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



U.S. Citizenship  
and Immigration  
Services

DATE: JUL 16 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

  
for

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the California Service Center denied the nonimmigrant visa petition. The decision was subsequently certified to the Administrative Appeals Office (AAO). We have reviewed the record of proceeding in its entirety and find that it does not establish eligibility for the benefit sought. Accordingly, the director's decision will be affirmed and the petition will be denied.

The petitioner, which describes itself as an 80-employee information technology software development company established in 2009,<sup>1</sup> seeks approval of this Petition for a Nonimmigrant Worker (Form I-129) so that it may employ the beneficiary as an H-1B temporary 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), and the related regulations at 8 C.F.R. § 214.2(h).

The petitioner filed this petition for a full-time position to which it assigned the job title "JAVA/J2EE Programmer." In support of this petition, the petitioner submitted a Labor Condition Application (LCA) certified for use with a job offer falling within the "Computer Programmers" occupational category, at a Level I (entry-level) prevailing wage rate.

The director denied the petition on December 4, 2013, concluding that the evidence of record did not establish that the proffered position is a specialty occupation. On April 14, 2014, the director certified the decision to us for review and consideration. Further, the director noted that the petitioner may submit a brief or other written statement for consideration within thirty days. As of today, no additional documentation has been received from the petitioner or its counsel.

The record of proceeding 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 initial decision denying the petition; and (5) the director's decision combined with the Form I-290C, Notice of Certification.

As will be discussed below, we find that, upon review of the entire record of proceeding, the evidence of record fails to overcome the director's proposed ground for denying this petition. Consequently, the director's decision to deny the petition will be affirmed.

## **I. Standard of Review**

As a preliminary matter, it is noted that in the exercise of its administrative review in this matter, as in all matters that come within its 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:

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 16, 2014).

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*. As the evidentiary analysis of this decision pursuant to that standard will reflect, the record does not contain sufficient relevant, probative, and credible evidence that leads us to believe the claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

## **II. The Petitioner and the Proffered Position**

As noted above, the petitioner stated on the Form I-129 that it has been doing business as an information technology software development company since 2009, that it currently employs 80 individuals, and that it has a gross annual income of \$7,099,217. The net annual income was left blank on the Form I-129.

The petitioner's March 25, 2013 letter of support, which was signed by the petitioner's president and filed with the Form I-129, described the petitioner as follows:



[The petitioner] is a premier IT Solutions company providing information technology services to Fortune 1000 companies across the globe. We provide business solutions to our customers by providing a full range of consultants in the areas [of] software analysis, design, development, and testing. [The petitioner] is to provide the highest quality services to our clients; delivering measurable business benefits with creativity, collaboration, partnership and process discipline to provide integrated IT solutions to our Customers in time and at best prices.

We provide services in [a] variety of platforms, languages and development methods. [The petitioner] provides its customers the opportunity to leverage off existing Information technology infrastructure and web technology to realize significant cost-savings and increase productivity.

**Training:**

[The petitioner] offers free IT training to the local community in an effort to assist those who are looking to start IT careers, but do not have the background or the resources to go to college. [The petitioner] believes in continuous education and training as the key enablers for its people to be successful. We not only believe in adequately compensating are [sic] people but also guiding them with their career growth and provide an environment, which is positive, friendly and willing to share knowledge.

**Solutions Provider:**

We manage turnkey projects, and have built, managed and supported our customers' IT systems across the value chain - infrastructure, applications and business processes. That is because our capabilities span the entire IT spectrum: IT architecture; hardware; software (including systems and application software, development or implementation, maintenance, and frameworks); network consulting; and IT-enabled processing services.

**Software Development:**

[The petitioner] offers software development services for our clients who would like for us to transform their idea into a functional IT solution. Our professionals can develop software applications, web applications, websites, databases, ERPs and databases to meet our client's needs and wishes. [The petitioner] offers on-site development for clients who would prefer that our team is at their offices due to network security concerns and we offer off-site development for those who do not have the space at their offices for our team of developers. [The petitioner] also provides off-shore services and has experience developing products for various international markets through our off-shore teams.

The petitioner proposes employing the beneficiary in a position it calls a "JAVA/J2EE Programmer" at a wage-rate of \$65,000 per year. As noted above, the petitioner submitted an LCA certified for a job



offer falling within the "Computer Programmers" occupational category, at a Level I (entry-level) prevailing-wage rate.

Per that letter, the petitioner stated the following with regard to the proffered position:

[We are] developing our own online website which will provide users and customers with one-click shopping for automotive parts. We are developing all of the various aspects of the website including the application development, testing, database development, website security, e-commerce capabilities and user interface. Our goal is to launch the website in 2015.

\* \* \*

We are hiring the beneficiary to assist with the development of our projects as well as our wire transfer product that is currently in the infant stages of development. We would like to make it clear that the beneficiary will be working primarily on these projects, but we may assign them [sic] to our other in-house development projects should we require their [sic] assistance.

The beneficiary will be working at our office located at [REDACTED]  
[REDACTED] At this location, the beneficiary will work under our direct supervision and support. . . .

The letter further described the proffered position and its duties as follows:

#### **Position Description for JAVA/J2EE Programmer**

This position is a subset of the larger classification of Computer Programmer (SOC code 15-1131.00). As a Java/J2EE Programmer, the Beneficiary's duties will include:

- Responsible for developing prototypes and performs complex application coding and programming.
- Interpret end-user business requirements to develop and/or modify technical design specifications for off-the-shelf and/or custom-developed applications.
- Analyze and review software requirements to determine feasibility of a design within time and cost restraints.
- Build complex systems using web services standards with SOAP, AXIS, WSDL, XML, XSLT, XML Schema, Spring, and hibernate, strong knowledge of Java and J2EE (including JSP, EJB, JDBC, STRUTS, SQL, XML, HTML and associated technologies)[.]

- Solid knowledge of Struts 2, Windows, Unix, and AS/400 operating systems, Oracle, DB2, and SQL database environment.
- Utilize exposure to Clouse computing (Public/Private clouds), WSAD, WeblogicServer 7.0 or greater. May be required to relocate residence upon completion of each long term project.
- Monitor information management processes for completeness, consistency and accuracy; identify problems and manage errors, including publishing process and system metrics.
- Utilizing organizational and team skills, mentor team members and customers, help them to develop technical skills and competencies.
- Maintain and optimize information systems development and support processes and standards.

These duties are consistent with the duties required for Computer Programmer generally. As such we submit that the position qualifies as a specialty occupation as that term is defined in the law.

The "Job Description" that was enclosed with counsel's October 7, 2013 letter replying to the RFE refined the description of the position and its constituent duties into the following list of job duties and associated percentages of time involved in their performance:

**80%**

- Will be involved in developing the functional specifications of Buy Car, Sell Car modules and Report modules of [REDACTED]
- Will be involved in writing programs in a computer language, designing related databases, web interfaces and content, or multimedia processes
- Will be involved in designing, coding, bug fixing, testing, evaluating and maintaining computer programs, right from the design stage to the UAT (User Acceptance Test) Stage
- [A]lso involve[d] in quality assurance, maintenance and documentation of applications
- Will be involved in writing the security and user permissions related programming

- Will be [sic] interact with the architecture team and interact with the UI team to create UI Specifications and identify cross browser issues, identify, analyze, design and code nightly job reports of onecarzone
- Will develop build and deployment scripts across environments using Maven and Ant for the projects

**10%**

- Will follow all the [the petitioner's] standard process and procedures for car junction and onecarzone
- Will attend bi weekly reviews with team to review the project status and plan for project next spring release

**10%**

- Will allocate and estimate work using the JIRA, review the code using crucible. . . .

Programming languages: Java, J2EE, Java script, C++, XSL FO, Picasso, JBC, STRUTS 1.2, 2, Spring, Jsp, JSTL, Servlets, AJAX, JDBC, XSTL, XML, XSL-FO, Web Services, IBM DB2, Oracle and Hibernate 3.2.

Programming tools: IBM RAD 7, 7.5, 8, Eclipse, WebSphere Application Server 6.1, /7.5, 8, Eclipse, Weblogic7.0, Resin 3.0, Subversion, Maven, Ant, Eclipse, JUnit, VSS, JIRA, XML Spy.

Requirements: Bachelor's in Computer Science or closely-related field

### **III. Specialty Occupation**

We will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, we agree with the director that the evidence of record fails to establish that the position as described constitutes a specialty occupation.

#### **A. Law**

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, 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 Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an



occupation that requires:

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty

occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

**B. Preliminary Findings Regarding the Proffered Position's Duties, the Relative Complexity of the Position, and the Speculative Nature of the Work**

We first note that the petitioner has not explained the basis for its assertion that the beneficiary must use all of the programming languages and programming tools that it specified in the Job Description quoted above. Aside from that concern, however, we find that the record of proceeding provides no objective and reliable standard by which we can determine that the performance of the duties as described requires at least a bachelor's degree in a specific specialty or its equivalent (that is, even if the position involves the use of the asserted programming tools and languages).

In this regard we observe that the "Computer Programmers" chapter of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* states that "most programmers learn only a few computer languages while in school," and that a computer science degree provides "the skills needed to learn new computer languages easily." However, the *Handbook* neither states nor indicates that a



degree – associate or bachelor's – in computer science or in any related specialty is required to learn or employ programming languages or any tool used by computer programmers.<sup>2</sup>

Further, there is no basis for us to take administrative notice that the proposed duties as described in the record of proceeding comprise a computer programming position that would require at least a bachelor's degree in computer science or, for that matter, in any specific specialty. Moreover, based on the evidence that is provided, we also do not find that it establishes relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise.

While the petitioner and counsel may claim that the nature of the proposed duties and the position that they are said to comprise elevate them above the range of usual Computer Programmer positions and duties by virtue of their level of specialization, complexity, and/or uniqueness, the evidence of record does not support these claims. 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).

As evident in the job description quoted above, the record of proceeding presents the duties comprising the proffered position in terms of relatively abstract and generalized functions. More specifically, they lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that their actual performance would require within the context of the petitioner's particular business operations. Take for example the following duty description:

Will be involved in developing the functional specifications of Buy Car, Sell Car modules and Report modules of [REDACTED]

The evidence of record contains neither substantive explanation nor documentation showing the range and volume of such specifications and reports that the beneficiary would have to develop. Likewise, the record does not clarify the substantive work and associated applications of specialized knowledge that would be involved in the referenced duty. Likewise, we see that the petitioner does not provide substantive information with regard to the particular work, methodologies, and applications of knowledge that would be required for the percentage-assigned duties, such as "Will be involved in writing the security and user permissions related programming." Thus, we conclude that, as generally described as all of the elements of the constituent duties are, they do not - even in the aggregate - establish the nature of the position or the nature of the position's duties as more

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<sup>2</sup> See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited July 16, 2014).



complex, specialized, and/or unique than those of computer programmer positions that do not require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

We further note that the petitioner has provided inconsistent information with respect to the proffered position. While the Form I-129, the LCA, and numerous supporting documents reference that the proffered position is "JAVA/J2EE Programmer" within the "Computer Programmers" occupational category, on numerous documents the proffered position is listed as "Web Developer."<sup>3</sup> As previously discussed, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384.

Again, 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 or its equivalent as the minimum for entry into the occupation, as required by the Act. *See* section 214(i)(1) of the Act; *see also Defensor v. Meissner*, 201 F. 3d at 387-388. Nevertheless, when a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, the petitioner has failed to demonstrate that it has secured work for the beneficiary for the entire period of requested employment when it filed the petition. On the Form I-129, the petitioner requested an H-1B for the period of October 1, 2013 to September 15, 2016. The petitioner stated that the beneficiary will be assisting with the development of the petitioner's projects, namely [REDACTED]<sup>4</sup> as well as the petitioner's wire transfer project.

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<sup>3</sup> The petitioner's document entitled Staff Assigned to Roles, submitted with the H-1B petition, references the beneficiary under the role of "WEB DEVELOPER." Additionally, the petitioner's document entitled Project Organization Chart submitted with the H-1B petition references "Web Developer," among many other roles in the project, but makes no reference to JAVA/J2EE Programmer or Computer Programmer. Further, in response to the RFE, counsel states that "[t]he petitioner is including a project summary document which contains the staffing for the project, the timelines for each position (beneficiary is considered a Web Developer) and the organizational chart for the project with this response." Finally, although the petitioner's document entitled Project Summary outlines the role requirements for the project, no reference is made to JAVA/J2EE Programmer or Computer Programmer, the purported proffered position for the beneficiary.

<sup>4</sup> The record of proceeding contains a document from the petitioner entitled "[REDACTED] Numerous and extensive portions of this document appear to have been taken virtually verbatim from other websites, without citing or properly crediting the information to its website. For example, the referenced report states that "[REDACTED] offers comprehensive pricing information, photo galleries, buying guides, side-by-side comparison tools, original editorial content, expert car reviews and access to all the information a car shopper needs to make a confident

The petitioner further referenced that the goal was to launch the website in 2015. In addition, the petitioner stated that "we would like to make it clear that the beneficiary will be working primarily on these projects [REDACTED] but we may assign [the beneficiary] to our other in-house development projects should we require the assistance." The petitioner did not provide any detailed evidence of the project and job duties the beneficiary would perform when the referenced projects were complete. Therefore, it is not clear if the beneficiary will work in the same position as described for the entire period of employment requested on the Form I-129.

In other words, there is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do and where the beneficiary would work, as well as how the unavailability of work would impact the circumstances of his relationship with the petitioner. We thus find that the petitioner has failed to establish that the petition was filed on behalf of the beneficiary for non-speculative work for the entire period requested that existed as of the time of the petition's filing.

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buying decision. [REDACTED] also provides the tools necessary for consumers to place an ad and sell their car online. . . ." This information is identical (virtually verbatim) as information provided on the website for [REDACTED] available at [REDACTED] (last visited July 16, 2014).

As another example, the petitioner's report goes on to state the following:

The automobile has arguably done as much to change modern life as any invention in human history. And while the car has only been with us for little more than a century, it has profoundly affected the way we live, and it has fueled one of the largest industries the world has ever seen – with more than 16 million new vehicles sold in 2007 in the United States alone. Yet in a century that saw remarkable changes in the car itself, there has been relatively little change in the way that cars are sold. The Internet was expected to dramatically change car buying – by offering consumers better information, which the Web has done excellently, and the opportunity to be in control of the process, and by extension giving dealers a more effective, targeted channel for finding buyers. But what's emerged instead is quite different. It's a deficient system based on selling to dealers the names of consumers researching car purchases online. This system, known as "lead generation," revolves around simply monetizing a consumer's desire to get a price quote on a particular car, and a dealer's desire to know who's looking.

This information is identical (virtually verbatim) as information provided on the website for [REDACTED], available at [REDACTED] (last visited July 16, 2014).

Based upon a complete review of the record of proceeding and the websites referenced there is no indication that the petitioner and these websites are related or affiliated. Perhaps most importantly, the [REDACTED] website contains a notice of copyright and that all rights are reserved. The petitioner has not provided any documentation to indicate that it obtained the prior consent of [REDACTED] and was permitted to submit the information to USCIS representing the information as its own.



USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.<sup>5</sup> Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 8 U.S.C. 1361 (Section 291 of the Act). The petitioner has thus not established that, at the time the petition was submitted, it had secured work for the beneficiary that would entail performing the duties as described in the petition and that was reserved for the beneficiary for the duration of the period requested.

### C. Review of the Director's Decision

Next, we will discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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.

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>6</sup> As noted above, the petitioner submitted an LCA

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<sup>5</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) also contemplates that speculative employment is not permitted stating that a "petition may not be filed. . .earlier than 6 months before the date of **actual need** for the beneficiary's services or training. . ."

<sup>6</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.



in support of this position certified for a job offer as a JAVA/J2EE Programmer, within the "Computer Programmers" occupational classification. However, as discussed above, the petitioner also referenced the proffered position as Web Developer.

Counsel maintains that the duties of the proffered position fall within those of the "Computer Programmers" occupational category. The evidence of record establishes that some of the duties of the proffered position fall within that category. A review however establishes that many of those proposed duties also fall within the *Handbook's* entries for the "Web Developers" occupational classification. We will therefore examine what the *Handbook* says regarding both occupations.

As discussed in the *Handbook*, web developers do not comprise an occupational category that normally requires at least a bachelor's degree in a specific specialty or its equivalent. In pertinent part, the *Handbook* states the following with regard to this occupational classification:

Web developers design and create websites. They are responsible for the look of the site. They are also responsible for the site's technical aspects, such as performance and capacity, which are measures of a website's speed and how much traffic the site can handle. They also may create content for the site.

Web developers typically do the following:

- Meet with their clients or management to discuss the needs of the website and the expected needs of the website's audience and plan how it should look
- Create and debug applications for a website
- Write code for the site, using programming languages such as HTML or XML
- Work with other team members to determine what information the site will contain
- Work with graphics and other designers to determine the website's layout
- Integrate graphics, audio, and video into the website
- Monitor website traffic

When creating a website, developers have to make their client's vision a reality. They work with clients to make sure it fits in with the type of site it is supposed to be, such as ecommerce, news, or gaming. Different types of websites may require different applications to work right. For example, a gaming site should be able to handle advanced graphics while an ecommerce site needs a payment processing

application. The developer decides which applications and designs will best fit the site.

Some developers handle all aspects of a website's construction, while others specialize in a certain aspect of it. The following are some types of specialized web developers:

**Web architects or programmers** are responsible for the overall technical construction of the website. They create the basic framework of the site and ensure that it works as expected. Web architects also establish procedures for allowing others to add new pages to the website and meet with management to discuss major changes to the site.

**Web designers** are responsible for how a website looks. They create the site's layout and integrate graphics; applications, such as a retail checkout tool; and other content into the site. They also write web-design programs in a variety of computer languages, such as HTML or JavaScript.

**Webmasters** maintain websites and keep them updated. They ensure that websites operate correctly and test for errors such as broken links. Many webmasters respond to user comments as well.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Web Developers," <http://www.bls.gov/ooh/computer-and-information-technology/web-developers.htm#tab-2> (last visited July 16, 2014).

In the project description provided by the petitioner, the petitioner is developing the [REDACTED] websites. The roles outlined for the project are: Datawarehouse, Network, DBQ, QA Analyst/Testers, Web Developers, Web Designers, Content Developers, Architect and Project Manager. The project organization chart lists six web developers assigned to the project and two senior web developers. No reference is made to computer programmers or JAVA/J2EE programmers in either of these documents. Based on the project description and the petitioner's March 25, 2013 letter, we find that the beneficiary's primary function would be performing tasks which, according to the *Handbook*, fall within those normally performed by web developers.

The *Handbook* states the following with regard to the educational requirements necessary for entrance into the Web Developers occupational group:

The typical education needed to become a web developer is an associate's degree in web design or related field. Web developers need knowledge of both programming and graphic design.

Educational requirements for web developers vary with the setting they work in and the type of work they do. Requirements range from a high school diploma to

a bachelor's degree. An associate's degree in web design or related field is the most common requirement.

However, for web architect or other, more technical, developer positions, some employers prefer workers who have at least a bachelor's degree in computer science, programming, or a related field.

Web developers need to have a thorough understanding of HTML. Many employers also want developers to understand other programming languages, such as JavaScript or SQL, as well as have some knowledge of multimedia publishing tools, such as Flash. Throughout their career, web developers must keep up to date on new tools and computer languages.

Some employers prefer web developers who have both a computer degree and have taken classes in graphic design, especially when hiring developers who will be heavily involved in the website's visual appearance.

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/web-developers.htm#tab-4> (last visited July 16, 2014).

We find that the *Handbook's* information does not support a finding that at least a bachelor's degree in a specific field of study or its equivalent is required for entry into the occupational classification of Web Developer. The *Handbook* specifically states that educational requirements for Web Developers "vary" with the setting they work in and the type of work they do and that such requirements range from a high school diploma to a bachelor's degree, but it does not state that for those positions which may require a bachelor's degree, the degree must be in a specific specialty or its equivalent. We also note that the *Handbook* relates that "an associate's degree in web design or related field is the most common requirement." Also, with regard to "web architect" the *Handbook* notes only that "some employers prefer workers who have at least a bachelor's degree in computer science, programming, or a related field." Such a preference by some employers does not equate to a standard, minimum entry requirement. Accordingly, a position's inclusion within this occupational category would not in itself be sufficient to establish the position as one for which the normal minimum entry requirement is at least a bachelor's degree in a specific specialty or its equivalent.

Having made that determination, we turn next to that portion of the proposed duties which coincide with those described in the *Handbook* as falling within the "Computer Programmers" occupational category. The *Handbook's* discussion of the duties of computer programmers states, in pertinent part, the following:

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.



Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Debug programs by testing for and fixing errors
- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

Programmers work closely with software developers, and in some businesses, their duties overlap. When this happens, programmers can do work that is typical of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, writing and debugging code, and designing an application or systems interface.

Some programs are relatively simple and usually take a few days to write, such as creating mobile applications for cell phones. Other programs, like computer operating systems, are more complex and can take a year or more to complete.

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited July 16, 2014).

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

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree

in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited July 16, 2014).

These statements from the *Handbook* do not indicate that at least a bachelor's degree in a specific specialty or its equivalent is normally required for entry into the Computer Programmers occupational category. First, the *Handbook* specifically states that "some employers hire [computer programmers] who have an associate's degree." The *Handbook's* recognition that a bachelor's or higher degree is not exclusively "required" by employers, strongly suggests that a bachelor's or higher degree in a specific specialty, or the equivalent, is not a standard, minimum entry requirement for this occupation. Rather, the Computer Programmer occupational category accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty or its equivalent. The *Handbook* continues by stating that employers value computer programmers who possess experience, which can be obtained through internships. Thus, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation.

Further, with regard to the *Handbook's* statements that "most" computer programmers possess a bachelor's degree and that "most" "get a degree" in a computer-related field, this is not the same as stating that most require a bachelor's degree in a computer-related field to enter the occupation. Rather, it may simply mean that of those in the occupation with associate or bachelor's degrees, "most" major in a computer-related field.

Even if the *Handbook* stated that most computer programmers require a bachelor's or higher degree in computer science, 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 programmer positions require at least a bachelor's degree in a specific specialty, it could be said that "most" computer programmer 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." § 214(i)(1) of the Act.

Accordingly, even if the evidence supported a finding that the primary duties of the proffered position would be those of a computer programmer instead of a web developer, as the *Handbook* indicates that entry into the Computer Programmer occupational category does not normally require at least a bachelor's degree in a specific specialty or its equivalent, it does not support the proffered position as satisfying this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). That is, in light of the *Handbook's* information on the range of acceptable educational credentials for entry into the Computer Programmer occupational category, a particular position's inclusion within this classification is not in itself sufficient to establish that position as one for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally a minimum requirement for entry.

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 the Computer Programmers occupational group is sufficient in and of itself to establish the proffered position as a "particular position" for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Although counsel asserts in his October 7, 2013 letter in response to the director's RFE that the "USCIS has consistently approved cases which involve Computer Programmers without questioning the degree requirement in the recent past," we note that copies of these allegedly approved petitions were not included in the record. If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, we may not consider such evidence as it would not be part of the instant record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii); *see also* *Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at \*6 (S.D. Tex. Feb. 26, 2009); *see also* *Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal).

Again, the petitioner in this case failed to submit copies of these petitions and their respective approval notices. As the record of proceeding does not contain any evidence of the allegedly approved petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

When "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. 8 U.S.C. § 1361; *see also* *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the



evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. We are 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).

Furthermore, our 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 the nonimmigrant petitions, we 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).

Finally, it is noted that the petitioner submitted an LCA certified for a computer programmer job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within the same occupation, which signifies that the beneficiary is only expected to possess a basic understanding of that occupation.<sup>7</sup>

In this case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that this particular position is one for which a baccalaureate

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<sup>7</sup> 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. A Level I wage is appropriate for a proffered position that is a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests 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. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited July 16, 2014).

or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find 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 for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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. Also, the record contains no letters or affidavits from firms or persons in the industry attesting to such a requirement. Further, there is no evidence of a professional association having made a bachelor's degree in a specific specialty, or the equivalent, a minimum requirement for entry.

The seven job-vacancy announcements submitted by counsel do not satisfy this alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). That is, neither the job-vacancy announcements themselves nor any other evidence within the record of proceeding establish that those advertisements pertain to positions that are parallel to the proffered position, as required for evidence to merit consideration under the first alternative prong is position. In this regard, we make several specific findings.

First, while some of the advertisements bear the title "Computer Programmer," it is the nature of the duties comprising the advertised positions that would determine whether those positions are in fact parallel to the proffered position. However, we see that the duty descriptions of the advertised positions and their constituent duties are not substantially similar to the proffered position's duties as stated in the Job Description sheet submitted with the petitioner's RFE response. We also see that the extensive IT experience that some of the job advertisements specify as hiring requirements as well as the senior-level designation of some of the advertised positions suggest that they involve the application of greater occupational knowledge than the proffered position, a Level I, entry-level position. So, the seven job-vacancy advertisements do not establish that the advertised positions are "parallel" to the proffered position.

Further, the petitioner has failed to establish that a number of the vacancy announcements relate to the petitioner's industry — IT software development. For instance, with respect to the vacancy announcement from "Confidential" for an IT Software Developer (Programmer) in Kansas City, Missouri and the vacancy announcement from "Employment Solutions," it is unclear what industry the hiring companies are in and whether they would be similar to that of the petitioner and, as such,



it also cannot be determined whether the jobs would be considered parallel to that of the proffered position. Moreover, the Pulse Systems vacancy announcement refers to "health care"; accordingly, it also cannot be found that this organization is either similar to the petitioner or that its advertised position would be in the same industry.

Additionally, the submitted advertisements do not all specify a requirement for a bachelor's or higher degree in a specific specialty or its equivalent. By way of example, the Speedy Cash Holding Corp. advertisement for a "Sr. [(Senior)] .Net Programmer" only states "Bachelor's degree required" without any specification of any particular academic major. Likewise, the Subway® Group advertisement for a ".Net Programmer Analyst specifies a "BS/BA degree and 2+ years related .Net experience and/or training; or equivalent combination of education and experience" with no indication that the "BA/BS" must be in any particular area or equivalent to a bachelor's or higher degree in a specific specialty. In addition, the Spencer Read Group, LLC advertisement for an ETL Programmer puts a premium on a certain range of IT experience, but only states a "4 Year Degree" as its educational requirement; the same is true for the Digital Staffing "Java Programmer" advertisement.

As the submitted vacancy-announcements are not probative evidence towards satisfying this criterion, further analysis of their content is not necessary. Therefore, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

Next, we find that the evidence of record does 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."

The statements of counsel and the petitioner with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, as reflected in our earlier comments and findings regarding the record's description of the duties comprising the proffered position, the petitioner has not provided sufficient evidence to establish why it is more likely than not that the proffered position can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

Also, we find that assertions of the requisite complexity or uniqueness are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within the same occupation. We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the level of relative complexity and uniqueness required to satisfy this second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates



that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited July 16, 2014).

Again, the *Handbook* indicates that there are positions located within both the "Web Developers" and "Computer Programmers" occupational categories which are performed by persons without at least a bachelor's degree in a specific specialty or the equivalent. Accordingly, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review would be so complex or unique relative to other web developers and computer programmers that it could only be performed by a person with at least a bachelor's degree in a specific specialty or the equivalent. Even more fundamentally, as discussed in detail above, the evidence of record does not establish that the proffered position possesses the relative complexity or uniqueness required to satisfy this criterion.

As the evidence of record therefore fails to establish how 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 at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn 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 or higher degree in a specific specialty or its equivalent for the position.

Our 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. Additionally, the record must establish that the 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.<sup>8</sup>

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

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<sup>8</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner submitted an LCA that had been certified for a Level I wage-level, which is appropriate for use with a comparatively low, entry-level position relative to others within the same 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* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The director's August 21, 2013 RFE specifically requested the petitioner to document its past recruiting and hiring history with regard to the proffered position. The RFE included the following detailed request for such documentation:

**Position Announcement:** To support the petitioner's contention that the position is a "specialty occupation," provide copies of the petitioner's present and past job vacancy announcements. The petitioner may also provide classified advertisements soliciting for the current position, showing that the petitioner requires its applicant to have a minimum of a baccalaureate or higher degree or its equivalent in a specific specialty.

**Past Employment Practices:** Provide evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher in a specific specialty, to perform the duties of the proffered position. Indicate the number of persons employed in similar positions. Further, submit documentation to establish how many of those persons have a baccalaureate degree or higher and the particular field of study in which the degree was attained. Documentation should include copies of transcripts and pay records or Quarterly Wage reports for the employees claimed to hold a baccalaureate degree in the specific field of study.

Thus, the director provided the petitioner with an additional opportunity to establish a history of recruiting and hiring for the proffered position only individuals with a bachelor's or higher degree in a specific specialty, or the equivalent. However, the petitioner submitted no such evidence.<sup>9</sup> While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is not possible that an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a

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<sup>9</sup> In response to the RFE, counsel stated as follows: "The petitioner has always previously required a bachelor's degree in a relevant IT field for this position. As evidence of this, the petitioner has included copies of their current employees['] degrees/transcripts and a paystub as evidence of their employment with the petitioner." No identification was provided to establish that the documentation submitted by counsel pertains to the proffered position, namely, JAVA/J2EE Programmer. Furthermore, the petitioner has failed to establish that the beneficiary's duties and responsibilities in the proffered position would be the same as these individuals'.



demonstration that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position.

As the evidence of record does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, we find that the evidence of record does not satisfy 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 specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Web Developers" and "Computer Programmers" occupational categories. Again, the *Handbook* does not indicate that a bachelor's or higher degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions; and the record indicates no factors that would elevate the duties proposed for the beneficiary above those of other entry-level positions generally discussed in the *Handbook*. As reflected in this decision's earlier discussion of the duty descriptions in the petitioner's letter of support, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education in a specific specialty. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent.

Additionally, we find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a Level I wage, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

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

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



tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited July 16, 2014).

The pertinent guidance from DOL, 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.

*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 the Level II wage-rate itself is associated with performance of only "moderately complex tasks that require limited judgment," is indicative of the relatively low level of complexity imputed to the proffered position by virtue of the petitioner's 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.*

Here we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL'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).

#### **D. USCIS Policy and Past Practice**

We are not persuaded by counsel's claim, in his October 7, 2013 letter replying to the RFE, that the director's denial of the petition was a reversal of binding USCIS policy. Specifically, counsel states the following:

The USCIS has consistently approved cases which involve Computer Programmers without questioning the degree requirement in the recent past and seems to have suddenly changed their policy without warning or notice.

As we stated earlier, counsel cites no agency policy memoranda or agency precedent decision that would support his general allegation. With regard to whatever decisions counsel may be referring, it is again noted that when any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ], the burden of proof shall be upon such person to establish that he is eligible" for such benefit. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, even if counsel had identified the file numbers related to whatever decisions he refers, any suggestion that USCIS would have to review such unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to



a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

Additionally, counsel's arguments bear consideration only to the extent that they are grounded in evident facts and legal authorities. 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).

To the extent that counsel's general claim regarding past USCIS decisions is meant to encompass unpublished AAO decisions, we note again that if a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. § 5.

In the instant case, the petitioner submits no copies of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. Further, While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Next, we note that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), which held that "[t]he knowledge and not 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."

We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." 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 (or its equivalent)" 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 (or its equivalent)," 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*.<sup>10</sup> We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are 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 us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Counsel also cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). In *Tapis Int'l v. INS*, the U.S. district court found that, while the former 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, INS's interpretation was not reasonable because 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." *Id.* 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.

We agree 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. Once again, 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 (or its equivalent)" 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 would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," 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, we also agree 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

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<sup>10</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to this office. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process we 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 us in our *de novo* review of the matter.

position may qualify as a specialty occupation. We do 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. Again, 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 or its equivalent 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, we do 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 was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 (stating that "[t]he 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 former 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*.

Finally, this office 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 to which counsel generally alluded 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. We are 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).

Again, 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, our 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, we 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 director's decision to deny the petition will be affirmed.

### **E. Additional Grounds of Ineligibility**

#### *The Beneficiary's Qualifications for the Position*

Beyond the decision of the director, there is an aspect of this petition that would come into play if the petitioner were able to establish the proffered position as a specialty occupation. While the beneficiary qualifications are not relevant unless a specialty occupation were established, we note that, according to the petitioner's assertions in the record of proceeding, as a specialty occupation position the proffered position would require "a bachelor's degree in Computer Science or [a] closely related field." We see that the evidence of record establishes that the beneficiary holds a foreign degree equivalent to a U.S. bachelor's degree in Engineering. However, to meet its stated requirement of a degree closely related to one in Computer Science, the petitioner materially relies on that segment of the evaluation-of-experience portion of [REDACTED] "Evaluation of Education, Training, and Experience" document in which Mr. [REDACTED] opined that the combination of (1) the beneficiary's education and (2) the beneficiary's work experience endows the beneficiary with the equivalent of a U.S. "Bachelor of Science Degree with a Dual Major in Computer Information Systems and Engineering."

However, upon review of the May 29, 2012 letter of endorsement provided by [REDACTED] PhD, Associate Dean-[REDACTED] we see that the petitioner has not established that Mr. [REDACTED] is recognized under the pertinent H-1B regulations as a person who is qualified to opine on the U.S. educational-equivalency of a person's work experience. Specifically, close reading of the

endorsement letter reveals that it falls short of establishing all of the necessary elements required to show, in the words of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(I), that Mr. [REDACTED] is "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience" (emphasis added)." Accordingly, Mr. [REDACTED] assessment of the educational equivalency of the beneficiary's experience lacks probative weight in this matter. That is, as that experience assessment was a material basis for Mr. [REDACTED] ultimate conclusion that the combination of the beneficiary's work experience and his U.S.-equivalent degree in Engineering should be regarded as the equivalent of a U.S. Bachelor of Science degree with a Dual Major in Computer Information Systems and Engineering, that conclusion lacks probative weight. Therefore, the petition would have to be denied even if we reversed the decision of the service center director.

#### *Labor Condition Application*

Finally, the petition must also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition. Specifically, although the job title on the LCA submitted with the petition reads "JAVA/J2EE PROGRAMMER," it was certified for SOC (O\*NET/OES) Code 15-1131 or "Computer Programmers." For the reasons discussed above, however, the job as described by the petitioner is best classified under SOC (O\*NET/OES) Code 15-1134 or "Web Developers." As such, the petitioner was required to provide at the time of filing an LCA certified for SOC (O\*NET/OES) Code 15-1134, not SOC (O\*NET/OES) Code 15-1131, in order for it to be found to correspond to the petition.

To permit otherwise may result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing that petitioner to submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for. The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. See 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at \*8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

In this matter, this would result in an LCA certified for a Level I prevailing wage of \$47,174 per year for a computer programmer when a certified LCA should have been submitted for a web developer position with a minimum, Level I prevailing wage at that time of \$52,874 per year. As such, even though the attested wage rate of \$65,000 per year on the Form I-129 exceeds this



amount, the petitioner must still submit an LCA certified for the proper occupation and wage to ensure the wage would not fall or be lowered below that required by law at that time.<sup>11</sup>

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

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that has been certified for the proper occupational classification, and the petition must be denied for this additional reason.<sup>12</sup>

Further, as discussed at length above, the petitioner submitted an LCA certified for a computer programmer job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within the same occupation. This indicates that the submitted LCA would not correspond with the proffered position even if the position were found to require be a

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<sup>11</sup> This would apply even if the position in this case also involves computer programmer duties. According to DOL's "Prevailing Wage Determination Policy Guidance":

If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the SWA should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited July 16, 2014). Therefore, as the web developer occupation was the higher paying occupation in the area of employment at the time the petition was filed, the petitioner was required to submit an LCA certified for this occupation and not the other.

<sup>12</sup> Further, if we had found that the proffered position was more complex, specialized, and/or unique relative to other positions within the same occupation, this would likely require that the petition be supported by an LCA certified for a higher-level position. In this case, a Level III or Level IV web developer position would require the LCA to have been certified with a respective prevailing wage of \$82,763 or \$97,698 per year – a salary significantly higher than that proffered by the petitioner in this matter.

computer programmer position requiring at least a bachelor's degree in a specific specialty, or its equivalent: that finding would elevate the position above both a low, entry-level position within the Computer Programmers occupational group, and also the corresponding Level I prevailing-wage rate that are signified by the LCA. For this additional reason, the petition would also have to be denied.

#### IV. Conclusion and Order

The evidence of record does not demonstrate that the proffered position is a specialty occupation and therefore does not overcome the director's basis for denying this petition. Consequently, the director's decision to deny the petition will be affirmed, and the petition will be denied.

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

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The director's decision is affirmed. The petition is denied.