



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 27 2014** OFFICE: VERMONT 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)

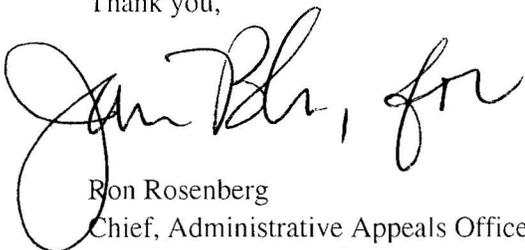
ON BEHALF OF PETITIONER:

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 (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a "Fuel Distributorship and Retail Stores" firm with 24 employees established in 1997. In order to employ the beneficiary in what it designates as a database administrator position, the petitioner seeks to classify her 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, finding that the petitioner failed to establish that the petitioner would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in his decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition. Specifically, the AAO finds that the Labor Condition Application (LCA) filed by the petitioner in support of this petition does not correspond to it, that is, the petitioner's claims in the record of proceeding with regard to the levels of independence, judgment, and responsibility to be exercised by the beneficiary do not comport with the LCA submitted by the petitioner, which was certified for a job prospect at the lowest level (Level I) wage-rate. The AAO conducts review of service center decisions on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

II. STANDARD OF REVIEW

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states 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" 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.

Id. at 375-76.

Again, the AAO conducts its review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the evidence of record does not establish that the proffered position is a specialty occupation was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the evidence of record does not establish that the claim of a proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

In similar fashion, as indicated by the AAO's supplemental finding made on appeal regarding the LCA and the evidentiary deficiencies present in the materials submitted with regard to the

qualifications of the beneficiary, the evidence of record also does not lead the AAO to believe the petitioner's implicit claim that the LCA submitted by the petitioner corresponds to the petition is "more likely than not" or "probably" true.

III. THE LCA SUBMITTED BY THE PETITIONER IN SUPPORT OF THE PETITION

Before addressing the director's determination that the proffered position is not a specialty occupation, the AAO will first address the supplemental finding it has made on appeal, which independently precludes approval of this petition, namely, our finding that the LCA submitted by the petitioner in support of this petition does not correspond to the petition.

The LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Database Administrators" occupational classification, SOC Code 15-1141, and at a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Wage levels should be determined only after selecting the most relevant O*NET code classification. A prevailing wage determination is then made by selecting one of four wage levels for an occupation based upon a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.¹

Prevailing wage determinations start at Level I (entry) and progress to a wage that is commensurate with that of Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.² The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

¹ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited Mar. 25, 2014).

² A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

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.

The petitioner has classified the proffered position at a Level I wage, which is only appropriate for a position requiring only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." That wage-level designation indicates further that the beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment." However, the AAO finds that many of the duties described by counsel and the petitioner exceed this threshold.

For example, in its September 10, 2012 letter the petitioner described the proposed duties as "complex and demanding," stated that they involve "specialized knowledge," and claimed that they can only be performed by "a person of exceptional ability and skills." The petitioner claimed further that it needs someone to perform these duties due, in part, to the "highly specialized and competitive nature" of the services it provides to its customers.

In her March 5, 2013 letter, counsel described the duties of the proffered position as "complex and demanding," stated that they require "prior knowledge and ability," and indicated that the beneficiary would be required to perform her duties "with little or no supervision." Counsel made similar assertions on appeal, and added that "[t]his multi-million dollar company is more than marginal and requires individuals in the specialty occupation of Database Administrator to perform job duties which are . . . complex."

These stated duties and characterizations of the position indicate that the beneficiary will be required to exercise extensive independent judgment in the proffered position, which conflicts with the Level I wage-rate designation.

The AAO, therefore, questions the level of complexity, independent judgment and understanding actually required for the proffered position, as the LCA was certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner conflict with the wage-rate element of the LCA submitted by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-

level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Thus, the petitioner's characterizations of the proffered position and the claimed duties and responsibilities conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the 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); *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]").

It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. The petitioner has offered the beneficiary a wage of \$49,379 per year, which satisfied the Level I (entry level) prevailing wage for Database Administrators in the San Antonio, Texas Metropolitan Statistical Area at the time the LCA was certified.³ However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise her salary to at least \$62,421 per year. The Level III (experienced) prevailing wage was \$75,462 per year, and the Level IV (fully competent) prevailing wage was \$88,504 per year.⁴

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level 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 wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work as characterized by the petitioner on the Form I-129 and allied submissions and as required under the

³ U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Database Administrators," <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1141&area=41700&year=13&source=1> (last visited Mar. 25, 2014).

⁴ *Id.*

Act, if the petition were granted for a higher-level and more complex position than addressed in the LCA as claimed elsewhere in the petition.

Additionally, this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. 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).

DOL and USCIS regulations reveal several features of the LCA-certification process that have material implications in USCIS review of a H-1B specialty occupation petitions, including the one before us now.

DOL has stated clearly that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

That the LCA-certification process does not involve a substantive review, but instead relies upon the petitioner to provide complete and accurate information, is highlighted by the following italicized-for-emphasis statement that appears at Part M, the certification section, of the standard LCA (ETA Form 9035/9035E):

The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified LCA.

By the signature at part K (Declaration of Employer) of the ETA Form 9035/9035E, the petitioner attested, in part, "that the information and labor condition statements provided [in the LCA] are true and accurate."

As the signature at Part 7 of the Form I-129 certifies under penalty of perjury that the "this petition and the evidence submitted with it are true and correct" to the best of the petitioner's knowledge, that signature also certified that the content of the LCA filed with it and identified by the LCA or ETA case number at item 2 of Part 5 (Basic Information about the Proposed Employment and

Employer) truly and correctly matched the related aspects of the petition. However, as just discussed above, this appears to not be the case.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.⁵

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 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.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, provided the proffered position was in fact found to be a higher-level and more complex position as claimed elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position. That is, specifically, the LCA submitted in support of this petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I, entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner

⁵ *See also* 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) ("An approved labor condition application is not a factor in determining whether a position is a specialty occupation").

failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the LCA submitted by the petitioner indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such higher-level work and responsibilities, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

IV. SPECIALTY OCCUPATION

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

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

As noted above, the LCA submitted to support the visa petition states that the proffered position is a database administrator position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1141, Database Administrators from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in computer applications from [REDACTED] and a master's degree in business administration, with a major in hospitality and a concentration in event planning, from [REDACTED]. The transcript of the beneficiary's studies at [REDACTED] University shows that the beneficiary's bachelor's degree was the result of three years of academic coursework.

Counsel also submitted, *inter alia*, the following: (1) an employment verification letter dated February 22, 2007; and (2) a letter, dated September 10, 2012, from the petitioner's president.

The employment verification letter states that the beneficiary worked for [REDACTED] from November 1, 2003 to January 31, 2007 as a database coordinator and it lists the duties she performed.

In his letter, the petitioner's president stated the following about the duties of the proffered position:

In this position, [the beneficiary's] specific duties will include: (i) designing, implementing, and administering the company's computer database system; (ii) coordinating changes to computer databases, testing and implementing the database, applying knowledge of data base management systems; (iii) planning, coordinating, and implementing security measures to safeguard computer databases; (iv) evaluating products including hardware, software and telecommunication equipment and recommending purchases consistent with the company's short-term and long-term objectives; (v) consulting with coworkers to research problems and to determine the impact of database changes; and (vi) trouble shooting hardware and software problems, maintaining server, and providing technical support to desktop users.

As to the educational requirement of the position, the petitioner's president stated:

Due to the complex and demanding requirements of the position of a Database Administrator, only a person of exceptional ability and skills in computer applications is capable of qualifying as a Database Administrator for [the petitioner]. These minimum prerequisites for the offered position require a skilled professional with a Bachelor's degree in Computer Science, or a related field.

On December 11, 2012, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The director observed, "[I]t is not clear how the beneficiary will be relieved from

performing non-qualifying functions because [the beneficiary has] only 24 employees. The director outlined the specific evidence to be submitted.

In response, counsel submitted, *inter alia*, (1) an evaluation of the beneficiary's education and employment experience; (2) an organizational chart of the petitioner's operations; and (3) counsel's own letter, dated March 5, 2013.

The evaluation of the beneficiary's education and employment experience states that the beneficiary's bachelor's degree is equivalent to three years of academic coursework and that the beneficiary's bachelor's degree and three years of work experience, considered together, are "equivalent to at least a Bachelor of Science degree in Computer Information Systems from an accredited institution of higher education in the United States.

The petitioner's organizational chart shows that it employs a president/director, an office manager, a purchasing director, a general manager, an accountant, a financial analyst, a credit analyst, department managers, a fuel distribution manager, assistant managers, sales agents, delivery drivers, cashiers, and stockers, and that it employs the beneficiary in a position designated "database administrator." The chart indicates that, other than the beneficiary, the petitioner does not employ anyone in a computer-related position.

In his March 5, 2013 letter, counsel provided what purports to be a description of the duties of the proffered position. Counsel asserted that the beneficiary's job duties would be:

Designing, implementing, and administering the company's computer database system. Coordinating changes to computer databases, testing and implementing the database, applying knowledge of data base management systems.

- establishing the needs of users and monitoring user access and security;
- monitoring performance and managing parameters to provide fast query responses to 'front end' users;
- mapping out the 'conceptual design' for a planned database in outline;
- considering both 'back end' organization of data and 'front end' accessibility for end users;
- refining the 'logical design' so that it can be translated into a specific data model;
- further refining the 'physical design' to meet system storage requirements;
- installing and testing new versions of the database management system (DBMS);
- maintaining data standards, including adherence to the Data Protection Act;

- writing database documentation, including data standards, procedures and definitions for the data dictionary ('metadata')
- maintaining customer databases based on [the petitioner's] requirements

Planning, coordinating, and implementing security measures to safeguard computer databases.

- controlling access permissions and privileges;
- developing, managing and testing backup and recovery plans;
- ensuring that storage, archiving, backup and recovery procedures are functioning correctly;
- capacity planning;
- working closely with managers and web developer;
- communicating regularly with technical, applications and Accountant to ensure database integrity and security of financial records and customer databases;
- commissioning and installing new applications

Evaluating products including hardware, software and telecommunication equipment and recommending purchases consistent with the company's short-term and long-term objectives. Consulting with coworkers to research problems and to determine the impact of database changes. Trouble shooting hardware and software problems, maintaining server, and providing technical support to desktop users.

- Provide immediate support for critical situations
- Evaluate and recommend new database technologies
- Build database scheme, tables, procedures and permissions
- Set up data sharing and disk partitioning
- Develop database utilities and automated reporting
- Create shell scripts for task automation
- Create, test and execute data management languages
- Analyze and sustain capacity and performance requirements
- Analyze, consolidate and tune database for optimal efficiency
- Monitor systems and platforms for availability.
- Oversee backup, clustering, mirroring, replication and failover
- Restore and recover corrupted databases
- Install and test upgrades and patches
- Implement security and encryption
- Evaluate and recommend new database technologies

Counsel cited various unpublished decisions for the proposition that computer-related positions, including database administrator positions, have been found to be specialty occupation positions.

Finally, counsel stated: "Beneficiary's position clearly indicates that majority of her time will be spent performing job duties of a Database Administrator."

The director denied the petition on April 11, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submitted additional copies of evidence previously provided, reiterated many of the assertions she made in the response to the RFE, and cited as precedent the cases previously cited in response to the RFE. Counsel asserted that the evidence in the record demonstrates that the proffered position qualifies as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent.

Counsel also stated the following:

[The petitioner's] business depends on its record keeping abilities of customer lists for its fuel distribution, online ordering, etc. Thus, there is always sufficient work for a full-time Database Administrator.

Additionally, the [petitioner] already has other employees that perform administrative work and it would not be prudent for [the petitioner] to pay an employee a professional salary and have them perform non-professional work which can be performed at a lower pay scale.

Counsel's reference to "online-ordering" suggests that the petitioner has an internet presence able to accept orders submitted online.

As to the cases cited by counsel, the AAO observes, first, that most of those decisions are non-precedent decisions. 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. Further, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions.

The AAO notes that the petitioner described the duties of the beneficiary's employment in the same general terms as those used from various sources available online, including the *Dictionary of Occupational Titles*, O*Net OnLine, and the *Occupational Outlook Handbook*. That is, the AAO notes that the wording of the above duties as provided by the petitioner for the proffered position is recited almost verbatim from other sources. This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing a position

as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Moreover, the AAO notes that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it 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.

Nor does the job description provided by counsel constitute probative evidence. The description was submitted by counsel, not the petitioner, and counsel's letter and brief were not signed or endorsed by the petitioner. The record of proceeding does not indicate the source of the expanded duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO finds that the petitioner describes the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will be responsible for "designing, implementing, and administering the company's computer database system." That statement fails to provide insight into the beneficiary's actual duties, and it does not include any information regarding the specific tasks that the beneficiary will perform. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position.

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertion with regard to the educational requirement is conclusory and unpersuasive, as it is not supported by the job description or substantive evidence.

Moreover, the evidence provided shows that the petitioner does not employ anyone other than the beneficiary in a computer-related position. It does not employ lower-level database developers or any other computer programmers or software developers. It does not employ a network administrator or a systems administrator. Although counsel appears to assert that the petitioner maintains a web presence with online ordering capability, the organizational chart does not indicate that the petitioner employs a web developer or anyone in any related position. The organizational chart shows that the petitioner does not employ any computer support specialists to help its employees with ordinary computer malfunctions or to help the petitioner's employees to operate various applications.

The duties attributed to the proffered position in the duty description provided, though, are all database administrator duties. Although counsel asserted that, because the petitioner employs other, less highly paid, workers, the beneficiary would be spared from performing non-specialty occupation duties, the petitioner does not appear to employ anyone to perform non-specialty occupation computer-related duties. That the petitioner employs no one else in a computer-related position suggests that the beneficiary, rather than devoting her time to the duties listed, would perform in many different computer-related roles, including performing many non-specialty occupation duties, such as computer support specialist duties. For this additional reason, the petitioner has not demonstrated that the duty description counsel provided is accurate.

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 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.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

V. CONCLUSION AND ORDER

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The evidence of record does not demonstrate that the proffered position is a specialty occupation and therefore does not overcome the director's ground for denying this petition. Consequently, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the petition will also be denied because the LCA filed by the petitioner in support of this petition does not correspond to it, and it fails to establish that the petitioner will pay the beneficiary an adequate salary. Consequently, this petition could be approved even if it were determined that the petitioner had overcome the director's ground for denying this petition, which it has not.

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 at 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d at 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 director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial.⁶ In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought.

⁶ Because these matters preclude approval of the petition, the AAO will not further discuss whether the evidence of record establishes that the beneficiary is qualified to perform the duties of the proffered position or any additional issues, deficiencies, or unresolved questions it has observed in the record of proceeding.

(b)(6)

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Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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