

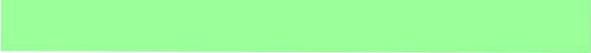


U.S. Citizenship  
and Immigration  
Services

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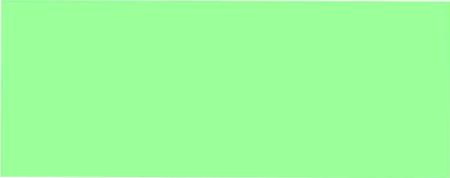


DATE: **JUN 27 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 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 manufacturing, textile, and marketing business, with six employees, established in 1998.<sup>1</sup> In order to employ the beneficiary in what it designates as a business management analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on November 6, 2013, finding that (1) the petitioner failed to establish that the proffered position qualifies as a specialty occupation; and (2) the LCA accompanying the petition does not correspond to the petition. On appeal, counsel for the petitioner 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 director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

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<sup>1</sup> The petitioner states that its gross annual income is \$100,000. Although requested on the Form I-129, the petitioner did not provide its net annual income. No explanation was provided.

The petitioner designated its business operations on the Form I-129 and LCA under the North American Industry Classification System (NAICS) code 323113.<sup>1</sup> This NAICS code is designated for "Commercial Screen Printing." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in screen printing without publishing (except books, grey goods, and manifold business forms). This industry includes establishments engaged in screen printing on purchased stock materials, such as stationery, invitations, labels, and similar items, on a job order basis. Establishments primarily engaged in printing on apparel and textile products, such as T-shirts, caps, jackets, towels, and napkins, are included in this industry.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 323113 – Commercial Screen Printing, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 26, 2014).

## I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services for a position it designates as a business management analyst on a full-time basis at the rate of pay of \$53,331 per year.<sup>2</sup> In the letter of support dated January 31, 2013, the petitioner provided the information regarding its business operations and the proffered position:

### THE COMPANY

[The petitioner] is a manufacturing, Textile & Marketing firm. [The petitioner] currently employs 6 individuals and has a gross annual income of approximately \$1000,000.

### The POSITION

**As a Business Management Analyst, [the beneficiary] will be performing the following duties:**

Design business management information systems to automate and facilitate the administration of company business management costs and business expenses, including revenue, marketing, maintenance, and management...20% of work time.

After consultation with Management, prepare detailed description of business and management information system needs, and design functions and steps required to design business management modules and systems...10% of work time.

Analyze company's management of its products, and design software to facilitate the management and business development of company materials, and equipment costing, and to automate related management operations...20% of work time.

Analyze the company's business requirements: its accounting, personnel, payroll procedures, and its materials management processes and design management information systems modules to automate these functions...10% of work time.

Design and develop the company's internal organization, communications, inventory controls, information flow patterns, and design management information systems modules to maximize the efficiency of procurement related to these functions, including a centralized business data networking system accessible by multiple users...20% of work time.

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<sup>2</sup> On the Form I-129, H-1B Data Supplement, the petitioner indicated that position falls under the Dictionary of Occupational Titles (DOT) Code 030 which corresponds to "Computer - Related Occupations" and more specifically "Occupations in Systems Analysis and Programming."

Design software business data systems to minimize inefficiencies in the areas of rental expense, revenue, marketing, maintenance, and equipment supply and management operations, accounting, human resources, personnel, and payroll procedures...10% of work time.

The petitioner did not state that the proffered position has any particular academic or experience requirements. Thus, it must be noted that the petitioner did not establish that the proffered position qualifies as a specialty occupation.<sup>3</sup>

With the petition, the petitioner provided copies of the beneficiary's foreign diplomas and transcripts. In addition, the petitioner submitted an academic credential evaluation indicating that the beneficiary received the U.S. equivalent of a Bachelor's degree in Computer Information Systems and a Bachelor's Degree in Business Management.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner asserts that the LCA designation for the proffered position corresponds to the occupational classification of "Management Analysts" – SOC (ONET/OES Code) 13-1111, at a Level I (entry level) wage.

The petitioner did not provide any further documentation regarding its business operations or the proffered position. The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 15, 2013. The director outlined the evidence to be submitted. The director noted that based on the job description provided, it appears that the proffered position is that of a computer systems analyst.

The petitioner responded to the RFE with a letter on new letterhead that provides a different company name. In the letter, the petitioner asserts that "[the beneficiary] is indeed a Business Management Analyst," and that his duties "heavily require management analysis tasks." The petitioner also provided a revised description of duties, and repeatedly stated that the proffered position requires a Bachelor's degree in Computer Information Systems and also in Business Management.

In the submission, the petitioner, for the first time, stated that the company is widely known under various other names and provided a new description of its business operation, vastly expanding its field of operations and stating the following:

We are widely known as [REDACTED] and as [REDACTED]  
[REDACTED] provides millions of dollars' worth of apparel to businesses, sports teams, and

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<sup>3</sup> The test to establish a position as a specialty occupation is whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge, and 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. See section 214(i)(1)(B) of the Act.

the government – for example, to the [REDACTED]

[REDACTED] has also diversified. We provide engineering, information technology, and technical services to federal and state government agencies. [REDACTED] has prime contracts . . . [o]ur contracts include program/project management, base operations support, engineering services, geospatial engineering, heavy construction, software development and sustainment, network management, and related work.

\* \* \*

[O]ur business takes in millions of dollars annually and is a diversified provider of apparel and technology services. . . . We need [the beneficiary] to plan our provision of [REDACTED] technological services in a high productivity environment. His baccalaureate degree equivalency in Computer Information Systems and in Business Management is indispensable because his management analysis tasks are for a company [REDACTED] whose business consists largely of providing Computer Information Systems services.

Further, counsel for the petitioner indicated that the petitioner "is a far larger and more diversified enterprise" and that it "provides apparel to numerous governmental and private entities, and it provides engineering, Information Technology, and technical services to major federal agencies." Counsel further claimed that "[i]ts gross receipts climbed from over \$600,000 to \$700,000 for 2012."

In addition, the petitioner and counsel submitted additional documents, including: (1) a Certificate of Assumed Name as "[REDACTED]" (2) contracts/orders/award notifications; (3) tax returns;<sup>4</sup> (4) Certificate of Reoccupancy and Compliance; (5) Articles of Incorporation and By-Laws; and (6) organization charts, indicating that the petitioner has approximately 15 employees (rather than six as claimed in the H-1B petition); and (7) related materials.

The director reviewed the record of proceeding and found that the petitioner did not establish eligibility for the benefit sought. The director denied the petition on November 6, 2013.

Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a letter outlining the reasons for the appeal and checked Box B on the Form I-290B, Part 2, indicating that a brief and/or evidence will be submitted within 30 days. However, the AAO did not receive a brief and/or additional evidence within the allotted timeframe.<sup>5</sup>

<sup>4</sup> The 2012 tax return indicates that the compensation of officers (line 7) was \$27,197 and the salaries and wages paid (line 8) was \$80,248. Its business activity on Schedule B is "Embroidery." The 2011 tax return indicates that the compensation of officers (line 7) was \$8,000 and the salaries and wages paid (line 8) was \$63,168. Its business activity on Schedule B is "Embroidery."

<sup>5</sup> Counsel filed the Form I-290B, Notice of Appeal or Motion, on December 6, 2013. He indicated on the Form I-290B that he would submit a brief and/or additional evidence within 30 days. However, counsel's brief and additional evidence were not received by the AAO until May 29, 2014 (174 days later). No

II. THE PREPONDERANCE OF THE EVIDENCE STANDARD

The petitioner and counsel reference the preponderance of the evidence standard. With respect to this standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

\* \* \*

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, 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. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

III. THE DIRECTOR'S DECISION

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explanation was provided by counsel for the late submission.

### A. Occupational Classification

The petitioner filed the LCA for the proffered position to correspond to the occupational category "Management Analysts" – SOC (ONET/OES Code) 13-1111, at a Level I (entry level) wage. The petitioner stated that the beneficiary would be paid \$53,331 per year. However, on the Form I-129, H-1B Data Supplement, the petitioner indicated that position falls under the Dictionary of Occupational Titles (DOT) Code 030 which corresponds to "Computer - Related Occupations" and more specifically "Occupations in Systems Analysis and Programming." Notably, the director found that the proffered position included job duties falling under the occupational category "Computer Systems Analysts."

On appeal, counsel states that the petitioner's job description "show[s] that much of the position involves the development of a computer network system for the petitioner" and claims that "the fact that the proffered position involves developing a computer information system makes it patently substantially more complex and unique than the Management Analyst duties described in the OOH [U.S. Department of Labor's Occupational Outlook Handbook]." Counsel continues by stating that "while it is not routine, neither is it unheard of for a management analyst to develop computer information systems."

Upon review, the constellation of duties presented in by the petitioner indicates a position containing elements of more than one occupational group as defined in the Standard Occupational Classification (SOC) system, the occupational classification system used by H-1B petitioners and U.S. Citizenship; and Immigration Services (USCIS) as a standard way to classify and thereby identify particular positions within defined occupational categories.<sup>6</sup> As described, the spectrum of proposed duties includes at least some duties that relate to the occupational category "Computer Systems Analysts."

With respect to the LCA, the U.S. Department of Labor (DOL) provides guidance for selecting the most relevant O\*NET classification code. DOL's "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer

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<sup>6</sup> The SOC system is accessible on the Internet at <http://www.bls.gov/soc/> (last visited June 26, 2014). That website introduces the SOC system as follows:

The 2010 Standard Occupational Classification (SOC) system is used by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. All workers are classified into one of 840 detailed occupations according to their occupational definition. To facilitate classification, detailed occupations are combined to form 461 broad occupations, 97 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, and/or training, are grouped together. . . .

shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the [determiner] should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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

When a proffered position is a combination of occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupational category. A search of the Foreign Labor Certification Data Center Online Wage Library reveals that the prevailing wage for "Computer Systems Analysts" SOC (O\*NET/OES) Code 15-1121 for [redacted] County [redacted] MI) at a Level I is \$59,530.<sup>7</sup> The petitioner's offered wage to the beneficiary is below the prevailing wage for the occupational category "Computer Systems Analysts" in the area of intended employment by \$6,199 per year. Thus, the petitioner selected the occupational code for the lower paying occupation.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

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

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<sup>7</sup> For more information, see the All Industries Database for 7/2012 - 6/2013 for Computer Systems Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1121&area=19804&year=13&source=1> (last visited June 26, 2014).

model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

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

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Here, the LCA does not properly reflect the correct occupational category and thus does not correspond to the H-1B petition. Further, the petitioner has not demonstrated that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.<sup>8</sup>

#### B. Specialty Occupation

For the reasons discussed above, the appeal must be dismissed and the petition denied. Nevertheless, we will now briefly discuss the issue of specialty occupation. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

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<sup>8</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 stating additional requirements that a position must meet, supplementing 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.

In ascertaining the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Here, as previously discussed, the petitioner has not established that it selected the proper occupational category for the proffered position on the LCA. Moreover, the petitioner and counsel claim that the proffered position is more complex, unique and/or specialized than other management analyst positions, yet the petitioner designated the proffered position as a Level I (entry) position relative to other positions within the occupation.<sup>9</sup> No explanation was provided for the discrepancy.

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<sup>9</sup> The wage levels are defined in the U.S. Department of Labor's (DOL) "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.

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

Further, in response to the RFE, the petitioner significantly revised the description of its services, as well as the nature and scope of its operations.<sup>10</sup>

Upon review, the petitioner has not provided sufficient evidence to establish that the beneficiary will perform the duties of the proffered position as stated in the petition and that, at the time of filing, it had secured non-speculative work for the beneficiary that is in accordance with its claims about the nature of its business operations. That is, the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment within the petitioner's business operations; (2) the actual work that the beneficiary; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Moreover, the petition contains inconsistent and conflicting statements on these issues, which preclude a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such probative evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Here, USCIS is precluded from 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

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<sup>10</sup> Further, as previously noted, the petitioner reports on the Form I-129 that its staff consists of six employees. It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, we review the record for evidence that the petitioner's operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Here, the petitioner provided varying information regarding the nature and scope of its business operations.

satisfy any of the criteria under the applicable provisions at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the appeal must be dismissed.

#### IV. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, 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.