



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: NOV 20 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

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,

Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked the previously approved nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner claims to be a "Technology [S]ervices" business established in 1995. In order to continue the employment of the beneficiary in a position it designates a "Sr. Programmer Analyst (Java Portals)" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) after receipt of an investigative report from the U.S. Consulate in India, demonstrating that the petitioner is unable to offer the position as originally described in the petition.

After issuance of a Notice of Intent to Revoke (NOIR) and upon review of the petitioner's submissions in response to this notice, the service center director revoked approval of the petition on August 27, 2013. The director determined that the petitioner had not overcome the grounds of revocation in that the petitioner had not submitted evidence it had *bona fide* specialty occupation work available for the beneficiary for the requested validity period.

The record of proceeding before this office contains: (1) the Form I-129 and supporting documentation; (2) the director's August 8, 2011 Request for Evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's NOIRs, dated March 1, 2013 and April 22, 2013; (5) the petitioner's responses to the NOIRs; (6) the director's August 27, 2013 notice of revocation (NOR); and (7) the Form I-290B, Notice of Appeal or Motion, the appeal brief, and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

I. FACTUAL AND PROCEDURAL BACKGROUND

The director revoked the petition's approval based on her determination that the petitioner had failed to establish that it had *bona fide* specialty occupation work available for the beneficiary for the requested validity period. Specifically, the director found that the petitioner had submitted information of an in-house project/product that appeared to be plagiarized from online sources and was not the original work of the petitioner. In the April 22, 2013 NOIR the director specifically requested that the petitioner provide evidence that it had *bona fide* specialty occupation work for the beneficiary for the requested validity period and suggested types of evidence that the petitioner could submit to establish this essential element. The petitioner failed to provide such evidence either in response to the director's NOIR or on appeal.

The Form I-129 petition was filed by the petitioner on July 28, 2011. On the Form I-129, the petitioner noted the beneficiary's intended employment period as: from date of approval to "+2 years & 3 months," the remaining H-1B time. In its letter of support dated July 19, 2011, the

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

petitioner claimed that it is "a leading business and information technology (IT) solution provider that helps government agencies and Fortune 500 companies plan, build, manage, and rationalize their technology investments to optimize mission and business performance." The petitioner provided the following description of the beneficiary's duties in the proffered position:

[D]evelop J2SE Struts, RAD, Eclipse, MySQL, JSP, and JBMP applications. Additionally, the candidate will analyze and mine data, develop, enhance, resolve, design and develop databases and software using Websphere application Server 6.0, WebSphere Portal Server 6.0, Bowstreet Java Script, Rational Rose, and UML.

The petitioner stated that the position proffered "requires a minimum Bachelor's Degree in Computer Science, Electrical Engineering, or related or equivalent."

The petitioner also submitted: (1) a Labor Condition Application (LCA) with the job prospect titled "Sr. Programmer Analyst (Java Portals)," which was certified for the occupational title of "Computer Programmers," SOC (ONET/OES) Code 15-1131;² (2) an excerpt from its website; (3) an excerpt from the 2010-2011 edition of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* on the occupation of "Computer Software Engineers and Computer Programmers"; and (4) a copy of the beneficiary's diploma, a notice of prior H-1B approval, a notice of an I-140, Immigrant Petition for Alien Worker, filed on behalf of the beneficiary, a letter regarding the beneficiary's leave, and copies of the beneficiary's pay statements.

The director issued an RFE requesting among other things, evidence that the petitioner had specialty occupation work available for the requested validity period. The director provided a summary of the type of documentation that could be provided.

In response, the petitioner provided a two-page document listing the beneficiary's overall responsibilities on a project and a summary of the project modules to be developed. The petitioner summarized the project as:

Developing DCAA Compliant Project management and Accounting Software with following Modules: Timesheet, Account Payable, Account Receivable, Project Management, Government and Commercial contract Tracking and Audit Application

The petitioner noted its minimum requirement of "a Bachelor's Degree or higher in computer Science, Engineering, Science, or a related field." The petitioner added that basic qualifications for the position included "6+ years web application development and implementation experience."

The petitioner also provided a 20-page document describing the "Online Timesheets, Accounts Payable and Accounts Receivable Application" which indicated the project had started June 2009 and would end March 2013. The record also included a document authored by [REDACTED] created July 10, 2007 and last revised July 8, 2010 which generally identified the petitioner's future

² The LCA is certified for a validity period from July 14, 2011 to July 14, 2014 at the petitioner's offices in [REDACTED], Texas.

plans for 2010-2015.³ The petitioner also submitted a 15-page document describing the "Applicant Tracking System and New [petitioner's] Website" which indicated the project(s) had started March 2008 and ended June 2009. The petitioner provided a flow chart and screen shots related to the Applicant Tracking System. The petitioner also included a copy of some source code it asserted the beneficiary had created. A review of the source code shows generally that the code relates to accounts payable and receivable with references to consultants, clients, base salary, bench pay, bonus, relocation, benefits, and vendors.⁴

Upon review of this information, the director approved the petition on October 25, 2011.

Upon receipt of the February 2, 2012 report from the U.S. Consulate General in [REDACTED] India, the director issued a NOIR with a copy of the consulate report attached. As noted above, the director referenced the report and requested evidence that the petitioner had *bona fide* specialty occupation work for the beneficiary for the requested employment period.

In a response dated May 22, 2012, counsel for the petitioner asserted that the project to which the beneficiary was assigned in 2011 is and was legitimate and that the petitioner continues to have an ongoing need for the beneficiary's services in the same capacity described in the petition, i.e., that of a computer programmer. In a May 20, 2013 letter, submitted in response to the NOIR, the petitioner emphasized that the beneficiary would be working at its headquarters, and not assigned to a third party, and that it has no intention of placing the beneficiary at a third party. The petitioner contended that the consular officer's claim that the materials submitted are vague and give few details of the projects purpose, is baseless, inaccurate and is based on non-factual allegations. The petitioner asserted that its "Applicant Tracking System" is a *bona fide*, real project "used for time and project tracking for payroll purpose." The petitioner noted that the beneficiary's "project assignments have evolved just from time sheet project to invoicing and finance module since the filing of the petition."

Counsel also attached a letter from the beneficiary, copies of the petitioner's 2011 and 2012 corporate income tax returns, and the beneficiary's most recent paycheck stubs.

³ The first page of the document lists the petitioner's technology software glossary including several modules (time management, accounting system, invoices and payrolls system, insurance, consultant tracking system and customer management system) and the petitioner's website and presentations. The future plans for 2010-2015 include: enhancement of running software to new technologies; develop progress assessment software; launch the petitioner's new website; crystal reporting tool setup; and live chatting system and other features. The remainder of the document does not identify a specific in-house project or any specific work needed for any project. Notably, the document does not identify the beneficiary or any computer programmers as necessary for the petitioner's future plans. Moreover, the document was last revised in July 2010, thus the continued viability of this generic overview of unnamed "project(s)" when the petition was filed is unknown.

⁴ As will be discussed in detail below, the computer programmer position generally described by the petitioner, and as evidenced by the beneficiary's work product, is not a specialty occupation. For this reason, the initial approval of the petition was gross error.

The director reviewed the submitted evidence but ultimately revoked the petition's approval. The director found that despite the petitioner's claims, the evidence of record did not establish that the petitioner had *bona fide* specialty occupation work for the beneficiary for the requested employment period. The director revoked the petition's approval on August 27, 2013.

On appeal, counsel for the petitioner asserts that the sole issue in this matter is whether the petitioner's Applicant Tracking System project is a sham project fabricated to circumvent immigration laws.⁵ The issue in this matter however, is whether the record includes sufficient evidence establishing that the petitioner has specialty occupation work available for the beneficiary to perform for the requested employment period. In that regard, counsel submits "an updated Applicant Tracking System Manual." Counsel notes that many companies offer Applicant Tracking Systems for sale and submits screen shots of the petitioner's applicant tracking system which include the petitioner's logo and employees' names. Counsel contends that the petitioner's business model requires an applicant tracking system. Counsel also asserts that an applicant tracking system "is not a proprietary system owned by the petitioner but is rather a generic term for a system used by numerous companies and organizations worldwide," and that the petitioner has more than established eligibility using the preponderance of evidence standard.

II. STANDARD OF REVIEW

In light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). 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

⁵ The director's NOIR, while questioning the validity of one of the petitioner's claimed projects, specifically requested evidence from the petitioner to establish that it had *bona fide* specialty occupation work available for the requested employment period. When the petitioner failed to provide such evidence, the director revoked approval of the petition.

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 appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were 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. MATERIAL FINDINGS

As noted above, the principal issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position for the duration of the requested employment period. Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

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

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS 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, 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. The petitioner has not done so here.

In the instant case, the duties of the proffered position, as described by the petitioner in support of the Form I-129 petition have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. Rather than provide a description of what the beneficiary is expected to do, and in what context the duties would be performed, the petitioner noted generally that the beneficiary will develop applications and will analyze and mine data, develop, enhance, resolve, design and develop databases and software. In response to the director's RFE requesting evidence expounding upon the project to which the beneficiary would be assigned, the petitioner again provided an overview of the beneficiary's expected duties and noted the duties would be applied to developing specific modules within the [REDACTED] Project. Notably, the petitioner identified two different sets of minimum qualifications to perform the duties initially described and to perform the duties described in response to the RFE.⁶ No explanation was provided for this variance.

In addition, the petitioner provided general information regarding the "Applicant Tracking System" and its new website. However, the documentation submitted did not indicate the beneficiary was assigned to this project and in fact indicated that the project had ended June 2009. As noted above, the record also included documentation regarding a different project, identified as including online timesheets, accounts payable and accounts receivable application modules, a project to which the beneficiary apparently had been assigned.⁷ Although the petitioner indicated that the project would continue to March 2013, the petitioner did not identify the beneficiary's specific role within the project during the multiple phases.

Thus, upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, 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 performance of the proffered position for the entire period requested. The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. Thus, the petitioner

⁶ The petitioner initially stated that the position "requires a minimum Bachelor's Degree in Computer Science, Electrical Engineering, or related or equivalent." In response to the director's RFE, the petitioner stated that general degrees in "Engineering" and "Science" are also acceptable.

⁷ The petitioner also refers to this project as the [REDACTED] Project.

has failed to demonstrate how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

In addition, to the lack of information regarding the beneficiary's specific duties as they relate to particular project(s), the documentation provided regarding the [REDACTED] project and the applicant tracking system project is non-specific and general. Upon review of the information regarding these projects, it appears the information regarding the project has been pasted onto the petitioner's stationery and photocopied. The petitioner's address logo in the bottom left hand corner of many of the pages overlaps the information provided. Although this incongruity is not in and of itself an indication the petitioner has copied this information from other sources, it raises questions regarding the proprietary nature of these particular projects. It is not clear if the petitioner is using openly available software and modifying it for its business use or whether the petitioner is designing software to market and sell. In that regard, counsel on appeal notes that the applicant tracking software "is not a proprietary system owned by the petitioner but is rather a generic term for a system used by numerous companies and organizations worldwide." Thus, any modifications to such a system would not involve design or analysis requiring a bachelor's degree in a specific discipline, but rather simple modifications and data input to include the petitioner's (or a client's) specific information.

We find that neither the overview of the projects submitted nor the petitioner's statements regarding its business operations provide sufficient information to ascertain the purpose of these projects.⁸ As we cannot deduce the petitioner's level of involvement in creating, designing, and modifying the software projects submitted, we cannot determine the actual technical requirements of the project and the specific educational requirements of any jobs associated with the projects.

Finally, the petitioner does not provide evidence that it has work available for the beneficiary for the entire requested employment period. The petitioner does not identify a specific end date for the

⁸ Regarding the petitioner's business operations, we observe that the petitioner, on the Form I-129 designated its business operations under the North American Industry Classification System (NAICS) Code as "541511." According to the U.S. Census Bureau, NAICS is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited November 19, 2014). The NAICS code "541511" industry is defined by the U.S. Department of Commerce, Census Bureau as a "U.S. industry compris[ing] establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer." U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 541511 – Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited November 19, 2014). On the petitioner's Forms 1120 for 2011 and 2012, the petitioner identified its business activity as "Staffing" and its product or service as "Temporary Services." Thus, it is not possible to ascertain from this limited and inconsistent information and the petitioner's general statements, exactly what the petitioner does. Nor does this information assist in clarifying the petitioner's role in the [REDACTED] and applicant tracking system projects.

beneficiary's intended employment, indicating only that the intended employment should be for "+2 years & 3 months," or the remainder of the beneficiary's allowed H-1B employment. The record evidence indicates that the petitioner's only project in effect when the petition was filed was the [REDACTED] project which ends March 2013, one year and seven or eight months after the petition was filed on July 28, 2011. Accordingly, the petitioner has not submitted sufficient evidence that it has specialty occupation employment available for the beneficiary for the "+2 years & 3 months," requested employment period.

For these material deficiencies in the record, some of which came to light after the approval of the petition, the approval of the petition was in gross error.

IV. REVOCATION ON NOTICE

A. Grounds for Revocation

We will now discuss the basis for the director's revocation, and whether this basis provided the director with sufficient grounds to revoke the H-1B petition on notice under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A).

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in

deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

We find that the content of the April 22, 2013 NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B). For example, the director suggested the type of evidence that could be submitted to overcome the grounds for revocation, namely evidence that the petitioner had *bona fide* specialty occupation work available for the beneficiary for the requested employment period. As will be discussed below, we further find that the director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding, and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, we shall not disturb the director's decision to revoke approval of the petition.

B. Basis for Revocation

The director revoked the petition's approval, finding that the petitioner had not established that it had *bona fide* specialty occupation work available for the beneficiary for the requested employment period. The director based her decision on the lack of evidence in the record demonstrating the petitioner had specific work the beneficiary would perform for the requested period of employment. After articulating these findings in the NOIR, the director afforded the petitioner the opportunity to respond and establish it had specialty occupation work for the beneficiary for the requested employment period. The petitioner, other than asserting that its "Applicant Tracking System" is a *bona fide* project and that the beneficiary's "project assignments have evolved just from time sheet project to invoicing and finance module since the filing of the petition" did not provide sufficient evidence of in-house or other work available to the beneficiary to perform.⁹ Thus, the record did not contain sufficient probative evidence demonstrating specialty occupation work existed when the petition was filed on July 28, 2011 and continuing throughout the requested dates of employment. We specifically find that the director's initial approval of the petition was in fact gross error. Upon review of the record, we agree with the director's determination to rectify this error by revoking approval of the petition after providing the petitioner an opportunity to submit evidence establishing this essential element when such evidence was not forthcoming.

The petitioner's proffer of employment must be reviewed within the context of the nature of the work and whether the petitioner has offered the beneficiary a position that is a specialty occupation position. For H-1B approval, the petitioner must demonstrate that a need for an H-1B employee

⁹ As footnoted above, the document authored by [REDACTED] is insufficient to establish that the petitioner had any specific in-house projects that required the beneficiary's services. Moreover, the 15-page document describing the petitioner's claimed "Applicant Tracking System" and "Website" indicates the project ended June 2009, two years prior to the petitioner's filing of the instant petition.

exists when the petition is filed and must substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That is to say, it is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

To reiterate, a position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative specialty occupation work would exist for the beneficiary for the period of employment specified in the Form I-129.¹⁰ The record of proceeding does not contain such evidence. As stated above, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

For these reasons, we find that the petitioner has not provided a *bona fide* offer of employment for specialty occupation work. As such, we agree with the director's decision to revoke the approval of the petition under 8 C.F.R. § 214.2(h)(11)(iii)(A).

V. SPECIALTY OCCUPATION

As noted above, the issue in this matter is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position for the requested

¹⁰ 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).

employment period. Although the material deficiencies in the record of proceeding as discussed above require the revocation of approval of the petition, we find that based upon a complete review of the record of proceeding, and for the specific reasons described below, the evidence also fails to establish that the proffered position as generally described constitutes a specialty occupation. Even if the ground for revocation discussed above had been overcome by the petitioner, the approval of the petition would need to be revoked on notice. Based on the current record before us, it was gross error for the director to approve the petition because the petitioner failed to establish that the proffered position constitutes a specialty occupation.

A. The Law

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

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human 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 at 387. 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), 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 at 147 (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. Analysis

We now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). As explained earlier in this decision, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed within the petitioner's business operations. 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 satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, for the sake of argument, we will review the record as if the petitioner had adequately and consistently described the position and its minimum requirements for the proffered position and will discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

We recognize the DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹¹

In this matter, the petitioner attests on the LCA that the position falls within the parameters of the Computer Programmers occupational classification identified by SOC (ONET/OES code) 15-1131. In the chapter on computer programmers, the *Handbook* provides the following overview of the occupation:

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.

The *Handbook* lists the typical duties of a computer programmer as:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs

¹¹ 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/>.

- 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*, 2014-2015 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited November 19, 2014).

Regarding the education and training of a computer programmer, the *Handbook* reports:

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited November 19, 2014).

If, in fact, the proffered position is that of a computer programmer, as the petitioner attested on the submitted LCA, the *Handbook* does not support the petitioner's claim that the proffered position is a specialty occupation. That is, the *Handbook's* pertinent information indicates that a position's inclusion within the Computer Programmers occupational group is not sufficient in itself to establish the position as one for which at least a bachelor's degree or the equivalent in a specific specialty is normally a minimum requirement for entry.

Although the *Handbook* indicates that most computer programmers have a bachelor's degree it also indicates that some employers hire workers who have an associate's degree. Accordingly, a bachelor's degree is not the minimum requirement necessary to enter into the occupation. In addition, although most programmers get a degree in computer science or a related subject "most" is not indicative that a computer programmer 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)).¹²

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, in order 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 other persuasive evidence that the proffered position would satisfy this criterion. However, the petitioner has not submitted such evidence.

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)(I).

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 requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

¹² 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 computer science or a closely related field, 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 generally described 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.

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. There are no submissions in the record from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

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).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that it had specialty occupation work for the beneficiary for the requested employment period, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted a copy of its 2011 and 2012 federal tax return, general descriptions of two claimed projects, and photographs of offices.

However, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.¹³

¹³ It must be noted that the petitioner has designated the proffered position as a Level II position on the

The petitioner has indicated that the beneficiary's educational background and her experience will assist her in carrying out the duties of the proffered position. 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 qualifies as a specialty occupation. In the instant case, the petitioner does not establish 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 fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, USCIS reviews the petitioner's past recruiting and hiring practices, information regarding employees who previously held the position, as well as any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

submitted LCA, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. *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. Therefore, it is not credible that the position is one with unique and specialized duties, as such a higher-level position would likely be classified as a Level IV position, requiring a significantly higher prevailing wage.

In this matter, although the petitioner has been in business since 1995 it does not provide documentary evidence of its past recruiting and hiring history for a JAVA computer programmer. We note that USCIS approved a prior petition filed on behalf of the beneficiary. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petition. However, if the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Moreover, the prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific 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 a specific specialty, or its equivalent.

We have reviewed the totality of the evidence in the record and have considered the petitioner's statements regarding the proffered position. However, the record does not support a claim that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we also reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as requiring only a Level II wage. This designation is indicative of a position for an employee who will only perform moderately complex tasks that require limited judgment, hence one not likely distinguishable by relatively specialized and complex duties.

The petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established 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. For these reasons, even if the ground for

revocation discussed above had been overcome by the petitioner, the approval of the petition would need to be revoked on notice because the evidence in the record does not establish that the proffered position constitutes a specialty occupation.

VI. CONCLUSION AND ORDER

The appeal will be dismissed and the approval of the petition will remain revoked. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the petition remains revoked.