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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 05 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and, upon consideration of a subsequent motion to reopen and reconsider, affirmed that decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In the Form I-129 visa petition, the petitioner describes itself as a 70-employee clothing manufacturer[1] established in 1989. In order to employ the beneficiary in what it designates as a part-time computer systems analyst position at a salary of $30,160 per year,[2] the petitioner seeks to extend his nonimmigrant classification as a 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 evidence in the record of proceeding failed to establish that the proffered position qualifies for classification as an H-1Bspecialty occupation.

On appeal, the petitioner's counsel supplements the Form I-290B with counsel's memorandum in support of the appeal (brief) and its allied documentary exhibits, some of which had been previously submitted.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; (5) counsel's motion to reopen and reconsider the director's decision; (6) the director's letter affirming the decision to deny the petition, upon consideration of the motion; and (7) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

As will be discussed below, based upon its complete review of the entire record of proceeding, the AAO concludes that the evidence fails to establish that the position as described constitutes a specialty occupation. Accordingly the appeal will be dismissed, and the petition will be denied.

---

[1] The petitioner provided a North American Industry Classification System (NAICS) Code of 315239, "Womens and Girls' Cut and Sew Other Outerwear Manufacturing." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2007 NAICS Definition, "315239 Womens and Girls' Cut and Sew Other Outerwear Manufacturing," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed Aug. 27, 2013).

[2] The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the occupational classification of "Computer Systems Analysts," SOC (O*NET/OES) Code 15-1121, and for which the appropriate prevailing wage level would be Level I (the lowest of the four assignable wage-rates).

Statutory and Regulatory Framework

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires [(1)] 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 requires [(2)] 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, the 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).[3] To avoid this illogical and absurd 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree *in the specific specialty* as the minimum for entry into the occupation, as required by the Act.

---

[3] The AILA memorandum submitted by counsel appears to argue that a degree in a specialty is not required. The AAO disagrees. As noted, such an interpretation would result in a position which does not satisfy the statutory or regulatory definition of a "specialty occupation" nonetheless qualifying as a specialty occupation because it meets a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A), which would be an illogical and absurd result.

The Evidentiary Standard

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, the AAO affirms that, in the exercise of its appellate review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe.* Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the petitioner did not establish the proffered position as a specialty occupation was correct. Upon its review of the entire record of proceeding, and with close attention and due

regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claim of a specialty occupation position is "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim is "more likely than not" or "probably" true.

Analysis

Consistent with the petitioner's claim, the AAO shall consider the proffered position as belonging to the Computer Systems Analysts occupational group, and it will evaluate the evidence of record accordingly.

As will be later discussed in greater detail, the *Occupational Outlook Handbook* (hereinafter, *Handbook*) – which is produced by the U.S. Department of Labor's Bureau of Labor Statistics and regarded by USCIS as an authoritative source of information about the duties and educational requirements of the occupational groups that it addresses – indicates that members of the Computer Systems Analysts occupational group include not only persons with a bachelor's or higher degree in a computer-related specialty, but also persons with bachelor's degrees in liberal arts and persons with less than a bachelor's degree. As will be reflected in the discussions that follow, on the basis of its review of the entire record of proceeding the AAO concludes that the evidence of record does not establish that the particular position that is the subject of this petition belongs among those computer systems analyst positions that require at least a bachelor's degree, or the equivalent, in any specific specialty. Accordingly, the appeal will be dismissed, and the petition will be denied.

In the petitioner's letter of support, dated March 9, 2012, and filed with the petition, the petitioner's vice president described the petitioner as a well-established manufacturing and distributing company that specializes in fashionable clothing and accessories. That letter provides the following description of the petitioner and its business:

> [The petitioner] is a California clothing manufacturing and distributing company that was founded [in] 1989. [It] specializes in manufacturing various clothing and accessories, including, belts, handbags, bracelets, pendants, and broach pins. We have built up a highly qualified and competitive staff that monitors and analyzes current fashion trends, and regularly designs new styles, thereby ensuring that we can provide clients with the latest best-selling products. In addition, an in-house quality and control and inspection system has been implemented with products meeting the quality standards required by consumers. We have been highly praised by many clients, particularly for our competitive prices, high quality, and prompt on-time delivery. Currently, our annual sales volume is more than $30 million. [The petitioner] owns a successful website, [identified in the original], which offers customers a wide array of clothing name brands in various sizes.

In this March 9, 2012 support letter, the petitioner's vice president introduced the nature of the proffered position by asserting that, "[i]n order to ensure the continued success of [the petitioner]

we wish to hire [the beneficiary] in the position of Computer Systems Analyst with the following duties:"

1. Analyze present hardware and software systems and determining if upgrades and modifications are necessary;

2. Establish technology goals, objectives, policies and procedures in order to maximize productive efficiency.

3. Confer with management in order to present and clear development plans for systems upgrades and modifications.

4. Lead all phases of hardware and software upgrading, programming, and maintenance.

5. Ensure upgrades and changes are tested and implemented to specified requirements.

6. Document internal operating policies and procedures related to new systems;

7. Ensure management and staff are updated on new program and system policies and procedures.

8. Provide oversight of computer systems management, backup, and security. (10%)

Later, as Exhibit 2 of the RFE response, counsel submitted a more detailed job description. This submission repeats each of the eight sets of duties quoted above from the petitioner's support letter. However, it added subparagraphs "a" which provided some additional information about each of the previously listed sets of duties. That expansion of the constituent duties reads as follows:

1. Analyze present hardware and software systems and determining if upgrades and modifications are necessary; (overall duty)

    a. Analyze hardware performance and capability as well as software for multi-million dollar clothing manufacturing and distributing company. Analysis includes benchmark testing for all present hardware, networking, software, as well as upgrade and development for proprietary industry hardware and software.

2. Establish technology goals, objectives, policies and procedures in order to maximize productive efficiency. (15%)

    a. In charge of all goals and policies for company-wide technological enhancements and performance both in hardware and software.

3. Confer with management in order to present and clear development plans for systems upgrades and modifications. (15%)

    a. Policies are discussed with management, but all policies and goals for company technology rest in the sole discretion of the computer systems analyst. All upgrades must fall within budget constraints and organizational vision.

4. Lead all phases of hardware and software upgrading, programming, and maintenance. (20%)

    a. Upgrades will be led by computer systems analyst who will perform both core programming, network infrastructure analysis, and hardware implementation. Systems must be upgraded seamlessly without disruption of daily processes. Network capability and wireless programs as well as server functionality must remain functional while upgrades are taking place.

5. Ensure upgrades and changes are tested and implemented to specified requirements. (15%)

    a. Upgrade testing involves benchmark testing as well as statistical analysis to determine performance enhancements over prior systems. Performance will be balanced with costs and will be fine-tuned as necessary to meet project goals.

6. Document internal operating policies and procedures related to new systems; (10%)

    a. All policies and procedures must be documented and catalogued in an organized system easily accessible and readily understood by staff members who will use systems on a day[-]to[-]basis.

7. Ensure management and staff are updated on new program and system policies and procedures. (15%)

    a. Conduct training sessions and create training materials for staff in order to ensure that all upgrades are sufficiently implemented and adhered to.

8. Provide oversight of computer systems management, backup, and security. (10%)

a. Set policy for data backup, data recovery plans, and server integrity/security. Monitor systems to ensure optimal performance and continue to optimize operations through analysis of detailed reports.

The petitioner's vice president's letter of December 20, 2012, submitted to the director as part of the unsuccessful motion, states, in part, that "[w]e feel we need an in-house computer systems analyst to optimize our existing computer systems to ensure the network security in our company." The letter also attests:

> We expect [the beneficiary] to be in charge of software administration as well as our embedded systems which would include the systems analysis and computer engineering. . . .

That letter also states that the beneficiary "is helping us analyze hardware and software systems to improve [the] company's operation, revenues, and profits."

Later, in its March 12, 2013 letter, which is submitted as part of the appeal, the petitioner addressed the proffered position as follows:

> We need [the beneficiary] as the Computer Systems Analyst to monitor and maintain all computers, their associated programs and systems, including our website (use of Magento) and the two dedicated servers. Between the 80 plus computers with some shared data among US, China and Vietnam, connected to our 2 dedicated servers and our proprietary wholesale distribution software, all systems must by in sync for all users to be able to access the markings, patterns, CADs and Pos. With the dynamic nature of the fashion industry and the hundreds of styles being developed within our company each week, [the beneficiary] will be constantly updating the software and facilitat[ing] the ease of data sharing between the users, making sure everyone is able to connect to the correct server and access the necessary files.
>
> [The beneficiary] will be responsible for overseeing and managing Corporate and Satellite hardware and software, POS hardware and software, Web Development, and Web-related business operations. He will manage and update programs that the employees create and implement continuous maintenance on the company systems. We expect him to develop and oversee the effective planning and execution of content across the different platforms and marketing campaigns to ensure efficiency, accuracy and timeline of all systems, programs, and campaigns.
>
> For the corporate and satellite hardware and software, [the beneficiary] will overview [the] network between 2 buildings and 2 satellite locations . . . He will perform routine maintenance on [a] network of 2 servers and 75 workstations at corporate locations. He will also perform routine maintenance of 6 workstations across 2 satellite locations accessing corporate servers over [the] VPN. He will be maintaining and managing [redacted] software used in all departments across 4

> locations from preproduction in invoicing and inventory control. He will maintain [the] internal network and coordinate with 2 different contracted ISPs to continually monitor and manage systems to keep up growth of our company. He will also maintain and monitor [the] internal DVR system running on [a] separate network to access feeds from 6 locations, including 2 overseas offices.
>
> In POS hardware and software, [the beneficiary] will maintain and monitor POS hardware consisting of 3 servers, 21 workstations and 21 scanners, used for tradeshow[s] 32 times a year. In addition, he will maintain and monitor POS software created specifically for tradeshows, which in turn can be incorporated into internal software.
>
> We also expect [the beneficiary] to implement and perform continuous maintenance on out [sic] company's web systems and oversee the launch of new developments including integrations, extensions and custom modules. We expect [the beneficiary] to work with the development team to prepare technical specifications for web applications and feature upgrades. We expect him to proactively manage changes in project scope, identify crises, and devise contingency plans. We expect him [to] coordinate among across [sic] functional teams to identify challenges, [and] recommend and implement solutions. We further expect him to coordinate and maintain computers [sic] systems that engage in ecommerce websites such as site content updates and graphics. He will be coordinating and overseeing computer systems for daily web sales, order processing, customer service, and web customer accounts for web channel business development and retention.

The AAO finds that the record's descriptions of the proffered position and the duties that the petitioner ascribes to it are not sufficiently detailed to relate the substantive nature of the particular work that the beneficiary would actually perform. Nor do those descriptions contain substantial details that convey and substantiate whatever levels of specialization, complexity, and/or uniqueness the petitioner may see in the position and its duties. Rather, the AAO finds, that the record's descriptions of the proffered position and its constituent duties are mostly abstract identifications of generalized functions (such, as for instance, "Analyz[ing] hardware performance and capability"; "Establish[ing] technology goals, objectives, and policies"; and "Lead[ing] all phases of hardware and software upgrading"; and responsibility for "overseeing and managing Corporate and Satellite hardware and software, POS hardware and software, Web Development, and Web-related business operations"). As such, they do not develop relative complexity, specialization, or uniqueness as aspects of the proffered position or its duties.

The AAO has taken into account the total aggregate of the record's information that relates to the proffered position, including not only the duty descriptions themselves, but all of the petitioner's statements and submissions regarding its business and its computer operations (which, the AAO finds to be presented in a relatively generalized fashion), such as the number of workstations and servers, the double-location of the petitioner's offices, the petitioner's trade-fair use of computers, and the general types of hardware and software that the petitioner mentioned. The AAO finds that this information is sufficient to establish that the proffered position as being that of a computer

systems analyst. However, it also finds that the information lacks sufficient substantive details about what performance of the particular position here proffered would actually involve in the everyday operations of the petitioner's computer-related activities. The AAO also finds that the record of proceeding lacks persuasive explanations and substantive corroboration of a necessary correlation between the actual performance requirements of the proffered position and the claimed need for at least a bachelor's degree in a specific specialty.[4]

Put another way, the AAO finds that, while the evidence of record indicates that the particular position here proffered requires the application of computer-related knowledge such as may properly include the proffered position within the Computer Systems Analysts occupational category, the evidence of record does not establish that the proffered position would require the practical and theoretical application of at least a bachelor's-degree level of a body of highly specialized knowledge in a computer-related specialty. In this regard, the petitioner should note that, as will be evident in this decision's discussion of the pertinent chapter of the *Handbook*, a particular position's inclusion within the Computer Systems Analysts occupational group is not, in itself, sufficient to establish the position as a specialty occupation.

This brings us to the two sets of documents that the petitioner has submitted for consideration as expert opinions with regard to the specialty occupation issue. For the reasons to be now discussed, the AAO accords no probative weight to either opinion.

One document-set is a four-page December 20, 2012 letter and an attached curriculum vitae, from Dr. Dr. identifies himself as an Associate Professor of Computer Applications and Information Systems at the This letter bears the subject line "Re: Academic Degree Requirements for the position of Computer Systems Analyst for [the Petitioner] and classification of the position as a USCIS Specialty Occupation." The four-page curriculum vitae is divided into sections entitled, in order of appearance: Education; Professional Employment; Publications and Presentations; Conferences Attended; Consulting Clients; Honorary Societies; and Community Service.

The second document-set submitted for consideration as an expert opinion consists of a (1) a document entitled "Expert Opinion Evaluation," dated December 19, 2012 and authored by Dr. who is identified in his curriculum vitae as an Associate Professor at the (2) a March 22, 2012 letter from which basically attests that Dr. is authorized to award credit to students on the basis of their "professional experience"; (3) a document from the Office of the University Registrar at which discusses the avenues an student may take to apply for award of academic credit based upon "prior professional, military, and other life experiences"; and (4) a seven-page curriculum vitae, which summarizes Dr. credentials in terms of Education, Professional Experience, Research Interests, Teaching Interests, Professional Affiliations, Research Grants/Contracts, Service, and Referred Publications in Journals and Proceedings.

---

[4] In this regard, the AAO notes that, as will be later discussed, it does not accord probative weight to the position evaluations that the petitioner submitted into the record for consideration as expert opinions.

In this December 19, 2012 letter, Dr. describes the credentials that he asserts as qualifying him to opine as an expert upon the proffered position, states his belief that the duties that he lists are specialized and require the theoretical and practical application of a body of highly specialized knowledge and require a bachelor's degree, and claims that this degree requirement is standard for the industry.

In his opinion document, also dated December 19, 2012, Dr. an Associate Professor at the also describes the credentials he believes qualify him to opine upon the proffered position, briefly lists the duties proposed for the beneficiary, states his belief that the duties he lists require the theoretical and practical application of an advanced highly specialized body of knowledge in the field of computer science, opines that the performance of those duties requires a bachelor's degree, and also claims the existence of an industry standard for such a qualification.

Dr. Todd's letter describes as follows the Computer Systems Analyst about which it opines:

- Analyzing present hardware and software systems and determining if upgrades and modifications are necessary;
- Establishing technology goals, objectives, policies and procedures in order to maximize productive efficiency;
- Conferring with management in order to present and clear development plans for systems upgrades and modifications.
- Leading all phases of hardware and software upgrading, programming, and maintenance;
- Ensuring upgrades and changes are tested and implemented to specified requirements;
- Documenting internal operating policies and procedures related to new systems;
- Ensuring management and staff are updated on new program and system policies and procedures;
- Providing oversight of computer systems management, backup, and security.

The AAO observes that Dr. lists substantially the same duties as Dr. in a bullet-phrase framework that mirrors the Dr. in near-verbatim fashion. Both sets of duties are substantially a recitation of the eight main duties (minus the "a." subparagraphs) listed in the earlier quoted March 9, 2012 letter of support from the petitioner.

In this light, the AAO finds that both of the professors fail to establish that the duty descriptions that they cite provide a substantive statement of specific duties that the beneficiary would actually perform within the context of the petitioner's particular business operations. Rather, it appears that both Dr. and Dr. are basing their opinions upon generalized and relatively abstract descriptions of functions that could relate to computer systems analyst positions in general and without regard to actual educational requirements.

Next, the AAO finds that Dr. and Dr. each fail to establish a sufficient basis for the AAO to accord any deference to their opinions with regard to the particular area for which the petitioner offers them, namely, the minimum education requirements for the performance of the particular position that is the subject of this petition.

The AAO notes Dr. assertion that he is "eminently qualified" to offer his opinion, based upon his claim that his education and experience has given him the "opportunity over the years to become familiar with the qualifications required to attain the position of Computer Systems Analyst and other similar positions, and the specialized and unique needs of the companies that recruit for this position."

Likewise, Dr. claims his academic positions, publications, and years of experience in Computer Science merit assigning "expert" weight to his "Expert Opinion Evaluation, as he states:

> I am qualified to comment on the position of Computer Systems Analyst in the field of Computer Science because of the positions that I hold, and have held at At the above mentioned institution, I have served as Professor, Graduate School of Computer and Information Sciences. Furthermore, I have more than sixteen years of professional experience in the field of computer science. Additionally, I am qualified to determine whether the position requires the candidate to have specialized knowledge in the position of Computer Systems Analyst because of my academic positions in the field, publications, and professional memberships.

The AAO finds, however, that, even considered in the aggregate, the resumes or curricula vitae, the lists of publications, the lists of memberships, and all of the other documents submitted by Dr. and by Dr. to support their claims to expertise do not establish that they have published, conducted research, run surveys, or engaged in any enterprise, pursuit, or employment - academic or otherwise - so structured as to provide them with such special knowledge in the particular area upon which their submissions opine as to equip them to render an opinion that the AAO should regard as authoritative or expert in that particular area. While both Dr. and Dr. claim expertise on the basis of their positions and the contents of their curricula vitae, neither persuasively articulates – and the documents that they present do not show – exactly how their background so recommends their knowledge of H-1B specialty occupation requirements or of the minimum educational requirements for computer systems analysts that the AAO should accord probative value to their opinions in this matter. 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. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Next, the AAO notes that neither of these opinions is accompanied by, or expressly states the full content of, whatever documentation and/or oral transmissions upon which they are based. Neither author indicates whether he visited the petitioner's business premises or spoke with anyone affiliated with the petitioner, so as to ascertain and base his opinions upon the substantive nature and educational requirements of the proposed duties as they would be actually performed. Further, the AAO finds no statements in either opinion submission that indicate the extent to which the author reviewed the particular position upon which he opined.

Nor did either author specify or discuss any relevant research, studies, surveys, or other authoritative publications as part of their review and or as a foundation for their opinions. In the same vein, the AAO finds that, on their face, neither the curricula vitae nor any other document submitted by the opining professors indicates that either professor has expertise or has been recognized as an authority in the areas on which they presented their opinions, that is, in the area of the minimum educational requirements for particular computer systems analyst positions or in the area of a position's qualification for H-1B specialty occupation recognition in accordance with the governing statutes and USCIS regulations.

Also, and significantly, neither professor discussed the pertinent occupational information provided in the *Handbook*, and neither made an attempt to differentiate the proffered position from those computer systems analyst positions that the *Handbook* indicates are performed by persons who lack a baccalaureate or higher degree at all, or who have attained only bachelor's degrees in liberal arts. Moreover, the AAO finds that, to the extent that the opinion submissions in question suggest that computer systems analyst positions comprise an occupational class that requires a bachelor's degree, or the equivalent, in a specific specialty, the submissions conflict with the Bureau of Labor Statistics information in the *Handbook* – and that do so without acknowledgement of the fact or explanation.

Additionally, in light of the fact that the only descriptions that the two professors present about the duties of the proffered position are the eight relatively abstract duties – quoted earlier in this decision - that the petitioner presented in its letter of support, the contents of the professors' opinions are not indicative of more than a cursory and superficial consideration of the proffered position.

The AAO notes further that neither of the professor-authors discusses the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only

expected to possess a basic understanding of the occupation.[5] These authors' omission of such an important factor severely diminishes the evidentiary value of their opinions.

Additionally, the AAO observes that neither author discusses the duties of the proffered position in any meaningful detail. To the contrary, both Dr. and Dr. simply repeated the bullet-pointed duty-listing contained in the petitioner's March 9, 2012 letter of support. The extent of meaningful analysis involved in the formulation of the position-evaluation opinions, therefore, is questionable. Nor did either author explain the empirical basis for his assertion regarding minimum industry hiring standards.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, the AAO finds that the letters from Dr. and Dr. do not merit recognition or weight as expert opinions, and that neither letter is probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Nor do the petitioner's citations to three unpublished AAO decisions establish that the proffered position is a specialty occupation or that it meets any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) enumerated above. It is noted that while 8 C.F.R. § 103.3(c) provides that AAO precedent

---

[5] The *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) issued by DOL states the following with regard to Level I wage rates:

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

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Having made these initial findings, the AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

As already noted, the AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.[6] As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Computer Systems Analysts" occupational category, and the AAO is analyzing the proffered position as belonging to that occupational group.

The *Handbook's* discussion of the duties and educational requirements of computer systems analysts states, in pertinent part, the following:

> Computer systems analysts study an organization's current computer systems and procedures and make recommendations to management to help the organization operate more efficiently and effectively. They bring business and information technology (IT) together by understanding the needs and limitations of both. . . .
>
> Computer systems analysts typically do the following:
>
> - Consult with managers to determine the role of the IT system in an organization
> - Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness
> - Prepare an analysis of costs and benefits so that management can decide if computer upgrades are financially worthwhile
> - Devise ways to make existing computer systems meet new needs

[6] The *Handbook*, which is available in printed form, may also be accessed online at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

- Design and develop new systems by choosing and configuring hardware and software
- Oversee installing and configuring the new system to customize it for the organization
- Do tests to ensure that the systems work as expected
- Train the system's end users and write instruction manuals, when required

> Analysts use a variety of techniques to design computer systems such as data-modeling systems, which create rules for the computer to follow when presenting data, thereby allowing analysts to make faster decisions. They also do information engineering, designing and setting up information systems to improve efficiency and communication.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2 (accessed October 30, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

> Most computer systems analysts have a bachelor's degree in a computer-related field. . . .
>
> * * *
>
> Although many analysts have technical degrees, such a degree is not always a requirement. Many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.
>
> Some analysts have an associate's degree and experience in a related occupation.

Id. at http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4.

These statements from the *Handbook* do not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into this occupation. With regard to the *Handbook's* statement that "most" computer systems analysts possess a bachelor's degree in a computer-related field, it is noted that the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer systems analyst positions require at least a bachelor's degree in computer science or a closely related field, it could be said that "most" computer systems analyst positions require such a degree. It cannot be found, therefore, that a

particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." Section 214(i)(1) of the Act.

Furthermore, the *Handbook* specifically states that an associate's degree combined with work experience is sufficient for some computer systems analyst positions. Additionally, with regard to positions that do require attainment of a bachelor's degree or equivalent, the *Handbook* indicates that a bachelor's degree in a specific specialty or the equivalent is not normally required: the *Handbook* states that technical degrees are not always required, and that many computer systems analysts have liberal arts degrees and gained their programming or technical expertise "elsewhere."

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within any of these occupational categories is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, the AAO notes again that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO finds that the petitioner has not satisfied 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent.

However, as evidence that the proffered positions satisfies the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), the petitioner has submitted two letters. One, dated March 7, 2013, is from a Mr. who signed it as General Manager of Fashion Debut. The other letter, dated March 11, 2013, was signed by a Mr. as President of Advanced Computer Equipment.

Mr. states that Fashion Debut is a company specializing in the wholesale of sweaters and junior wear, and that it currently employs a computer systems analyst with a foreign bachelor's degree in computer science.

Mr. states that his company, Advanced Computer Equipment, has been serving the fashion industry since 1994 and "specialize[s] in providing computer-related hardware and software systems to numerous clients in the fashion industry since 1994. Mr. also states that he has "served [the petitioner] since 1994." Against this contextual backdrop, Sun states that he is "writing [on behalf of [the petitioner] in agreement with their desire to hire an in-house Computer Systems Analyst for their company." Mr. offers his comments as a 19-year veteran "in the computer industry in [the] fashion manufacturing industry."

The AAO finds that Mr. observations, which appear in the two paragraphs below, do not support a contention that, for positions parallel to the one here proffered, fashion-industry organizations similar to the petitioner commonly specify at least a bachelor's degree, or the equivalent, in a computer/IT-related specialty as a minimum requirement in their recruiting and hiring process for positions parallel to the one that is the subject of this petition. Mr. letter states, in pertinent part:

> I have served [the petitioner] since April 1994. The industry is changing rapidly. Many companies are hiring in-house computer systems analysts to accommodate complex problems that arise, especially in a large multi-pronged firm like [the petitioner]. Computer systems analysts often handle a great deal of the business minutia, as well as providing coordination among creative team[s], sales and production personnel, and interfacing with wholesale buyers and overseas manufacturers.
>
> There is a trend these days in the fashion manufacturing industry to employ specialists in computer science. It has been my experience to observe companies of smaller size than [the petitioner] hiring Computer Systems Analyst[s] with a Bachelor's Degree with [a] computer science major to handle sensitive area such as PLM (Product Lifestyle Management), ERP (Enterprise Resource Planning), complex website management/development and to safeguard the company confidential data.

Mr. letter only notes what he observes regarding what "many" companies are doing - not as what companies are commonly doing in the industry. Also, while Mr. asserts a current trend in the industry, and also states that he has observed "companies of smaller size than the petitioner "hiring Computer Systems Analyst[s] with a Bachelor's Degree with [a] computer science major to handle sensitive areas such as such as PLM (product Lifecycle Management), ERP (Enterprise Resource Planning), complex website management/development and to safeguard the confidential data," Mr. letter establishes neither how representative the referenced companies' practices are of those of similar companies in the industry, nor whether the positions about which he comments were sufficiently similar to the proffered position in their substantive duties and associated educational requirements to be regarded as parallel to it.

Mr. states that his firm, is a company specializing in the wholesale of sweaters and junior wear, and that it currently employs a computer systems analyst with a foreign bachelor's degree in computer science. Mr. also states his company's expectation that someone serving in that position should have that type of bachelor's degree in order to "to meet the challenges that are presented by complex computer hardware and software system[s] these days."

Even assuming for the sake of argument that Mr. firm was correct in its assessment of its need for a bachelor's degree in computer science due to the particular substantive performance requirements and associated level of theoretical and practical applications of computer/IT-related knowledge, nothing in Mr. letter establishes that his company's computer systems analyst position is sufficiently similar to the proffered position to be deemed parallel to it – which is a material consideration in light of the *Handbook's* information regarding the diversity of degree requirements among the population of computer systems analyst positions. Also, the evidence of record does not establish that that the pertinent recruiting and hiring practices of Mr. company for its computer systems analyst position reflect a common practice in the petitioner's industry with regard to computer systems analysts in general, let alone reflect a common recruiting and hiring practice with regard to positions that are parallel to the particular one here proffered.

Also, the evidence of record does not establish that either Mr. company or the companies observed by Mr. were sufficiently like the petitioner in size, scope and scale of operations, business efforts, expenditures, or other fundamental dimensions as to be considered as organizations that are similar to the petitioner – and such similarity is a material element for establishing relevancy under the criterion here being applied, that is, the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Additionally, the record contains no information regarding any objective means by which Mr. firm has determined that the foreign degree held by his company's computer systems analyst has been determined to be equivalent to a U.S. bachelor's degree in a specific specialty, or the equivalent.

Nor do the 25 job-vacancy announcements submitted into the record satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

First, the petitioner has not submitted any evidence to demonstrate that these advertisements are from companies "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or other fundamental dimensions.[7] Second, the petitioner has not established that these 25 positions are "parallel" to the proffered position.[8] Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the positions advertised. Again, simply 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 at 165.[9]

Therefore, as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to

---

[7] As noted above, the petitioner described itself on the Form I-129 as a clothing manufacturer, and it specified a North American Industry Classification System (NAICS) Code 315239, "Womens and Girls' Cut and Sew Other Outerwear Manufacturing." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "315239 Womens and Girls' Cut and Sew Other Outerwear Manufacturing," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed Aug. 27, 2013).

The petitioner did not explain it is similar to any of these companies. Again, simply 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.

[8] For example, it is noted that work experience is required for 20 these 25 positions, and "preferred" for another. However, as noted above, the petitioner indicated by the wage-level in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. It is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to the positions described in these job vacancy announcements.

[9] Furthermore, according to the *Handbook* there were approximately 664,800 persons employed as computer systems analysts in 2010. *Handbook* at http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-6 (last visited Aug. 27, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the 25 submitted vacancy announcements 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 these 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 these 25 job-vacancy announcements established that the employers that issued them routinely recruited and hired for the advertised positions only persons with at least a bachelor's degree in a specific specialty closely related to the positions, it cannot be found that these 25 job-vacancy announcements which 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 for entry into the occupation in the United States.

the proffered position and (2) located in organizations that are similar to the petitioner, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform that position. Rather, the AAO finds, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic computer-systems-analysis work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO hereby incorporates into this analysis its earlier comments and findings about the negative evidentiary impact of the petitioner's reducing its descriptions of the proffered position and its constituent duties to relatively abstract terms of generalized functions.

The petitioner, therefore, did not establish that the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, 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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a

degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.[10] In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The record indicates that this is a newly-created position. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

---

[10] Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

However, even if the record contained such evidence, the AAO would still find that the petitioner failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) because the record does not, as indicated above, establish that its degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position, a determination which is strengthened by the petitioner's submission as the supporting LCA one that was certified for the lowest wage-level, which is appropriate for a comparatively low, entry-level position relative to others within its occupational group.

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), 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 them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

As reflected in this decision's earlier discussion and findings with regard to generalized level of the duty descriptions provided in this record of proceeding, the petitioner has not presented the proposed duties in terms sufficiently detailed to convey their substantive nature, and, thereby, whatever level of relative complexity and specialization may reside in them. As the evidence of record does not develop relative specialization and complexity as dimensions of the proposed duties, the petitioner has not established a sufficient foundation for the AAO to determine whatever relative level of specialization and complexity \may reside in those duties, let alone for the AAO to determine a usual association between such an un-established level and the attainment of any particular educational level of knowledge in any specialty.

Aside from the above discussed evidentiary deficiencies which preclude a favorable finding under this criterion, there is the negative implication of the fact that the petitioner submitted an LCA that had been certified for use with a position meriting no more than a Level I wage.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of its own perception that the proposed duties are of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor states the following with regard to Level I wage rates:

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

> Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* 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.

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 very 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, the AAO notes 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. . . .

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.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with the Department of Labor's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II). For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

Finally, the AAO is not persuaded by the case law counsel cites on appeal.

Counsel first cites *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). The AAO notes that in *Tapis Int'l v. INS*, the U.S. district court found that while the legacy Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, the INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

The AAO agrees with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty *or its equivalent*, and that this language indicates that the degree does not have to be a degree in a single specific specialty. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

Moreover, the AAO also agrees that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. The AAO does not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, the AAO does not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the legacy INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes that, in contrast to the broad

precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Counsel also cites *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "'[t]he knowledge and no[t] the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.'"

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." Again, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.[11] The AAO also notes again that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. at 715. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

---

[11] It is noted that the district judge's decision in this case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

Finally, it is noted that the beneficiary currently holds H-1B status. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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.