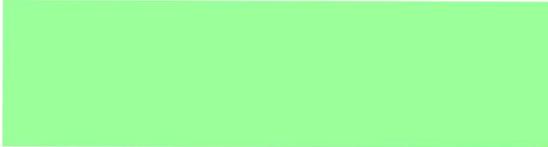


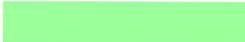
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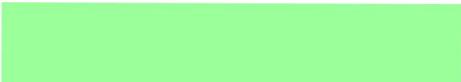
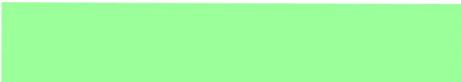
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: FEB 26 2015 OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the supporting documents, the petitioner describes itself as a law firm that was established in [REDACTED]. In order to continuously employ the beneficiary, 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).¹

The director reviewed the record of proceeding and determined that the petitioner did not establish eligibility for the benefit sought. Specifically, the director stated that (1) the petitioner failed to submit a valid Labor Condition Application (LCA) that was certified by the U.S. Department of Labor (DOL) prior to submitting the Form I-129; and (2) the petitioner had not established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The director denied the petition.

The record of proceeding 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 decision; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.²

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

II. STANDARD OF PROOF

As a preliminary matter, it is noted that in the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), unless the law specifically provides that a different standard applies.

The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). In visa petition proceedings, the burden of proving

¹ Initially, the petitioner designated the proffered position on the Form I-129 as a "Law Clerk" position. Thereafter, in response to the RFE, the petitioner designated the position as a "Legal Support Worker (Law Clerk)." No explanation for the variance in the petitioner's job title was provided.

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

eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, that burden has not been met.

III. LABOR CONDITION APPLICATION AND H-1B VISA PETITION PROCESS

A. Legal Framework

In pertinent part, the Act defines an H-1B nonimmigrant worker as:

[A]n alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . who meets the requirements for the occupation specified in section 214(i)(2) . . . and with respect to whom *the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)*

Section 101(a)(15)(H)(i)(b) of the Act (emphasis added).³

In turn, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), requires an employer to pay an H-1B worker the *higher* of either the prevailing wage for the occupational classification in the area of employment or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services.⁴ See 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *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).

Implemented through the LCA certification process, section 212(n)(1) is intended to protect U.S. workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers. See, e.g., 65 Fed. Reg. 80,110, 80,110-111, 80,202 (2000). The LCA currently requires petitioners to describe, *inter alia*, the number of workers sought, the pertinent visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place(s) of employment. The employer must also comply with DOL's notice requirements.⁵ 20 C.F.R. § 655.734.

³ In accordance with section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Act describing functions which were transferred from the Attorney General or other Department of Justice official to DHS by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. See 6 U.S.C. § 557 (2003) (codifying HSA, tit. XV, § 1517); 6 U.S.C. § 542 note; 8 U.S.C. § 1551 note.

⁴ The prevailing wage may be determined based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(ii).

⁵ The employer must provide notice that it intends to hire an H-1B nonimmigrant worker by either providing notice of the LCA to the bargaining representative, or where there is no bargaining representative, providing

To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). If an employer does not submit the LCA to USCIS in support of an H-1B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security. See section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b); see also 56 Fed. Reg. 37,175, 37,177 (1991); 57 Fed. Reg. 1316, 1318 (1992) (discussing filing sequence).

Upon receiving DOL's certification, the employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

We further note that the general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for benefit requests is found at 8 C.F.R. § 103.2(b)(1):

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

The instructions for the Form I-129 state that the petitioner must submit all required initial evidence along with all of the supporting documentation with the petition at the time of filing. The instructions also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129. Notably, the instructions continue by specifying

notice of the filing of the LCA by posting notice of the LCA in at least two conspicuous locations in the employer's place(s) of business in the area of intended employment or electronically. The notice must contain specific information about the nonimmigrant worker(s) sought and the process for submitting allegations of misrepresentation or non-compliance related to the LCA. The notice must include the statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor." 20 C.F.R. § 655.734.

that a petition requesting an extension must be filed with evidence that DOL has certified an LCA for the specialty occupation which is valid for the period of time requested.

B. Analysis

In the instant case, the petitioner submitted the H-1B petition on October 16, 2013. The petitioner indicated on the Form I-129 that it intended to employ the beneficiary from November 1, 2013 to November 1, 2016. With the petition, the petitioner submitted an LCA [REDACTED], valid from September 1, 2010 to September 1, 2013. Thus, the LCA was not valid for the requested dates of employment.

The director issued an RFE, stating, *inter alia*, the following:

The validity dates on the Form ETA 9035(E) Labor Condition Application (LCA) from the Department of Labor that you submitted have expired. Submit evidence of an approved LCA for the beneficiary's specialty occupation, valid for the period of intended employment. Eligibility must be established as of the date of filing the Petition for a Nonimmigrant Worker (Form I-129); therefore, the LCA must be certified **prior to** the filing of the Form I-129.

Thus, the petitioner was put on notice that additional evidence was required and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated.

In response to the director's RFE, the petitioner submitted a new LCA [REDACTED] that was certified on February 21, 2014 – over four months after the H-1B petition was filed. The new LCA was valid from February 15, 2014 to February 15, 2017. The petitioner did not provide (1) an LCA certified by DOL prior to the H-1B filing and (2) that was valid for the employment dates requested in the petition.

In a letter submitted with the RFE response, the petitioner stated the following:

In response to your request for an LCA that is certified prior to the filing of Form I-129, we are requesting that newly certified LCA which predates amended form I-129 be accepted as an amended petition pursuant to 8 C.F.R. 214.2(h)(2)(E).

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

In the alternative, Petitioner would like to point out that the fact that the case load of the firm has been so heavy. Petitioner and beneficiary have been especially involved in high pressure and stressful international oil and gas litigation with frequent deadlines. In the course of trying to meet the deadline of 11/1/2013, Petitioner inadvertently omitted to file an approved LCA prior to submitting the original Form I-129. Petitioner's position is that the requirement that the LCA be certified prior to the filing of Form I-129 is not a jurisdictional requirement and can therefore be waived depending upon equitable circumstances. . . .

In the appeal brief, the petitioner recognizes that it erred but claims that the "mistake was mere inadvertence and not willful." The petitioner requests that the omission be overlooked because it was busy and had other competing deadlines. Thus, the petitioner acknowledges that it did establish eligibility for the requested benefit by providing required evidence in accordance with the applicable statutory and regulatory provisions.

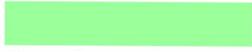
USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). A benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed. 8 C.F.R. § 103.2(b)(12).

The petitioner submitted the H-1B petition on October 16, 2013 without required evidence. In response to the RFE, the petitioner attempted to submit an "amended petition"; however, to file an amended or new petition, the petitioner must properly submit the submission in accordance with the applicable provisions and Form I-129 instructions, along with the required fee(s) – which it did not do here.⁶ Further, doing so would not "cure" the instant petition. Rather, each petition filing is a separate proceeding with a separate record.⁷ *See Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-

⁶ The request to reconsider the original petition as an amended petition was rejected by the director. The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) requires that a petitioner *file* an amended or new petition, *with the required fee(s)*, to reflect any material changes. Here, the petitioner submitted its request in response to the director's RFE, rather than properly filing the submission with USCIS and including the required fee(s) in accordance with the regulations and Form I-129 instructions.

Further, on the new Form I-129 and new LCA, the petitioner marked that the basis for the classification request was "Continuation of previously approved employment without change with the same employer" rather than "Amended petition." Thus, contrary to the petitioner's assertion, the submission does not indicate that it is for an amended petition.

⁷ Moreover, the petitioner's assertion on appeal that the delay was the fault of USCIS and that the "conduct on the part of USCIS unfairly prejudiced the Petitioner's application" is without merit. As discussed, the petitioner must establish that it is eligible for the requested benefit at the time of filing the benefit request,



cv-1261, 2009 WL 497141, at *6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000).

Moreover, we observe that the new LCA submitted in response to the RFE contains a number of deficiencies. For example, an authorized official of the petitioner has not signed and dated the Declaration of Employer (section K), as that section requires in order to obtain (1) the petitioner's attestation that the statements in the LCA are true and correct, that the petitioner "agree[s] to comply with the [LCA] Statements as set forth in the Labor Condition Application - General Instructions Form ETA 9035CP and with the U.S. Department of Labor regulations (20 CFR part 655, Subparts H and I)," and (2) the petitioner's agreement to make the LCA, its supporting documentation, and other records available to DOL.

It is noted that on the first page of the new LCA, the petitioner affirmatively checked the box confirming that that it "understood and agreed" to take the listed actions within the specified times and circumstances. The listed actions are the following:

- Print and sign a hardcopy of the electronically filed and certified LCA;
- Maintain a signed hardcopy of this LCA in my public access files;
- Submit a signed hardcopy of the LCA to the United States Citizenship and Immigration Services (USCIS) in support of the I-129, on the date of the submission of the I-129;
- Provide a signed hardcopy of this LCA to each H-1B nonimmigrant who is employed pursuant to the LCA.

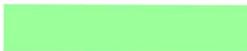
In addition, in the section "Signature Notification and Complaints" (Section N, page 5), the following notice is provided:

The signature and dates signed on this form will not be filled out when electronically submitting to the Department of Labor for processing, but **MUST** be completed

and each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. 8 C.F.R. § 103.2(b)(1).

The petitioner suggests that there were delays by USCIS in the processing of the H-1B petition. Upon review, we note that the petition was adjudicated within normal processing times. Although the petitioner could have requested expedited processing by submitting a Form I-907 (Request for Premium Processing Service) along with the required fee, it did not do so. We further observe that the petitioner submitted the Form I-129 petition on October 16, 2013, obtained a new LCA approximately four months later (on February 21, 2014), and waited approximately two months to respond to the director's RFE.

A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's attempt to shift its evidentiary burden in this proceeding from itself to USCIS is without merit and contrary to section 291 of the Act, 8 U.S.C. § 1361.



when submitted non-electronically. If the application is submitted electronically, any resulting certification **MUST** be signed *immediately upon receipt* from the Department of Labor before it can be submitted to USCIS for processing.

DOL and DHS regulations require that the beneficiary's employer or a representative of the employer submit a copy of the signed, certified Form ETA 9035/ETA 9035E to USCIS in support of the Form I-129 petition.

The DOL regulation at 20 C.F.R. § 655.705(c) states, in pertinent part, the following:

- (1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. . . . The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service or INS) in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B nonimmigrant. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.

* * *

- (3) The employer then may submit a copy of the certified, signed LCA to DHS with a completed petition (Form I-129) requesting H-1B classification.

Furthermore, the regulation at 20 C.F.R. § 655.730(c), in pertinent part, states the following:

- (2) *Undertaking of the Employer.* In submitting the LCA, and by affixing the signature of the employer or its authorized agent or representative on Form ETA 9035E or Form ETA 9035, the employer (or its authorized agent or representative on behalf of the employer) attests the statements in the LCA are true and promises to comply with the labor condition statements (attestations) specifically identified in Forms ETA 9035E and ETA 9035, as well as set forth in full in the Form ETA 9035CP.
- (3) *Signed Originals, Public Access, and Use of Certified LCAs.* . . . For H-1B visas only, the employer must submit a copy of the signed, certified Form ETA 9035 or ETA 9035E to the U.S. Citizenship and Immigration Services (USCIS, formerly INS) in support of the Form I-129 petition, thereby reaffirming the employer's acceptance of all of the attestation obligations in accordance with 8 CFR 214.2(h)(4)(iii)(B)(2).

As noted in the DOL regulations cited above, 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), states that the petitioner will provide "[a] statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay."

The regulation at 8 C.F.R. § 103.2(a)(2), concerning the requirement of a signature on applications and petitions of which the LCA is a part according to 8 C.F.R. § 103.2(b)(1), states the following:

An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. . . .

Based on DOL and DHS filing requirements, the LCA that is filed with USCIS in support of an H-1B petition must be certified by DOL, signed by the beneficiary's employer, and submitted to USCIS on the date the Form I-129 is filed. Here, the petitioner submitted a copy of a certified, but unsigned, Form ETA 9035/9035E after the petition was filed that is not valid for the entire period requested in the petition. Thus, the petitioner did not comply with the regulatory requirements for H-1B visa classification as set forth at 8 C.F.R. § 103.2(a)(2), 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), 8 C.F.R. § 655.730(c)(2) and (3). Accordingly, the director properly denied the petition and the appeal must be dismissed.

IV. REQUIRED WAGE

Beyond the director's decision, we note that the petitioner stated on the Form I-129 (page 5) and on the H-1B Data Collection and Filing Fee Exemption Supplement (page 17) that the beneficiary would be paid \$22,360 per year for full-time employment. The petitioner signed these documents on October 11, 2013. In response to the RFE, the petitioner resubmitted these documents with a signature date of May 14, 2014. In this second submission, the petitioner again indicated (on pages 5 and 17) that the beneficiary would be paid \$22,360 per year for full-time employment.

In the response to the RFE, the petitioner submitted a new LCA indicating that the proffered position falls under the occupational category "Legal Support Workers, All Other" at a Level I (entry) wage level. The petitioner claimed on this LCA that the prevailing wage for the offered position was \$26,416 per year. The petitioner claimed that the source of information for the prevailing wage was the Office of Foreign Labor Certification (OFLC) Online Data Center database. Thus, the H-1B petition indicates that the beneficiary would be paid \$4,056 per year less than the prevailing wage (as stated by the petitioner).

Assuming, *arguendo*, that the petitioner properly selected the occupational category and wage level for the LCA as claimed in the RFE response, we note that a search of the OFLC Online Data Center database indicates that the prevailing wage for the occupational category of "Legal Support Workers, All Other" for [REDACTED] Mississippi) was \$36,878 per year at the time the

petition was submitted (not \$26,416 per year as claimed by the petitioner).⁸ Thus, the offered salary to the beneficiary would be \$14,518 per year less than the prevailing wage.

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.

The petitioner was required to provide, at the time of filing the H-1B petition, a valid LCA certified for the requested dates of employment and 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.⁹ Here, the petitioner has not established that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. Thus, for this reason also, the petition cannot be approved.

V. SPECIALTY OCCUPATION

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human

⁸ For more information regarding the wages for "Legal Support Workers, All Other" – SOC (ONET/OES Code) 23-2099, see <http://www.flcdatacenter.com/OesQuickResults.aspx?code=23-2099&year=14&source=1> (last visited February 25, 2015).

⁹ By attempting to submit a preexisting LCA to USCIS, it appears that the petitioner sought to impede efforts to verify the wages and working conditions offered to the beneficiary. Full compliance with the LCA and H-1B petition process, including adhering to the proper sequence of submissions to DOL and USCIS, is critical to the U.S. worker protection scheme established in the Act and necessary for H-1B visa petition approval.

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.

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

Upon review of the record, we note that there are discrepancies in the record with regard to the petitioner's claims about the occupational classification and level of responsibility inherent in the proffered position. Notably, these material conflicts undermine the assertion that the proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

More specifically, with the initial Form I-129, the petitioner submitted an LCA for the occupational category of "Law Clerks" - SOC (ONET/OES) code 23-2092. In response to the RFE, the petitioner submitted a new LCA for the occupational category of "Legal Support Worker" - SOC (ONET/OES) code 23-2099 at a Level I (entry).¹⁰ The petitioner stated in a letter submitted in response to the RFE that the educational requirements for the duties of the position are a bachelor's degree and a juris doctorate in law. The petitioner reported that the beneficiary supervises staff members and delegates responsibilities to supervisory staff based upon their skill levels. The

¹⁰ The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

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

petitioner submitted a copy of the O*NET Online Summary Report for the occupational category "Lawyers" and claimed that it was relevant in this matter.

In addition, the petitioner submitted a business plan. In describing its business, the petitioner indicated that the two partners of the firm, "are assisted by two attorneys who are associates (Legal Support Workers-Law Clerks)." The petitioner further stated that it "will continue to service its current clientele using current personnel of two lawyers, three intake assistants and one receptionist secretary" and that the "addition of two law clerks will be exclusively devoted to rapid development of its niche area of Oil and Gas supervision and preparation of documents and other materials needed in other areas of practice." Under "Personnel Plan," the petitioner states "[t]wo law clerks working full-time as Associate Attorneys shall be hired by [the petitioner], upon approval by [USCIS]."

On appeal, the petitioner asserted that "[the] specialty occupation work of a law clerk is the same as that of an attorney." The petitioner claimed that the "research and work done by a trained attorney is completely different than a paralegal or legal assistant." The petitioner further asserted that the "duties of a law clerk are similar to duties done by judicial clerks." The petitioner emphasized that the beneficiary has a law degree from [REDACTED] and is licensed to practice as an attorney in the state of Florida.

With respect to the LCA, DOL provides specific guidance for selecting the most relevant Occupational Information Network (O*NET) classification code. The "Prevailing Wage Determination Policy Guidance" states the following:

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

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

At the time of filing this petition, the prevailing wage for the occupational category "Legal Support Workers, All Other" – SOC (ONET/OES Code) 23-2099, at a Level I (entry) was \$36,878 per year.¹¹ Further, the prevailing wage for the occupational category "Lawyers" SOC (O*NET/OES

¹¹ For more information regarding the prevailing wage for "Legal Support Workers, All Other" – SOC (ONET/OES Code) 23-2099, see <http://www.flcdcenter.com/OesQuickResults.aspx?code=23->

Code 23-1011 at a Level I was \$56,326 per year.¹² Thus, if the petitioner believed that the proffered position was a combination of occupations ("[the] work of a law clerk is the same as that of an attorney"), then according to the DOL guidance the petitioner should have chosen the relevant occupational category for the highest paying occupation, in this case "Lawyers."

When responding to a request for evidence (or when submitting an appeal), a petitioner cannot offer a new position to the beneficiary, materially change a position's associated job responsibilities, or alter the claimed occupational category of a position. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N at 249. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Here, the petitioner has provided inconsistent information regarding the occupational category for the proffered position and, consequently, the nature of the position. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has not established that the proffered position satisfies any of the applicable provisions. For this reason also, the petition cannot be approved.

VI. ORAL ARGUMENT REQUEST

On appeal, the petitioner requested an oral argument stating that "[t]he facts of this case involve questions of law and fact that cannot be adequately expressed in writing." Specifically, the petitioner stated that "an oral argument is necessary to provide a much detailed explanation on the issue of how [USCIS] should treat cases where H-1B visa was current at the time [extension of stay request] was received, but lapsed due to processing delay."

USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). Upon review, the written record of proceeding fully represents the facts and issues in this matter, and there is no explanation why any facts or issues in this matter,

2099& &year= 14&source=1 (last visited February 25, 2015).

¹² For more information regarding the prevailing wage for "Lawyers" SOC (ONET/OES) Code 23-1011, see <http://www.flcdatacenter.com/OesQuickResults.aspx?code=23-1011& &year=14&source=1> (last visited February 25, 2015).

whether novel or not, have not and cannot be adequately addressed in writing. Consequently, we deny the request for oral argument.

VII. EQUITABLE TOLLING

The petitioner asserts that USCIS should apply "equitable tolling" to stay the requirement of 8 C.F.R. §214.2(h)(4)(i). However, our jurisdiction is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). Specifically, our jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, we have no authority to adjudicate equitable considerations that may be involved in our dismissal of this appeal.

IX. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision.¹³ 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. at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed.

¹³ As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding.