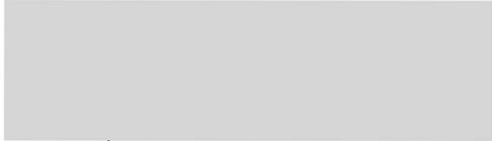




U.S. Citizenship
and Immigration
Services

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PETITION RECEIPT #:



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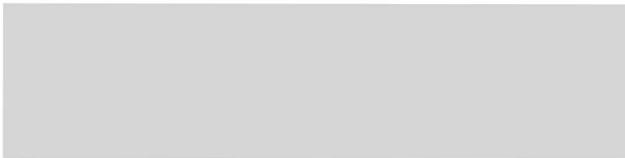
Petitioner:



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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a geotechnical engineering firm, with 60 employees, that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Land Surveyor" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, concluding that the petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the Director's bases for denial of the petition were erroneous, because, the petitioner contends, the Director failed to recognize that the evidence of record satisfied two of the supplementary criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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, and the petition will be denied.

I. STANDARD OF REVIEW

As a preliminary matter, and in light of the petitioner's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm 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. In pertinent part, that decision states the following:

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

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *



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

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

Id.

We conduct our review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the Director's determination that the petitioner did not establish the proffered position as a specialty occupation was correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that it does not establish that the proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

II. LEGAL FRAMEWORK

The issue on appeal is whether the petitioner provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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 must look 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."

III. THE PETITIONER AND ITS PROFFERED POSITION

The record establishes the accuracy of the appeal brief's description of the petitioner as "a multidiscipline geotechnical and materials engineering and testing firm" that is based in [REDACTED], [REDACTED] and that provides its services to both the public and private sectors.

We also find that the copies of invoices and contract-related documents submitted from the petitioner's business records support the petitioner's claim that it conducts its business operations in the [REDACTED] of [REDACTED]. The articles submitted into the record confirm that the [REDACTED] is highly prone to geologically-induced damage to structures built upon its soil unless the adverse properties of the soil are recognized, properly evaluated, and, to the extent possible, mitigated by appropriate geotechnical-engineering measures. We observe, in particular, that the article "[REDACTED] History, Geography, and Planning/Management Issues" discusses geotechnical reasons why foundation shifting, pavement failure, utility-line ruptures, and slope failure may occur in the general area where the petitioner operates.

According to the Form I-129, the petitioner was established in [REDACTED] and employed 60 persons at the time of the petition's filing. On the Form I-129 the petitioner listed a gross annual income of "\$6.8 million (approx.)," and an annual income of \$491,228."

The petitioner's August 12, 2014 letter responding to the RFE includes the following description of the proffered position:

Detailed Job Description

The [petitioner's] Land Surveyor position holds major high-level responsibilities. The duties include:

Managing survey projects: [The petitioner's] Professional Engineers (licensed) will assign individual projects to the [the petitioner's] Land Surveyor.

Producing internal drawings: drawings for internal use by [the petitioner] will be prepared using Autocad, <http://autodesk.com/products/autocad/overview>, a 2D and 3D design tool.

Conducting field verification checks: [The] Land Surveyor will go into the field to determine if the recommendations of [the petitioner's] professional engineers were followed. For example, [the petitioner's] Professional Engineers may recommend that the contractor not dig next to an existing foundation but instead 10 feet away for safety reasons. [The petitioner's] Land Surveyor's will survey to ensure any digging actually occurred in the proper place. Also [one of the petitioner's] Professional Engineer[s] may recommend installation of instruments to cover ground movements. [A] Land Surveyor [of the petitioner] will survey to ensure that the drill crew positioned instruments in the proper location.

Preparing accurate and complete field notes: [The petitioner's] Land Surveyor will go into the field to survey project sites. In particular, the [petitioner's] Land Surveyor will look for landslide features such as tilted trees and cracked ground, that would suggest landslide movements. [The petitioner's] Land Surveyor will prepare accurate and complete topographic survey maps, which is a prerequisite to accurately depict subsurface geology and its spatial relationship to foundations.

Verifying accuracy and maintaining survey data: [The petitioner's] Land Surveyor will internally verify accuracy of survey data for [the petitioner's] projects. Academic coursework related to a survey class provides [the petitioner's] Land Surveyor with the ideal academic preparation to review pertinent information.

According to the petitioner, it has never before sought to employ anyone in the proffered position.

IV. ANALYSIS

At the outset, we observe that the petitioner asserts that the evidence of record is sufficient to merit approval of the petition on each of two independent grounds, namely, (1) that it satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that is, by showing that the particular position that is the subject of the petition is so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty;¹ and (2) that it satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), that is, by establishing that the nature of the proffered position's specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of at least a bachelor's degree in a specific specialty.

Adverse import of the Labor Condition Application (LCA) submitted into the record

As the LCA which the petitioner submitted as corresponding to the petition, and to the prevailing-wage rate which the duties and responsibilities of the proffered position merited, the petitioner submitted an LCA that had been certified for use with a position within the Surveyors occupational group, identifiable by the Specific Occupational Code (SOC) 17-1022, for which the appropriate prevailing wage-rate would be Level I - the lowest of the four prevailing-wage rates that can be assigned - which, for the time of the LCA's certification for the petitioner's location was \$14.69 per hour. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) - OFLC (Office of Foreign Labor Certification) Online Data Center.² We note that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational 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.³

¹ The petitioner's attorney makes this claim at footnote 1 of her Brief in Support of Appeal, stating that the proffered position "would also qualify as a 'specialty occupation' based on the fact that the position is so complex or unique that it could only be performed by an individual with a bachelor's degree in engineering.

² The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Dep't of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

³ For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev.

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) position 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.⁴ The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

In the brief on appeal, the petitioner asserts that the proffered position exceeds the requirements of the Surveyors occupational group as described in DOL's *Occupational Outlook Handbook (Handbook)*. The petitioner asserts, for instance, that the proffered position is distinguishable from those covered in the *Handbook* because "[a] key function of the proffered position is to provide 'slope stability analysis,' which is not data [that] landscape typically focus on collecting," and because while "other land surveyors will measure, plot, and identify boundaries, [the petitioner's] Land Surveyor duties require greater data and analysis relevant to existing and potential ground shift." We also note that the above-quoted August 12, 2014 petitioner's letter responding to the RFE introduced the proffered position as "hold[ing] major high-level responsibilities." We also find that the petitioner's "Job Description" pie chart submitted on appeal ascribes 40% of the proffered position's duties to "Managing survey projects" as an indication that the petitioner would be relying upon the beneficiary to engage in management responsibilities, at least with regard to the survey projects which would be assigned to him. Moreover, the petitioner's assertions about the proffered position suggests that its holder would have latitude to independently exercise his skills, technical knowledge, and judgment in performing functions that the petitioner characterizes as essential to public safety, subject of course, to ultimate review by the petitioner's civil engineers. Further, there is no indication in any of the petitioner's statements that it intended to closely supervise its Surveyor or closely monitor the Surveyor's work. In addition, it appears that the petitioner regards a person with a U.S. bachelor's degree, or the foreign equivalent, in engineering (preferably civil engineering) to be fully equipped to perform the proffered position.

Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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

We find that the petitioner's characterization of the proffered position and its constituent duties materially conflict with the Level I prevailing-wage level, which the petitioner attested as sufficient and adequate for the duties and responsibilities of the proffered position by its submission of an LCA certified for that lowest of the four assignable levels.

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

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

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

None of the statements or information provided by the petitioner about the proffered position, its constituent duties, and the position-holder's responsibilities comports with the type of position for which the above-quoted section of DOL's policy guidance prescribes use of the Level I prevailing-wage rate.

That Policy Guidance document describes the next higher wage-level 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.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, **Level II** wage rate itself indicates performance of only "moderately complex tasks that require limited judgment," is telling with regard to the relatively low level of

complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this **Level II** wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned Prevailing Wage Determination Policy Guidance describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

Id.

The Prevailing Wage Determination Policy Guidance describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Id.

We find that the conflict between (1) the Level I prevailing-wage rate that the petitioner attested as appropriate for the position by its submission of an LCA certified for that rate, on the one hand, and (2) the petitioner's assertions regarding the relative specialization, complexity, and/or uniqueness of the proffered position and its constituent duties undermines the credibility of the petition as a whole and, in particular, the credibility of the petitioner's claim that the proffered position is so complex or unique that it can only be performed by a person with a bachelor's degree in a specific specialty, or its equivalent, and also the credibility of the petitioner's claim that the nature of the proffered position's specific duties is so specialized and complex that their performance would require

knowledge usually associated with the attainment of at least a bachelor's degree, or the equivalent, in civil engineering or a related specialty. That is, the claimed level of education, knowledge and special skills required to perform the duties of the proffered position as stated by the petitioner is at odds with the wage-rate that the petitioner attested as appropriate for the position by the LCA that it submitted into the record, which is indicative of a comparatively low, entry-level position relative to others within the same occupation. Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time (for the claimed occupational category "Surveyor") would have been \$18.33 per hour (\$38,126 per year) for a Level II position, \$21.98 (\$45,718 per year) for a Level III position, and \$25.62 per hour (\$53,290) per year for a Level IV position, as opposed to the \$14.69 per hour (\$30,555 per year) wage-rate specified in the LCA.

The petitioner indicates that it will be relying heavily on the beneficiary's work product and expertise in an area critical to the company's operations. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where (relative to others within the occupation) the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment.

We further note find that the Level I prevailing-wage aspect of the LCA undermines the credibility of the petition and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. Consequently, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed. We are, therefore, precluded from finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. For this reason also, the appeal will must be dismissed and the petition will be denied.⁵

Additional material deficiencies in the record of proceeding

We shall now address some additional evidentiary deficiencies that materially undermine the petition's specialty occupation claim and so constitute additional reasons to dismiss the appeal.

In the appeal, the petitioner references three courses offered as part of the [REDACTED]'s coursework for a bachelor's degree in civil engineering. The petitioner has not

⁵ Again we acknowledge that the petitioner's appeal has asserted that the Director erred only in his adverse findings with regard to the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

established that the full content of such soil-related coursework is necessary for performance of the proffered position. Moreover, the petitioner has not established either (1) the extent of substantive soil-stability/soil-condition knowledge that the beneficiary would have to bring to bear in the proffered position or (2) that sufficient knowledge for performance of the soil evaluation aspects of the proffered position is not available through other avenues, such as, for instance, professional education vendors, community colleges offering surveyor or engineering technician courses, or online continuing education courses. Thus, we conclude that the petitioner has not substantiated its claim that only a bachelor's degree or the equivalent in engineering (preferably civil engineering) would equip the beneficiary to meet the claimed complexity, specialization, and/or uniqueness of the position.

In the same vein, we also find that the evidence of record does not substantiate the petitioner's claim to the effect that "public safety" requires that its surveyor have attained no less than a bachelor's degree, or the equivalent, in engineering (preferably civil engineering). While the petitioner suggests that it is now adding surveyors to its staff in reaction to the [REDACTED] building collapse in [REDACTED], the petitioner presents neither documentary evidence to establish a causal correlation between the [REDACTED] event and the absence of surveyors on the staff of the petitioner, which is a geotechnical engineering firm that started in [REDACTED]. In fact, although the articles submitted about the [REDACTED] incident indicate that soil composition was a factor, neither they nor any other information in the record (1) state what defective aspects of the petitioner's practices, if any, contributed to the incident, and (2) why a surveyor with a bachelor's degree in engineering would be required to remedy such practices. 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)). Also, the record of proceeding does not reference any section of [REDACTED] law that would require the petitioner to hire only surveyors with at least a bachelor's degree in engineering, or its equivalent.

For these reasons also, we conclude that the petitioner has not provided a credible evidentiary foundation to establish that it has satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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.

Beyond the decision of the Director, we find an additional aspect of the record of proceeding that precludes approval of the petition, namely, the petitioner has not provided an LCA that has been certified for a prevailing-wage rate that corresponds to the petitioner's claims about the level of responsibility, judgment, and knowledge required for the proffered position.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing-wage level for the occupational classification in

the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, if the proffered position were found to qualify as a specialty occupation on the basis that it was a higher-level and more complex position, as claimed elsewhere in the petition, the petition could still not be approved as the petitioner has not established that it would pay the wage required for that level of work as required under the Act.⁶

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

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

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

⁶ Here, provided the proffered position was in fact found to be a higher-level and more complex position (which requires special skills) as asserted by the petitioner elsewhere in the petition, the petitioner would not have submitted a valid LCA that corresponds to the claimed duties and requirements of the proffered position; that is, specifically, the LCA submitted in support of the petition would then would not correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance section 212(n)(1)(A) of the Act and the pertinent LCA regulations. 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).

part (emphasis added):

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.⁷

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements, which if accepted as accurate would result in the beneficiary being paid a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for this additional reason.

V. CONCLUSION AND ORDER

An application or petition that does not 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 143, 145 (3d Cir. 2004) (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 the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d

⁷ 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). Upon receiving DOL's certification, the prospective 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, including the specific place of employment. 20 C.F.R. § 655.705(b); *see generally* 8 C.F.R. § 214.2(h)(4)(i)(B).



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 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.