previously submitted LCA.
- A job announcement for a Production Manager – [REDACTED] Company.
- A Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary.

Additionally, in a letter dated July 8, 2013, the petitioner provided a revised description of the duties of the proffered position. Specifically, the petitioner stated that the beneficiary would perform the following job duties:

- Develop and direct strategies to attain healthy employee morale[.]
- Training and development of personnel.
- Motivation of all workers.
- Promoting teamwork at all levels and expanding cooperation between employees.
- Placement of workers according to their abilities.
- Communicate with employees regarding specific and clear objectives that are real and attainable and conclusive to attaining the general objectives of the company.
- Facilitate and assist employees in reaching their specific objectives.
- Give timely performance reviews to each employee as to achievements and objectives, change existing strategies when necessary to reach the desired goals.
- Coordinate efforts with subordinate to reach or exceed established standards of production; such as efficiency, waste, finished product, and machine downtime[.]
- Coordinate and ensure accurate shipping to all distributors in a timely manner[.]
- Maintain, supervise and coordinate product deliveries in a timely fashion[.]
- Develop and update operations procedures intended to create consistency in the operation of equipment that serve as guides for training among employees[.]
- Supervise and control the completion of established standards in reference to consumption, quality, yield, etc. of the necessary materials and packaging materials used in the manufacturing of our finished product.
- Resolve conflict among employees, issue disciplinary actions and special recognition, and maintain documentation of incident.

- Ensure permanent solutions are implemented for re-occurring problems.
- Ensure all departmental and organizational training are completed and recorded appropriately according to organizational guidelines.
- Ensure that work instructions, procedures, job descriptions are followed.
- Promote safety among plant employees.
- Control budget through reduction and control of overtime and management.
- Participate with Safety, Sanitation, Quality and new products Committees, responsible for but not limited to internal auditing, training, implementation, and corrective actions[.]
- Work in a safe manner, observing all safety requirements[.]
- Create an employee handbook and consistently apply company procedures per employee handbook and per company policies (i.e. attendance, safety, etc.) and ensure that safety regulations, policies and procedures are followed[.]
- Monitor schedules, timecards, and prepare all HR-related paperwork, including disciplinary actions, ESNs, Attendance Forms, etc.
- Ensure all food safety principles and legal requirements have been applied effectively.

Further, the petitioner indicated that it requires an individual that has a "[m]inimum of Bachelor of Business Administration."

The director reviewed the record of proceeding, and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition. Thereafter, the petitioner and counsel submitted an appeal of the denial of the H-1B petition. With the appeal, the petitioner submitted a letter with a revised job description, along with additional evidence.

The AAO reviewed the record of proceeding in its entirety and agrees with the director that the petitioner has not established eligibility for the benefit sought. Moreover, the AAO has identified several, additional issues that preclude the approval of the H-1B petition that were not identified by the director. Consequently, even if the petitioner overcame the grounds for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought.

II. The Petitioner Has Not Established Eligibility for the Benefit Sought

A. Dates of Intended Employment

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. Fiscal Year (FY) 2012 covers employment dates from October 1, 2011 through September 30, 2012, and FY 2013 covers employment dates from October 1, 2012 through September 30, 2013.

A non-cap exempt H-1B petition, requesting a start date during FY 2012, cannot be approved if it was filed after Nov. 22, 2011. *See* 8 C.F.R. § 214.2(h)(8)(ii). A non-cap exempt H-1B petition requesting a start date during FY 2013, cannot be approved if it was filed after June 11, 2012. *Id.*

A petitioner must establish eligibility at the time of filing the benefit request. *See* 8 C.F.R. § 103.2(b)(1). Specifically, the regulation states the following:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

Id. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). If the petitioner wishes to make any material changes to the terms and conditions of the employment as provided in the H-1B submission, it may file a new petition with the required fee(s) to reflect the changes. *See* 8 C.F.R. § 214.2(h)(2)(E). After a decision is rendered, a petitioner may not make material changes to an H-1B submission in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On April 1, 2013, USCIS began accepting H-1B petitions filed for employment beginning in FY 2014. The petitioner submitted the instant H-1B petition on April 1, 2013; however, on the Form I-129 (page 5), the petitioner stated the dates of intended employment as September 15, 2012 to September 15, 2015.⁴ In the letter of support, the petitioner claimed that "this position is valid from 09/13/2013 till 09/12/2016."⁵ The petitioner did not further address the issue or explain the inconsistency in the dates.

Thereafter, in response to the RFE, the petitioner submitted a new Form I-129 that confirmed on page 5 the same dates of employment as previously provided, specifically September 15, 2012 to September 15, 2015. Without explanation, however, counsel submitted a letter stating, "The Start date is indeed October 1, 2013." The letter was not signed or endorsed by the petitioner, and no further information was provided. Notably, counsel's statement was not in accordance with the

⁴ The petitioner's start date of September 15, 2012 falls under FY 2012.

⁵ The petitioner's validity date of September 13, 2013 falls under FY 2013.

Form I-129 that was initially submitted (or with the Form I-129 that was provided in response to the RFE).

The director denied the petition and, subsequently, the petitioner and counsel submitted an appeal of the denial. With the appeal, the petitioner provided an excerpt of the Form I-129 (page 5). Notably, the start date for the beneficiary's employment has been changed to October 1, 2013.

The petitioner's attempt to remedy the deficiency by changing the beneficiary's intended start date on the Form I-129 (page 5) submitted with the appeal is ineffective. A petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. The appeal process is not intended to be a venue for a petitioner to make a material change to a petition. If the petitioner wishes to make a material change to the terms of the beneficiary's employment, it must file a new petition with the appropriate fee(s) in accordance with the applicable statutory and regulatory provisions. As the instant petition was filed after the FY 2012 cap was reached, it cannot be approved.

B. Attestation for Transportation Costs

Furthermore, in the instant case, the Form I-129 petition was not properly signed by the petitioner. Specifically, the petitioner failed to certify that it would be liable for the reasonable costs of return transportation if the beneficiary is dismissed from its employment prior to the period of authorized stay.

The regulation at 8 C.F.R. § 103.2(a)(1) states, in pertinent part, the following:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.

The instructions for Form I-129 state that the petition must be properly signed, and that a petition that is not properly signed will be rejected. Moreover, according to the instructions, a petitioner that fails to completely fill out the form will not establish eligibility for the benefit sought and the petition may be denied.

The regulation at 8 C.F.R. § 103.2(a)(2), which concerns the requirement of a signature on applications and petitions, states the following:

An applicant or petitioner must sign his or her benefit request. . . . By signing the benefit request, the applicant or petitioner . . . certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct.

Pursuant to 8 C.F.R. § 103.2(a)(7)(i) and (iii), a petition which is not properly signed shall be rejected as improperly filed, and will not retain a filing date.

The regulation at 8 C.F.R. § 103.2(b)(1) provides, in pertinent part, the following:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

The petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. All required petition forms must be properly completed and filed with any initial evidence required by applicable regulations and the form instructions. *Id.*

In the instant case, the petitioner failed to comply with the signature requirement. More specifically, the Form I-129 (page 12) contains a signature block that is devoid of any signature from the petitioning employer. This section of the form reads as follows:

As an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized stay.

By failing to sign this signature block of the Form I-129, the petitioner has failed to attest that it will comply with § 214(c)(5) of the Act, which states the following:

In the case of an alien who is provided nonimmigrant status under section 101(a)(15)(H)(i)(b) or 101(a)(15)(H)(ii)(b) and who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad.

The regulation at 8 CFR § 214.2(h)(4)(iii)(E) further states, in pertinent part, the following:

The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. . . . Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B status.

Thus, the petition has not been properly filed because the petitioning employer did not sign the signature block certifying that it would be liable for the reasonable costs of return transportation if the beneficiary is dismissed from its employment prior to the period of authorized stay. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition. While the director did not reject the petition, the AAO is not controlled by service center decisions. *Louisiana*

Philharmonic Orchestra v. INS, 2000 WL 282785 at 3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001). The AAO notes that the integrity of the immigration process depends on the employer signing the official immigration forms. As previously mentioned, the AAO conducts appellate review on a *de novo* basis, and it was in the exercise of this function that the AAO identified this additional ground for dismissing the appeal. *See Soltane v. DOJ*, 381 F.3d 145. Thus, for this reason as well, the petition may not be approved.

C. LCA Case Number

Moreover, upon review of the Form I-129 and LCA, the AAO notes that the petitioner failed to submit a certified LCA that properly corresponds to the petition. Each LCA has a unique identification number. On page 4 of the Form I-129, the petitioner reported that the corresponding LCA for the petition was LCA Case Number [REDACTED]. A review of the Foreign Labor Certification (FLC) Data Center website indicates that the LCA referenced on the Form I-129 was submitted to DOL on July 30, 2012 (and that the dates of employment would be from September 15, 2012 to September 15, 2015).⁶

The AAO notes that the petitioner did not provide the LCA referenced on the Form I-129 petition to USCIS. Instead, the petitioner submitted an LCA with the Case Number I-200-13073-159140 to USCIS. Thus, the LCA submitted to support the petition contains a different identification number than the LCA referenced on the Form I-129 (page 4).

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

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that the Form I-129 petition is supported by an LCA that corresponds it. Here, the LCA referenced on the Form I-129 does not correspond to the LCA provided to USCIS by the petitioner. Thus, for this reason as well, the petition must be denied.

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

D. The Required Wage

In this matter, the petitioner stated on the Form I-129 petition that it seeks the beneficiary's services as a general manager to serve on a full-time basis in [REDACTED]. The petitioner provided inconsistent information regarding the beneficiary's salary. Specifically, the petitioner provided the following information:

- On the Form I-129 (page 5) = \$998.00 P/W; on the LCA = \$24.95 per hour; and in the letter of support = \$51,896 per year. The amounts correspond to \$51,896 per year.
- On the Form I-129 (page 17), the petitioner stated that the beneficiary would be paid \$48,256 per year.
- In the Form I-129 submitted in response to the RFE, the petitioner stated on page 5 that the beneficiary would be paid \$928 per week (which is \$48,256 per year).
- In the Form I-129 submitted with the appeal, the petitioner stated on page 5 that the beneficiary would be paid \$928 per week (which is \$48,256 per year).

In the LCA, the petitioner designated the proffered position as falling under the occupational category "Administrative Services Managers." The petitioner indicated that a Level I wage for this occupation was \$24.92 per hour (or \$51,834 per year). The wage source is listed as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.¹⁰ The LCA was certified by DOL on March 20, 2013 and signed by the petitioner on March 25, 2013. The proffered wage of \$928 per week (\$48,256 per year) as stated on the Form I-129 (outlined above) is below the prevailing wage of \$51,834 per year for the occupational classification in the area of intended employment by more than \$3,575 per year.

The petitioner has submitted inconsistent information regarding the offered salary for the general manager position, and it has repeatedly indicated that it will pay the beneficiary a salary that is less

⁹ According to the regulation at 20 C.F.R. § 655.731(c)(7) regarding employer wage obligations for H-1B personnel, "[a] full-time week is 40 hours per week, unless the employer can demonstrate that less than 40 hours per week is full-time employment in its regular course of business." The petitioner does not claim, nor has it submitted any documentation to demonstrate that within its regular course of business, less than 40 hours per week is full-time employment.

¹⁰ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See U.S. Dep't of Labor, Bureau of Labor Statistics, on the Internet at <http://www.bls.gov/oes/> (last visited February 19, 2014). The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

than the prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 LCA.¹¹ See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed. Appx. 722, 723 (7th Cir. 2010). 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]").

In the instant case, the petitioner has failed to establish that it will pay the beneficiary an adequate wage for his work if the petition were approved. As a result, even if it were determined that the petitioner overcame the other independent reasons for the denial of the petition (which it has not), the petition could still not be approved.

E. 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:

¹¹ The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. The required wage rate means the rate of pay which is the higher of the actual wage for the specific employment in question or the prevailing wage rate for the occupation in which the beneficiary will be employed in the geographic area of intended employment. See 20 C.F.R. § 655.715.

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, 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.

As a preliminary matter, the petitioner's claim that a bachelor's degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly 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).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business 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).¹⁶

¹⁶ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Moreover, the petitioner has failed to establish the substantive nature of the proffered position. More specifically, with the Form I-129 petition, the petitioner submitted a brief description of the duties of the proffered position. The petitioner also submitted an LCA indicating that the proffered position falls under the occupational category "Administrative Services Managers" as a Level I (entry) position.¹⁷

Thereafter, the director issued a request for evidence. The director specifically asked the petitioner to provide a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity. The petitioner was asked to include the specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, etc. The director outlined the information to be provided.

In response to the RFE, the petitioner submitted, *inter alia*, a revised job description for the proffered position, along with a job posting for the [REDACTED]. Upon review, the AAO observes that the petitioner's revised job description is recited virtually verbatim from the job

F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

¹⁷ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

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.

posting for the [REDACTED]. There is no indication that the petitioner and the [REDACTED] are related or affiliated. No explanation was provided by the petitioner.

Although specifically requested by the director in the RFE, the petitioner did not submit information such as the percentage of time to be spent on each duty. The petitioner did not provide information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. The petitioner failed to specify which tasks were major functions of the proffered position. It also did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

Thereafter, in the appeal brief, the petitioner submitted a new job description for the proffered position. In addition, the petitioner now claims that the proffered position is most akin to the occupational category "Top Executives."¹⁸

When responding to a request for evidence (or when submitting an appeal), a petitioner cannot offer a new position to the beneficiary, materially change a position's associated job responsibilities, or alter the claimed occupational category of a position. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N at 249. 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. With each submission, the petitioner did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (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. 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. Furthermore, there is a lack of probative evidence substantiating the petitioner's claims with regard to the duties, responsibilities and requirements of the proffered position.

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

¹⁸ On the LCA, the petitioner designated the proffered position as falling under the occupational category "Administrative Services Managers" at a Level I (entry) wage level. On appeal, the petitioner claims that the position involves a significant number of duties falling under the occupational category "Top Executives"; however, it must be noted that the petitioner has not demonstrated that the LCA accurately reflects the occupational category and/or appropriate wage level for such a position.

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 satisfies any of the applicable provisions.

As described, the AAO finds, the job descriptions 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.

III. Conclusion

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 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, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.