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



U.S. Citizenship
and Immigration
Services

DATE: **JUN 30 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an "IT Solutions & Services" firm established in 2012, with 11 employees. In order to employ the beneficiary in what it designates as a "Software Engineer" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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

Upon review of the entire record of proceeding, we find that the petitioner failed to overcome the director's ground for denying this petition.¹ Accordingly, the appeal will be dismissed and the petition will remain denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a Software Engineer, to work on a full-time basis at a salary of \$60,500 per year. The petitioner indicated that the beneficiary would be employed at its offices located at [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2013 to September 14, 2016.

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the position is "Software Developers, Applications" SOC (ONET/OES) Code 15-1132, at a Level I (entry level) wage. The LCA was certified for a validity period beginning September 15, 2013 to September 14, 2016.

In a letter of support, dated April 1, 2013, the petitioner described the company as an organization that develops systems architecture and enterprise solutions to meet client's needs as well as "build

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

new applications, infrastructure, or adapt third-party, open source software" per client needs. The petitioner stated as a Software Engineer, the beneficiary's duties will be as follows:

- He will modify existing software to correct errors, allow it to adapt to new hardware, or to improve its performance.
- He will develop and direct software system testing and validation procedures, programming, and documentation.
- Confer with systems analysts, engineers, programmers and others to design system and to obtain information on project limitations and capabilities, performance requirement and interfaces.
- He will analyze user needs and software requirements to determine feasibility of design within time and cost constraints.
- He will design, develop and modify software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.
- Further, he will store, retrieve, and manipulate data for analysis of system capabilities and requirements.
- Consult with customers about software system design and maintenance.
- Supervise the work of programmers, technologists and technicians and other engineering and scientific personnel.
- Will coordinate software system installation and monitor equipment functioning to ensure specifications are met.
- Will obtain and evaluate information on factors such as reporting formats required, costs, and security needs to determine hardware configuration.

Notably, the job description duplicates virtually verbatim the tasks from the occupational category "Software Developers, Applications" as described in the Occupational Information Network (O*NET) Online Code Connector for SOC (ONET/OES) Code 15-1132. *See* U.S. Dep't of Labor, Emp't & Training Admin., Occupational Information Network (O*NET) Code Connector, Software Developer, Applications – SOC (ONET/OES Code) 15-1132 on the Internet at <http://www.onetonline.org/link/summary/15-1132> (last visited June 28, 2014). That is, all of the duties provided by the petitioner have been recited from the description from the O*NET Code Connector for the occupational category "Software Developers, Applications."

The petitioner claimed that "to successfully discharge the duties and to complete the job requirements in [a] suitable manner, a Software Engineer must have theoretical and practical application of a body of highly specialized knowledge in the field of Computer Science, and requires a bachelor's degree or higher in the related field." The petitioner further claimed that "to perform the related job duties, the beneficiary should have apprehensive [*sic*] knowledge of computer skills, and programming." The petitioner stated that the beneficiary qualifies for the position proffered here based on "his Bachelors of Science degree in Information [T]echnology from the [REDACTED] India." The petitioner included the beneficiary's resume and a credentials evaluation.

The petitioner also included a copy of its organizational chart. The chart shows 17 positions, with 15 of those positions filled. The petitioner also included a copy of a business plan and proposed product development strategy.

The director issued an RFE on June 18, 2013. The petitioner was asked to submit, among other things, evidence establishing that it has specialty occupation work available for the beneficiary to perform for the entire requested validity period and evidence documenting the specific project to which the beneficiary will be assigned.

In response to the director's RFE, counsel for the petitioner submitted a letter dated September 4, 2013. Counsel stated that the beneficiary will be assigned to work on the petitioner's in-house project [REDACTED] which the petitioner is currently developing. Counsel added that the "beneficiary will utilize its services as a Software Engineer in basic development, troubleshooting, and further projection of the In-House Project." Counsel further explained that the petitioner has several projects and services agreement with end-clients but the petitioner currently "does not foresee any placement outside its location."

The petitioner provided the same proposed product development strategy as provided with the initial petition. The document includes a product development strategy beginning in the last quarter of 2013, as well as a resource level chart, phase-wise deliverable and activities, and an organizational chart for the project. The organizational chart shows a "[REDACTED] Project Manager" with three "Principle Consultants" reporting directly to the project manager position. Six "Onsite Lead" positions report to the principle consultants and three team members report to each of the onsite leads. Finally, a chart for "salaries" is included, but does not specify a salary for the position of "Software Engineer."

Upon review, the director denied the petition determining that the petitioner had not established that the proffered position is a specialty occupation within the meaning of the applicable statute and regulations.

On appeal, counsel for the petitioner submits a brief. Counsel claims that the director's denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel notes that the director's RFE did not request the petitioner to prove beyond a preponderance of the evidence that the proffered position qualifies as a specialty occupation. Counsel contends that the director ignored crucial factors and failed to review the position proffered here or the job duties or the beneficiary's education. Counsel asserts that the director did not consider the evidence in its entirety and that the petitioner has established by a preponderance of the evidence that the position proffered here is a specialty occupation.

The sole issue on appeal is whether the petitioner has established that the duties of the proffered position comprise the duties of a specialty occupation.

II. STANDARD OF REVIEW

In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

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

* * *

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

* * *

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

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

Id. at 375-76.

Again, we conduct our review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determination in this matter was correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

III. Law

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.

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

IV. ANALYSIS

We will now address the director's basis for denying the petition, namely that the petitioner has not established that the proffered position is a specialty occupation. Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that

the position proffered here comprises the duties of a specialty occupation.²

The petitioner stated on the Form I-129 that the beneficiary would be employed in a "Software Engineer" position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation, as required by the Act.

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a software engineer/software developer, applications).

The petitioner in this matter has not provided a credible supported description of the actual duties the beneficiary will perform for the duration of the requested employment period. A crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that we may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline. In this matter the petitioner has not provided this essential information.

As previously mentioned, the description of the proffered position as provided by the petitioner and counsel is copied from the occupational category "Software Developers, Applications" as described in the O*NET Code Connector. However, simply copying a job description from the O*NET (or

² Counsel for the petitioner points out that the director did not explicitly ask that the petitioner submit evidence establishing that the position proffered here is a specialty occupation. We observe, however, that the director did request that the petitioner establish that it has specialty occupation work available for the beneficiary to perform for the entire requested validity period as well as evidence documenting the specific project to which the beneficiary will be assigned. The petitioner did not further describe the specific duties the beneficiary would be required to perform in relation to the petitioner's specific business. Moreover, if the petitioner has further evidence regarding the duties of the proffered position, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as an appropriate forum for that new evidence. In the present matter, the evidence, including the evidence and argument submitted on appeal, does not demonstrate that the proffered position is a specialty occupation.

other source) is generally not sufficient for establishing H-1B eligibility. That is, while this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. The broad description for an occupational category fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. More specifically, in establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

In this matter, the proposed job duties state that the beneficiary will "supervise the work" of other staff members, including programmers, technologists, technicians, and other engineering and scientific personnel. The petitioner has not provided any names, titles, or job descriptions of the beneficiary's purported subordinates. The petitioner does not identify the beneficiary's placement on the project's organizational chart. Thus, it is not possible to ascertain that the beneficiary will actually perform this listed duty. Furthermore, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform any of these functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested. The description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's assertion that the position is a specialty occupation. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "design, develop, and modify software systems" and "modify existing software to correct errors." The petitioner's statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. The duties provide no detail as to how the beneficiary's role as a Software Engineer will be utilized in the in-house project ' [REDACTED]

Moreover, the petitioner's description of the claimed in-house project lacks sufficient detail to corroborate the petitioner's claim regarding availability of work for the beneficiary. Specifically, the organizational chart fails to show which of the petitioner's in-house employees would be assigned to the project. While the projected project timeline shows work beginning in 2013, the petitioner has provided no evidence that work on the project has commenced. Finally, the petitioner shows a proposed budget for the development, but does not detail availability of funds, or, any plans showing projected income from the project or potential buyers/clients for the product.

Upon review, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

Based upon a complete review of the record of proceeding, the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in the record that would also require dismissal of the appeal.

Assuming for the sake of argument that the proffered duties as generally described by the petitioner in its initial letter and reiterated on appeal would in fact be the duties to be performed by the beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.

To make its determination as to whether the employment described above qualifies as a specialty occupation, we turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. We recognize the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³

³ Our references to the *Handbook*, are references to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

In this matter, the petitioner identifies the proffered position as a software engineer and accords the occupational code of 15-1132, software developers, applications, to the position. Regarding the education sought for this occupation, the *Handbook* reports:

Software developers usually have a bachelor's degree, typically in computer science, software engineering, or a related field. A degree in mathematics is also acceptable. Computer science degree programs are the most common, because they tend to cover a broad range of topics. Students should focus on classes related to building software in order to better prepare themselves for work in the occupation. For some positions, employers may prefer a master's degree.

Although writing code is not their first priority, developers must have a strong background in computer programming. They usually gain this experience in school. Throughout their career, developers must keep up to date on new tools and computer languages.

Software developers also need skills related to the industry in which they work. Developers working in a bank, for example, should have knowledge of finance so that they can understand a bank's computing needs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Software Developers," <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-4> (last visited June 27, 2014).

Here, although the *Handbook* indicates that software developers usually have a bachelor's degree, typically in computer science, software engineering, or a related field, it also indicates that a degree in mathematics is acceptable. Accordingly, a bachelor's degree in a specific discipline is not the minimum requirement necessary to enter into the occupation. In addition, although a bachelor's degree in computer science or software engineering is "typical" this is not indicative that a software developer/engineer position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)). It cannot be found, therefore, that a "typical" degree is the normal minimum entry requirement for that occupation, much less for the generally described and limited position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

To satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) the petitioner must demonstrate that a baccalaureate or higher degree in a specific discipline is normally the minimum requirement for entry into the particular position. Thus, the proffered position must require a precise and specific course of study that relates directly and closely to the position in question. Although a general-purpose bachelor's degree, or a degree in a variety of fields, may be acceptable for a particular occupation,

such general requirements do not establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position. Accordingly, the *Handbook* does not identify a degree in a specific discipline as required to perform the duties of a software developer as here described.

We find, 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).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position. Here, the petitioner has not established how the general fields of computer science, software engineering, and mathematics, all directly relate to the duties and responsibilities of its particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties.

As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or the equivalent, to satisfy this first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. We have considered counsel's reference to the O*NET and its classification of this occupation as falling within the parameters of a Job Zone "Four" occupation. However, the O*NET does not state a requirement for a bachelor's degree. Rather, a Job Zone "Four" rating, groups this occupation among occupations of which "most," but not all, "require a four-year bachelor's degree." Such a requirement is not the equivalent of a normal minimum entry requirement for that occupation. Further, the O*NET does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty directly related to the occupation. Therefore, the O*NET information is not probative of the position proffered here being a specialty occupation.

As the evidence in the record of proceeding does not establish that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the

particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

As stated earlier, 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 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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. In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the petitioner's custom computer programming services industry. The four advertisers listed in the job announcements are [REDACTED] and [REDACTED]. The petitioner has not submitted any evidence that these four advertisers are organizations that are similar to the petitioner in terms of size, work, or industry, thus, the relevance of these four advertisements is unclear. In any event, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.

USCIS "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." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

Accordingly, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to 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 petitioner in this matter provided a broad description of the duties of the proffered position. As determined above, it is not possible to ascertain what the beneficiary will actually do on a daily basis. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Thus, the petitioner fails to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

The petitioner references the beneficiary's educational background in information technology as qualifying the beneficiary to carry out the duties of the proffered position. Counsel asserts that the director failed to consider the beneficiary's education when determining that the position proffered here is not a specialty occupation. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. Counsel does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the third criterion, the petitioner submitted evidence on appeal identifying three individuals it had hired for positions titled software engineer (2), and software engineer/QA analyst (1) and that these three individuals have been approved for H-1B classification. The petitioner included the letters submitted in support of the Form I-129 petitions and the approval notices for these three individuals. Counsel asserts this evidence demonstrates that the petitioner normally requires a degree or its equivalent for the proffered position.

The director's decision does not indicate whether the prior approvals of the other nonimmigrant petitions were reviewed. However, if the previous nonimmigrant petitions were approved based on the same unsupported and inconsistent 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).

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 the nonimmigrant petitions on behalf of the 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).

We also observe that while a petitioner may believe and assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of software engineers/developers, applications, positions that are not usually associated with attainment of at least a bachelor's degree in a specific specialty or its equivalent.

In addition, we observe that the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.⁴ This aspect of the petition is materially inconsistent with a

⁴ *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.

position whose duties' performance would require knowledge usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.⁵

Upon review of the totality of the record, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

V. CONCLUSION

The petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.

⁵ Counsel asserts on appeal that the proffered position qualifies as a specialty occupation on the basis that its duties are so specialized and complex. However, the duties as described lack sufficient specificity to distinguish the proffered position from other software engineers/developers, applications positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties.

Moreover, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See Id.* Therefore, it is not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).