



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 01 2014** Office: CALIFORNIA SERVICE CENTER File: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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 9, 2013. On the Form I-129 petition, the petitioner describes itself as a manufacturer of glass bottles and containers for food, pharmaceuticals, cosmetics, perfumery and alcohol established in 2005, with 535 employees. In order to employ the beneficiary in a position to which it assigned the job title of "Engineer, Machines," the petitioner seeks to classify the beneficiary 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 10, 2013, finding that the petitioner failed to submit a Labor Condition Application (LCA) with an occupation title that is consistent with the position offered. The director also noted that the petitioner submitted a new LCA that cannot be considered for this position since the new LCA was certified after the date of filing. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous. Counsel submits a brief and additional evidence in support of this assertion.

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 director's notice of intent to deny (NOID); (5) the petitioner's response to the NOID; (6) the director's notice denying the petition; and (7) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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

As a preliminary matter, the AAO will also address additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition.¹ Specifically, beyond the decision of the director, the evidence in the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

I. THE LAW

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

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

in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in

8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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 evidence in the record of proceeding establishes that performance of the particular proffered 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.

II. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated on the Form I-129 petition that it seeks the beneficiary's services in a position that it designates as a "Engineer, Machines" to work on a full-time basis with an annual salary of \$60,000.

The petitioner submitted an LCA in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Mechanical Engineers" - SOC (ONET/OES) Code 17-2141, at a Level II wage.

In a support letter dated March 21, 2013, the petitioner stated that the beneficiary will perform the following duties in the proffered position:

As the Engineer, Machines, [the beneficiary] will be responsible for IS Machines and other industrial machinery in addition to maintaining, designing, developing, testing, and evaluating integrated industrial production processes and preventative maintenance schedules. More specifically, [the beneficiary] will be involved in the following activities:

Operations and Maintenance

- Effecting preventive maintenance schedules of various machinery and instruments to increase machine up time and equipment reliability; thereby accomplishing planned production targets within budget;
- Proactively identifying areas of obstruction and breakdowns and taking steps to rectify the equipment through application of trouble shooting tools;
- Coordinating material and spare parts planning related activities encompassing identification of vendors, requirement of specification and offer evaluation; planning and executing capital procurement;
- Periodic analysis of machine downtime using Why-Why Analysis, finding the root cause of it and rectifying it;
- Planning of spares requirement considering the department inventory;
- Inspection of newly purchased spares;
- Directing maintenance technicians; monitoring expenses with optimum utilization of resources; and,
- Department budgeting and monitoring the expenses.

Process Enhancement & Cost Control

- Identifying scope for implementation and monitoring of technological changes to enhance productivity; and
- Executing cost saving techniques, measures and modifications to achieve substantial reduction in expenditures and work within the budget.

Technical Support/Troubleshooting

- Responsible for dismantling, assembling, and troubleshooting of pneumatic operated automatic machines and mechanisms, conveyor and handling equipment's maintenance.
- Increasing Mean Time between failures & reducing Mean Time to repair the machines, thereby increasing productivity;
- Analysis of spares failure and taking necessary steps to overcome it; and
- Handling of all types of pipelines, fittings and valves for compressed air flow to operate the machine mechanisms.

In the letter of support, the petitioner asserts that "the successful execution of the duties of this key position can only be attained through the completion of at least a Bachelor of Science in

Mechanical Engineering or closely related field." The petitioner also stated that "[w]e have not, nor would it be feasible to hire someone with lesser qualifications."

The petitioner stated that the beneficiary is qualified to perform services in the proffered position by virtue of "his education and professional experience in industrial machine maintenance." The petitioner provided a copy of the beneficiary's Bachelor of Engineering (Mechanical Branch), awarded by [REDACTED] in India, and a copy of his university transcripts. The petitioner also submitted a credential evaluation from [REDACTED] Inc., stating that the beneficiary has the equivalent of a U.S. Bachelor's Degree in Engineering. The petitioner also submitted the beneficiary's resume.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 15, 2013. The director outlined the evidence to be submitted. The director also noted that although the petitioner categorized the position as a "Mechanical Engineer," the job duties appear to be that of an "Industrial Machinery Mechanics and Maintenance Worker" as described by the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*.

The petitioner's attorney responded to the director's RFE and submitted a response letter and additional evidence. In the letter in response to the RFE, dated May 30, 2013, counsel asserted that the beneficiary "will be responsible for ensuring the overall functioning of Individual Section ("IS") machines," and that the "oversight and operation of IS machines requires a high degree of knowledge of physics and mathematics that can only be obtained through the attainment of a baccalaureate or higher degree." Also, in the RFE response letter, counsel provided a revised description of the job duties for the proffered position, as follows:

Managing and Monitoring Glass Engineering Functions – 80%

Eighty percent of [the beneficiary's] job will consist of managing the development of IS machine parameters and production. Specifically, [the beneficiary's] responsibilities will include:

- Monitor IS machine production processes and develop new IS machine functions in order to meet customer requirements and international safety standards
- Design and oversee an accountability system using technical mechanical engineering knowledge and experience to manage the IS machine system
- Analyze machine production, and maximize machine efficiency by reducing transverse relaxation time ("T2 times") in glass formation
- Develop a Preventive Maintenance Program for IS machines, which requires an understanding of the engineering components of IS machines
- Create a work order system using mathematical and scientific principles to effectively manage IS machine system
- Troubleshoot IS machine operational problems to maintain optimum production
- Analyze processes for glass formation and plan changes in job activity to maximize efficiency of production

- Oversee daily reviews of IS machine production and generate feedback and plans for improvement in functional operation of machines
- Review operational problems with IS machines that fail to function properly, and implement necessary mechanical engineering improvements to remedy problems with IS machines
- Oversee employees' work to minimize machine downtime, ensure mechanical integrity and procedures, optimize glass quality, and adherence to standard operating procedures
- Maintain consistent glass bottle production without downtime or product losses due to IS machine mechanical errors
- Alter functioning and settings of IS machines according to specifications of each new job, and ensure machines function properly through changes in settings
- Plan and administer IS machine upgrades to optimize production
- Train employees in IS machine operation

Developing Standard Mechanical Operations – 10%

Ten percent of [the beneficiary's] work will be dedicated to the following duties:

- Identify training needs, develop lesson plans, and ensure employees are implementing new technological developments
- Train two Assistant Managers on engineering principles required for succession planning, assessments, coaching, mentoring and training
- Develop new standard operating procedures and audit prevailing procedures, modify procedures, and train employees in new mechanical engineering procedures
- Develop and implement safety rules and regulations for operation of IS machines, enforce safety rules and regulations

Ensuring Preventative Methods and Machine Efficiency Needs – 10%

The remaining 10% of the beneficiary's work will be spent on the following duties:

- Actively participate in International Organization for Standardization ("ISO 9000") and Top Quality Management ("TSQ"), a management philosophy dedicated to improving quality of products and processes, and improving plant-wide and department specific quality systems programs and processes
- Identify preventive measures in anticipation of possible IS machine breakdowns
- Plan production of glass bottles to meet both high production value and high efficiency, while keeping within budgetary targets
- Identify and work on productivity improvement projects.
- Prepare "Action Plans for Improvement in Efficiency" based on performance runs of IS machines.

Counsel also explained that the beneficiary will oversee the work of 24 machine repair personnel. Counsel stated that "[i]t is [the beneficiary's] job to identify the engineering needs, improvements and direction," and then he "will dictate these professional findings to these employees below him, who then are responsible for implementing his changes and engineering findings." Counsel further explained that the position offered to the beneficiary qualifies as a specialty occupation.

On June 11, 2013, the director sent a NOID. In the NOID, the director stated that although the petitioner's LCA lists the proffered position as a "Mechanical Engineer" as listed in the *Handbook*, an analysis of the documentation submitted indicates that the proposed duties of the position reflect the duties of an "Industrial Machinery Mechanics and Maintenance Worker" as outlined in the *Handbook*. The director asked that the petitioner submit a copy of an approved LCA in the occupational specialty in which the beneficiary will be employed.

In a letter in response to the NOID dated June 25, 2013, counsel for the petitioner stated that "[w]hile we acknowledge your finding that the beneficiary's proposed position reflects the duties of an Industrial Machinery Mechanics and Maintenance Worker, we respectfully maintain that the Engineer, Machines position falls squarely within the duties of a Mechanical Engineer as described by the Occupational Outlook Handbook, as originally submitted." The petitioner submitted a revised LCA, certified on June 21, 2013, listing the SOC (ONET/OES) occupation title as Industrial Machinery Mechanics, SOC (ONET/OES) code 49-9041.

The director denied the petition stating that the occupational classification in the initially submitted LCA is not consistent with the position offered. The director also noted that the new LCA cannot be accepted as it was certified after the date that the instant petition was filed. The petitioner submitted a timely appeal of the denial of the H-1B petition.

III. ANALYSIS

A. Failure to Establish that Proffered Position Qualifies as a Specialty Occupation

As a preliminary matter, beyond the decision of the director, the AAO will first determine if the petitioner has established that the proffered position qualifies as a specialty occupation.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, 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."

The petitioner stated on the Form I-129 that the beneficiary would be employed in an engineer, machines position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² As previously discussed, the petitioner asserted in the LCA that the proffered position falls within the occupational category "Mechanical Engineers." The director reviewed the petitioner's job description and found that the proffered position reflects duties that fall within the occupational category "Industrial Machinery Mechanics and Maintenance Workers and Millwrights."

The AAO reviewed the information in the *Handbook* regarding the occupational category "Industrial Machinery Mechanics and Maintenance Workers and Millwrights" including the sections regarding the typical duties and requirements for this occupational category.³ The AAO notes that the *Handbook* does not support a conclusion that this occupation normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

More specifically, the subchapter of the *Handbook* entitled "How to Become an Industrial Machinery Mechanic or Maintenance Worker or Millwrights" states the following about this occupational category:

Industrial machinery mechanics and maintenance workers and millwrights typically need a high school diploma. However, industrial machinery mechanics

² The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2014-2015 edition available online.

³ For additional information regarding the occupational category "Industrial Machinery Mechanics and Maintenance Workers and Millwrights," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Industrial Machinery Mechanics and Maintenance Workers and Millwrights, on the Internet at <http://www.bls.gov/ooh/installation-maintenance-and-repair/industrial-machinery-mechanics-and-maintenance-workers-and-millwrights.htm#tab-4><http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-1> (last visited April 30, 2014).

need a year or more of training after high school, whereas maintenance workers typically receive on-the-job training that lasts a few months to a year. Millwrights mostly go through an apprenticeship program that lasts about 4 years. Programs are usually a combination of technical instruction and on-the-job training. Others learn their trade through a 2-year associate's degree program in industrial maintenance. A high school diploma or equivalent is the typical education needed to become a millwright.

Education

Employers of industrial machinery mechanics and maintenance workers and millwrights generally require them to have at least a high school diploma or a General Educational Development (GED) certificate. However, employers increasingly prefer to hire workers with some education in industrial technology from a community or technical college. Employers also prefer to hire workers who have taken high school or postsecondary courses in mechanical drawing, mathematics, blueprint reading, computer programming, or electronics.

Industrial machinery mechanics usually need a year or more of education and training after high school to learn the necessary mechanical and technical skills. Although mechanics used to specialize in one area, such as hydraulics or electronics, many factories now require every mechanic to understand electricity, electronics, hydraulics, and computer programming. These skills allow mechanics to troubleshoot a much larger range of machine problems.

Some mechanics complete a 2-year associate's degree program in industrial maintenance. Others may start as helpers or in other factory jobs and learn the skills of the trade on the job or take courses offered through their employer.

Employers may offer onsite technical training or send workers to local technical schools in addition to on-the-job training. Classroom instruction focuses on subjects such as shop mathematics, blueprint reading, the use of hand tools, welding, electronics, and computer training. In addition to technical instruction, mechanics train on the specific machines that they will repair. They can get this training on the job, through dealers' or manufacturers' representatives, or in a classroom.

A high school diploma is the typical education needed to become a millwright. However, there are 2-year associate's degree programs in industrial maintenance that also provide good preparation for prospects. Employers may give workers classroom instruction in addition to on-the-job training.

Training

Most millwrights learn their trade through a 3- or 4-year apprenticeship. For each year of the program, apprentices must have at least 144 hours of related technical

instruction and 2,000 hours of paid on-the-job training. On the job, apprentices learn to set up, clean, lubricate, repair, and start machinery. During technical instruction, they are taught welding, mathematics, how to read blueprints, how to use electronic devices, pneumatics (using air pressure), and how to use grease and fluid properly. Many also receive computer training.

After completing an apprenticeship program, millwrights are considered fully qualified and can usually perform tasks with less guidance.

Apprenticeship programs are often sponsored by employers, local unions, contractor associations, and the state labor department. The basic qualifications for entering an apprenticeship program are as follows:

Minimum age of 18
High school diploma or equivalent
Physically able to do the work

Machinery maintenance workers typically receive on-the-job training that lasts a few months to a year. They learn how to perform routine tasks, such as setting up, cleaning, lubricating, and starting machinery. This training may be offered on-the-job, by professional trainers hired by the employer, or by representatives of equipment manufacturers.

Important Qualities

Manual dexterity. When handling very small parts, workers must have a steady hand and good hand–eye coordination.

Mechanical skills. Workers must be able to reassemble large, complex machines after finishing a repair.

Technical skills. Industrial machinery mechanics and maintenance workers and millwrights use technical manuals and sophisticated diagnostic equipment to figure out why machines are not working.

Troubleshooting skills. Industrial machinery mechanics and maintenance workers and millwrights must observe and properly diagnose and fix problems that a machine may be having.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Industrial Machinery Mechanics and Maintenance Workers and Millwrights, on the Internet at <http://www.bls.gov/ooh/installation-maintenance-and-repair/industrial-machinery-mechanics-and-maintenance-workers-and-millwrights.htm#tab-4><http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-1> (last visited April 30, 2014).

The *Handbook* does not report that, as an occupational group, "Industrial Machinery Mechanics and Maintenance Workers and Millwrights" require at least a bachelor's degree in a specific specialty, or its equivalent. The *Handbook* states that "[e]mployers of industrial machinery mechanics and maintenance workers and millwrights generally require them to have at least a

high school diploma or a General Educational Development (GED) certificate. However, employers increasingly prefer to hire workers with some education in industrial technology from a community or technical college." Thus, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the "Industrial Machinery Mechanics and Maintenance Workers and Millwrights" occupational group.

The AAO also reviewed the information in the *Handbook* regarding the occupational category "Mechanical Engineers," including the sections regarding the typical duties and requirements for this occupational category.⁴ Although the petitioner titled the position "engineer, machines," upon review of the job descriptions provided by the petitioner, the AAO is not persuaded that the proffered position falls under the occupational category of "Mechanical Engineers."

The subchapter of the *Handbook* entitled "What Mechanical Engineers Do" states the following about this occupational category:

Mechanical engineering is one of the broadest engineering disciplines. Mechanical engineers research, design, develop, build, and test mechanical and thermal devices, including tools, engines, and machines.

Duties

Mechanical engineers typically do the following:

- Analyze problems to see how mechanical and thermal devices might help solve the problem
- Design or redesign mechanical and thermal devices using analysis and computer-aided design
- Develop and test prototypes of devices they design
- Analyze the test results and change the design as needed
- Oversee the manufacturing process for the device

Mechanical engineers design and oversee the manufacturing of many products ranging from medical devices to new batteries.

Mechanical engineers design power-producing machines such as electric generators, internal combustion engines, and steam and gas turbines as well as power-using machines, such as refrigeration and air-conditioning systems.

⁴ For additional information regarding the occupational category "Mechanical Engineers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Mechanical Engineers, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/mechanical-engineers.htm> (last visited April 30, 2014).

Mechanical engineers design other machines inside buildings, such as elevators and escalators. They also design material-handling systems, such as conveyor systems and automated transfer stations.

Like other engineers, mechanical engineers use computers extensively. Computers help mechanical engineers create and analyze designs, run simulations and test how a machine is likely to work, and generate specifications for parts.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Mechanical Engineers, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/mechanical-engineers.htm#tab-2> (last visited April 30, 2014).

Upon review of the submitted job duties, the AAO finds that none of the duties of the proffered position include designing, developing, and building machinery and devices, which are the main duties of mechanical engineering jobs. Instead, the job duties of the proffered position emphasize the oversight of IS machine operations including preventative maintenance, maintenance schedules, ordering of parts, and analysis of machine breakdowns, rather than the design, development and building of IS machines. The duties of the proffered position vary greatly from the duties listed in the *Handbook* for Mechanical Engineers.

In addition, the director requested a copy of the petitioner's organizational chart showing its hierarchy and staffing levels. The petitioner failed to submit this evidence in its response to the RFE. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The organizational chart would assist the AAO in understanding whether the petitioner has an engineering department, whether the proffered position is placed within the engineering department, and who supervises the beneficiary.

The AAO agrees with the director that the job duties of the position offered to the beneficiary do not appear to fall within the occupational category "Mechanical Engineers." The petitioner did not submit sufficient evidence regarding the proffered position in order for the AAO to make an assessment of whether the proffered position qualifies as a specialty occupation. Indeed, it is not sufficiently clear what the beneficiary will be doing and where the beneficiary's position falls within the petitioner's corporate hierarchy, as the petitioner did not provide an organizational chart indicating the company's structure. In addition, the job duties are not fully encompassed in the duties listed in the *Handbook* for the occupational category "Mechanical Engineers." Given that the proffered position does not appear to fall within this occupational category, and that the petitioner has not provided sufficient evidence to establish that the proffered position falls within this category, it cannot be found that the proffered position qualifies as a specialty occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to

provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry into the occupation is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Finally, for the reasons discussed in greater detail below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided copies of eight job postings.

The AAO reviewed the evidence submitted, but finds that the documentation does not establish that the petitioner has met this prong of the regulations.

The petitioner explained that it is a company engaged in the manufacturing of glass bottles for personal care (cosmetic and fragrance), specialty (liquor bottles), and pharmaceuticals. On the Form I-129, the petitioner stated that it was established in 2005, with 535 employees, and a gross annual income of \$82 million. Although requested, the petitioner did not provide its net annual income on the Form I-129. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 327213.⁵ The AAO notes that this NAICS code is designated for "Glass Container Manufacturing." 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 manufacturing glass packaging containers.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 327213 - Glass Container Manufacturing, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 30, 2014).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Here, the petitioner submits no evidence demonstrating that any of the advertising companies are similar in size and scope to that of the petitioner, a manufacturer of glass bottles and containers for food, pharmaceuticals, cosmetics, perfumery and alcohol, with 535 employees. Thus, the record is devoid of sufficient information regarding the advertising companies to conduct a legitimate comparison of each of these firms to the petitioner. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements) may be considered. It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The AAO reviewed the job advertisements submitted by the petitioner. The petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further,

⁵ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited April 30, 2014).

as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

For example, the petitioner submitted the following advertisements:

- A job posting for Pittsburgh Glass Works for a process engineer, in Elkin, North Carolina. The posting indicated that the employer is the “#1 manufacturer and distributor of automotive glass in North America.” The company employs more than 4,000 people worldwide. The petitioner did not state which aspects or traits (if any) it believes it shares with the advertising organization.

The posting does not provide sufficient information as to whether the advertising company is similar to the petitioner. It appears that the advertising company is engaged in the manufacturing of automotive glass which is an area that the petitioner does not appear to be involved in. It also appears that the advertising company may be much larger than the petitioner. The petitioner did not present enough evidence that the advertising company is similar to the petitioner. Thus, further review of the advertisement is not necessary.

- An advertisement for Saint-Grobain, for a process engineer. The advertisement states that the company is a “leading worldwide producer of abrasives, building materials, high-performance plastics, insulation, flat glass, glass containers, piping, reinforcements and industrial ceramics.” The company employs over 24,000 people, and has approximately 200 manufacturing locations and total sales of \$8.4 billion. No further information regarding the advertising employer was provided. The petitioner has not supplemented the record or provided any information regarding which aspects or traits (if any) it shares with the advertising organization. Moreover, the advertising company has sales of \$8.4 billion which is very different from the petitioner that has gross sales of \$82 million. It is not clear if the advertising company is similar to the petitioner. Therefore, further review of the advertisement is not necessary.
- An advertisement for Jeannette Specialty Glass for a ceramic engineer in Jeannette, Pennsylvania. The employer is “one of North America’s foremost manufacturers of borosilicate glass products used in commercial, medial, and industrial application.” The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics.

Further, the posting states that the duties of the position will include, “provide direct support to the design groups, manufacturing, and suppliers in the areas of material development and selection, process development and control, improvement, failure analysis, and problem solving.” The

petitioner's job duties do not include direct responsibility for the design and manufacturing process development. Thus, further review of the advertisement is not necessary.

- An advertisement for Corning for a process engineer glass melting. The advertisement states that "Corning is the world leader in specialty glass and ceramics, creating and manufacturing keystone components that enable high-technology systems. The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics.

Further, the posting requires an M.S. – Ph.D. in glass, ceramics, materials science, chemical or mechanical engineering. In reviewing the duties in the advertisement, it appears that the duties are not similar to the duties to be performed by the beneficiary. For instance, the advertisement lists, "technical analysis of melting and delivery processes and application of results to improving processes and meeting customer requirements;" "interface with Development and Engineering to develop and lead production trials of new products, processes, and technology to improve melting operations;" "design and implementation of process experiments;" and, "worldwide migration of new processes, products, and technologies." This job posting places emphasis on designing applications and processes – duties that are not comparable to the job duties offered to the beneficiary. The petitioner's job duties do not include direct responsibility for the design and manufacturing process development. Thus, further review of the advertisement is not necessary.

- An advertisement for Johns Manville for a process engineer. The advertisement states that the company is a "leading manufacturer and marketer of premium-quality building and specialty products." The advertisement also states that the company employs approximately 7,800 people and operates 41 manufacturing facilities. The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics. Moreover, the advertising company employs approximately 7,400 people which is much larger than the petitioner. It is not clear if the advertising company is similar to the petitioner. Therefore, further review of the advertisement is not necessary.
- An advertisement for KIK Custom Products for a production unit manager, located in Gainesville, Georgia. The advertisement also states that "KIK Custom Division is the #1 contract manufacturer for the Consumer Packaged Goods Industry (CPG) and the largest contract manufacturer for some of the world's largest CPG companies." The petitioner did not provide any additional information to establish that the

advertising company and the petitioner share the same general characteristics.

Moreover, the job duties for the posting include, “responsible for managing the overall daily production process,” and “trains and coaches team to meet defined productivity targets.” The job duties for the offered position do not include the daily task of managing the production process and defining productivity targets. Thus, it appears that the duties for the position offered by the advertising company are different from the duties of the proffered position. Therefore, further review of the advertisement is not necessary.

- An advertisement for Guardian Science and Technology Center for an advanced insulated glass engineer, located in Carleton, Michigan. The advertisement also states that the advertising company is “one of the world’s largest manufacturers of float glass and fabricated glass products. The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics.

Moreover, the job duties for the posting include, “test procedure creation, execution and reporting,” test schedule creation, sampling schedules, maintenance and compliance,” “create detailed plans, flow diagrams to communicate project test plans and workflow,” and “practice lab and testing safety compliance according to Environmental, Health and Safety standards.” The duties listed in this advertisement are not listed in the job duties for the proffered position. Thus, it appears that the duties for the position offered by the advertising company are different from the duties of the position offered to the beneficiary. Therefore, further review of the advertisement is not necessary.

- An advertisement by The Albrecht Group seeking a production supervisor for an undisclosed client. Thus, the advertisement does not provide sufficient information regarding the employer. The petitioner did not provide any additional information to establish that the recruiter’s client and the petitioner share the same general characteristics.

Further, there is insufficient information in the record to establish that the advertised positions are parallel to the proffered position. That is, there is a lack of information regarding the specific knowledge and skills required for the positions, the complexity of the job duties, the amount of independent judgment required, and the amount of supervision received. Accordingly, it is unclear whether the advertised positions are parallel to the proffered position. Thus, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

It must be noted that even if all of the job postings indicated that a requirement of bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just eight advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of engineer, machines at a manufacturer of glass bottles and containers for food, pharmaceuticals, cosmetics, perfumery and alcohol required a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty (or its equivalent) for entry into the occupation in the United States.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in positions parallel to the proffered position, among organizations similar to the petitioner.

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Specifically, the petitioner failed to demonstrate how the proffered position's duties as described in the record of proceeding comprise a position that requires the theoretical and practical application of a body of highly specialized knowledge such that only a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level based upon the occupational classification

"Mechanical Engineers" at a Level II (qualified) wage.⁶ This wage-level designation is indicative of a position a step above entry-level, but a step below experienced, relative to others within the designated occupation.⁷ That is, in accordance with the relevant DOL explanatory information on wage levels, this Level II wage rate indicates that the beneficiary will be expected to perform moderately complex tasks that require limited, if any, exercise of judgment. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁸

The record lacks sufficiently detailed information to distinguish the proffered position as more

⁶ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

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

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at: http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁷ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level II wage rate is describes as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Id.

⁸ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

complex or unique than other positions in the pertinent occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

In response to the director's request for evidence, counsel for the petitioner contends that "oversight of IS machine operations is a position that requires the attainment of at least a Bachelor's degree." Counsel further states:

Maintaining and overseeing the IS machine process, as well as implementing work orders for production, requires a highly specialized knowledge of the physics and mathematics involved in glass container production. For example, [the beneficiary] will be required to implement preventive maintenance programs and new work orders for the machine, a job that requires in depth knowledge of the thermal properties involved in glass formation. One of the thermal properties important to glass formation is the measure of the glass's viscosity, which is the measure of its resistance to deformation by stress. Glass's viscosity changes with its temperature, and is measured by various viscosity "fixpoints." Understanding the working point, the fixpoint at which a gob of molten glass may be delivered to a forming machine, and the formulation for calculating the working point, is crucial to operation of the IS machine. . . .

It appears that the machines utilized by the petitioner may perform complex operations; however, the petitioner does not establish why the beneficiary would need a bachelor's degree while other positions that work with the machines do not appear to require a bachelor's degree. In addition, the petitioner provided a much more expansive job description in response to the RFE and it is not clear why this expansive job description was not submitted with the initial filing. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

Consequently, as the petitioner fails to demonstrate how its particular position is so complex or unique relative to other positions in the pertinent occupation that can be performed by an individual without at least a bachelor's degree in a specific specialty, or its equivalent for entry into the occupation in the United States, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its

equivalent, for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past. Counsel for the petitioner stated that the petitioner "has not hired, nor would it be feasible to hire, an individual with lesser qualification for this complex position." However, the petitioner did not submit any evidence to corroborate this claim. 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 Obaighena*, 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). Thus, the petitioner did not submit evidence to satisfy this criterion.

As the petitioner has not provided any evidence to demonstrate a history of recruiting and hiring only individuals with at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position, it has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Upon review of the entire record of the proceeding, the AAO finds that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. There is insufficient evidence to establish that the duties of the proffered position require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level II wage-rate designation (the second of four possible wage-levels) in the LCA. That is, that the proffered position's Level II wage designation is indicative of a position with moderately complex skills relative to others within the occupational category and hence one not likely distinguishable by relatively specialized and complex duties.

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the duties of the position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, 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.

B. Lack of an LCA That Corresponds to the Petition

The AAO will now address the director's basis for denying the petition, namely whether the petition must also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition.

Specifically, the LCA submitted with the petition was certified for SOC (O*NET/OES) Code 17-2141 or "Mechanical Engineers." For the reasons discussed, *supra*, the job as described by the petitioner does not appear to fall within this occupational classification. Thus, the LCA submitted with the petition does not correspond to the petition.

To permit otherwise may result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing that petitioner to submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for. 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]."). Again, according to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See* 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

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

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

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

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, the petitioner has failed to submit a valid LCA that has been certified for the proper occupational classification, and the petition must be denied for this additional reason.

Lastly, as discussed in this decision, the petitioner did not submit sufficient evidence to establish that the proffered position qualifies as a specialty occupation. Absent the determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, even if the proffered position were a "Mechanical Engineer" position that qualified as a specialty occupation, there is insufficient evidence that the beneficiary has the requisite license for engineers in Missouri (or the ability to get licensure) in order to use the title of "engineer" to perform the duties of such a position.

IV. 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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