

U.S. Department of Homeland Security

U.S. Citizenship and Immigration Service:
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **NOV 26 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 service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director for action consistent with this decision.

I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a 280-employee nursing care facility established in [REDACTED].¹ In order to employ the beneficiary in what it designates as a full-time "Continuous Quality Improvement Supervisor" position at a salary of \$48,381 per year,² the petitioner seeks to extend her classification 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 found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE). The petitioner responded to the director's RFE. Thereafter, the director sent a Notice of Intent to Deny (NOID) the petition, and the petitioner responded to the NOID. The director denied the petition, concluding that the evidence of record failed to establish that the beneficiary is qualified to perform services in a specialty occupation. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

Upon review of the documentation, we found that we were unable to determine that the petitioner is a corporation in good standing and issued an RFE on October 2, 2014. The petitioner responded to our RFE on October 30, 2014.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's RFE and NOID; (3) the petitioner's response to the RFE and NOID; (4) the director's letter denying the petition; (5) the Form I-290B and supporting documentation; (6) our RFE; and (7) counsel's response to our RFE.

II. DUTIES OF THE PROFFERED POSITION

In its support letter and RFE response letter, the petitioner provided rather a lengthy description of

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 623110, "Nursing Care Facilities (Skilled Nursing Facilities)." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "623110, "Nursing Care Facilities (Skilled Nursing Facilities)," <http://www.naics.com/naics-code-description/?code=623110> (last visited November 19, 2014).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Occupational Health and Safety Specialists" occupational classification, SOC (O*NET/OES) Code 29-9011, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

the duties of the proffered position. In its NOID response letter, the petitioner broke down the percentages of time for the duties of the proffered position as follows:

- 12% research and analysis[:]** conduct research into best methods of healthcare delivery; research and analyze products, procedures, services, quality requirements; research and analyze health care requirements; assess health care needs; analyze result of health care performance and staff performance; determine optimal means of assisting patients; analyze procedures implemented by the Center; study existing policies and procedures; identify and analyze problems, plan tasks, implement solutions[.]
- 25% devise and implement plans for delivery and management of health care services[:]** develop quantitative and analytical studies of operational data to assess the success of quality assurance programs; analyze statistical data on quality control initiatives; use quantitative analyses to modify and improve quality control programs; determine optimal plans and procedures for health care service delivery; plan delivery and management of health care services; create plans for delivery of health care services; research and analyze health care requirements, analyze health care needs, determine the most suitable means of assisting patients; implement health care service plans; provide data analysis, trending, reporting and presentation on individual and departmental statistics relating to the identification of areas requiring improvement; recommend and implement changes to improve efficiency and effectiveness of healthcare services; devise and implement healthcare service plans and quality improvement plans; participate in and organize site surveys and management assessments of managed healthcare plans; develop corrective action plans to comply with federal requirements for the improvement of managed care systems; design and conduct focused studies to monitor outcomes of specific care or services provided by managed care plans[.]
- 13% manage healthcare quality assurance programs[:]** implement and manage healthcare quality assurance programs; coordinate healthcare quality work of work [sic] of [sic] Health Services Manager, health Education Manger, Clinical Coordinator, Registered Nurses, License[d] Practical Nurses, Physical Therapists, Occupational Therapists, Dieticians[,], and other medical professionals; record observations; prepare statistical surveys of medical/data; implement changes to healthcare quality assurance programs; ensure quality levels of healthcare[.]
- 12% review and analyze actions taken[:]** interview personnel and patients to evaluate effectiveness of quality assurance programs; prepare statistical studies of healthcare quality services; conduct analyses of operational data; analyze statistical data on quality control initiatives; conduct analyses of healthcare service delivery; prepare analytical reports assessing quality of

Center's medical services; suggest improvements to healthcare service delivery; revise health care standards and procedures; develop training and related reward systems; develop systematic approaches for assuring high quality services; provide guidance on development, performance, and productivity issues; analyze effectiveness of new healthcare assurance programs[.]

- 12% continuous quality improvement development and monitoring[:]** develop and monitor detailed continuous quality improvement and action plans for prepaid health plans; develop, monitor, plan, execute, work with plans to achieve defined action targets; direct plans in achieving set long-term and short-term Quality Goals; use CQI process and on-going frequent monitoring to achieve targeted results and establish short-term operations goals and long-range objectives for quality assurance performance in managed care programs based on in-depth knowledge of the programs[.]
- 13% education and training[:]** determine personnel requirements; hire and train personnel; implement personnel training programs; train staff in health care quality issues and procedures; conduct programs geared to new staff members and advanced classes in quality assurance matters; attend seminars and conferences in healthcare quality assurance; keep apprised of developments in the field of quality assurance management to maintain current; work in conjunction with Education Department to develop and present training programs and resource materials for staff development, provider education, and client awareness[.]
- 13% manage development of specialized quality control programs[:]** research, analyze, develop healthcare quality control programs; implement healthcare quality control programs; devise and implement training and quality requires [sic] in areas of emergency medicines, sterile techniques, dialysis, new medical procedures and equipment; review and revise healthcare quality control programs and procedures; review and approve Validation Protocols and Reports; prepare annual service reviews; approve Center SOPs, master Batch Records, Stability Protocols and Reports, Test Methods and Specifications; develop Quality Process specifications and Quality Standard Reference inspection criteria[.]

On appeal, counsel reiterated the same duties and stated that "the beneficiary plays a leadership role to ensure quality management with in the Center."

III. BENEFICIARY QUALIFICATIONS

We note that the director denied the petition, finding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation. However, a beneficiary's

credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). In the instant case, the record of proceeding does not establish that the proffered position qualifies as a specialty occupation. Thus, the matter will be remanded to the director for review and issuance of a new decision.

IV. SPECIALTY OCCUPATION

To meet the petitioner's burden of proof in establishing the proffered position as a specialty occupation, the evidence of record must establish that the employment the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its

particular position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title

of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We will first review the record of proceeding in relation 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 normally the minimum requirement for entry into the particular position.

We will now look at the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ The petitioner asserts in the LCA that the proffered position falls under the occupational category "Occupational Health and Safety Specialists." When reviewing the *Handbook*, we must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁴ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation should be considered for positions in which the employee will serve as a research fellow, worker in training, or an intern.

³ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are from the 2014-15 edition available online. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Occupational Health and Safety Specialists."

⁴ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

We reviewed the chapter of the *Handbook* entitled "Occupational Health and Safety Specialists" but we are not persuaded that the duties of the proffered position are encompassed by the duties of this occupational classification. The *Handbook* describes the duties of "Occupational Health and Safety Specialists" in the subsection entitled "What Occupational Health and Safety Specialists Do" and states the following about the duties of this occupation:

Occupational health and safety specialists typically do the following:

- Identify hazards in the workplace
- Collect samples of potentially toxic materials for analysis
- Inspect and evaluate workplace environments, equipment, and practices for compliance with corporate and government health and safety standards and regulations
- Design and implement workplace processes and procedures that help protect workers from potentially hazardous work conditions
- Investigate accidents and incidents to identify their causes and to determine how they might be prevented in the future
- Conduct training on a variety of topics such as emergency preparedness

Occupational health and safety specialists examine lighting, equipment, ventilation, and other conditions and materials in the workplace that could affect employee health, safety, comfort, and performance. Specialists seek to increase worker productivity by reducing absenteeism and equipment downtime. They also seek to save money by lowering insurance premiums and workers' compensation payments and by preventing government fines.

Some specialists develop and conduct employee safety and training programs. These programs cover a range of topics, such as how to use safety equipment correctly and how to respond in an emergency.

In addition to protecting workers, specialists also work to prevent harm to property, the environment, and the public by inspecting workplaces for chemical, physical, radiological, and biological hazards. Specialists who work for governments conduct safety inspections and can impose fines.

Occupational health and safety specialists work with engineers and physicians to control or fix potentially hazardous conditions or equipment. They also work closely with occupational health and safety technicians to collect and analyze data in the workplace.

The tasks of occupational health and safety specialists vary by industry, workplace, and types of hazards affecting employees. The following are examples of types of occupational health and safety specialists:

Ergonomists consider the design of industrial, office, and other equipment to maximize workers' comfort, safety, and productivity.

Health physicists work in locations that use radiation and radioactive material. They help to protect people and the environment from hazardous radiation exposure that may be caused by medical treatments or come from nuclear plants, among other sources.

Industrial or occupational hygienists identify workplace health hazards, such as lead, asbestos, noise, pesticides, and communicable diseases.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Occupational Health and Safety Specialists," <http://www.bls.gov/ooh/healthcare/occupational-health-and-safety-specialists.htm#tab-2> (last visited November 19, 2014).

The *Handbook* states the following for the work environment of the occupational health and safety specialists:

Occupational health and safety specialists held about 62,900 jobs in 2012. They work in a variety of settings, such as offices, factories, and mines. Their jobs often involve considerable fieldwork and travel.

About 32 percent of occupational health and safety specialists worked for federal, state, and local governments in 2012. In the federal government, specialists are employed by various agencies, including the National Institute for Occupational Safety and Health (NIOSH) and the Occupational Safety & Health Administration (OSHA). Most large government agencies employ specialists to protect agency employees. In addition to working for governments, occupational health and safety specialists worked in management, scientific, and technical consulting services; education services; hospitals; and manufacturing.

Occupational health and safety specialists may be exposed to strenuous, dangerous, or stressful conditions. Specialists use gloves, helmets, respirators, and other personal protective and safety equipment to minimize illness and injury.

Id. at <http://www.bls.gov/ooh/healthcare/occupational-health-and-safety-specialists.htm#tab-3> (last visited November 19, 2014).

We reviewed the record of proceeding, but we are not persuaded by the petitioner's claim that the proffered position falls under the occupational category for occupational health and safety specialist positions. In the instant case, the petitioner submitted a broad description of the proffered position, but the statements do not include information regarding the day-to-day tasks of the position and do not delineate the actual work that the beneficiary will perform. Nevertheless, upon review of the record of proceeding and the chapter regarding "Occupational Health and Safety Specialists" in the

Handbook, we find that the petitioner has not provided sufficient evidence to demonstrate that its continuous quality improvement supervisor position has the same or similar duties, tasks, knowledge, work activities, requirements, etc. that are generally associated with "Occupational Health and Safety Specialists." For example, the petitioner does not claim that the beneficiary will identify chemical, physical, radiological, and biological hazards in the workplace. In addition, the petitioner does not claim that the beneficiary will collect samples of potentially toxic materials for analysis.

Further, the petitioner does not assert that the beneficiary will inspect and evaluate workplace environments, equipment, and practices to ensure that safety standards and government regulations are being followed. The record of proceeding does not establish that the beneficiary will recommend measures to help protect workers from potentially hazardous work conditions. Moreover, the petitioner does not claim that the beneficiary will investigate accidents to identify their causes and to determine how they might be prevented in the future. Additionally, the duties of the proffered position do not indicate that the beneficiary will examine lighting, equipment, ventilation, and other conditions that could affect employee health, safety, comfort, and performance. Furthermore, there is no evidence that the beneficiary will be employed as an environmental protection officer, ergonomist, health physicist, industrial hygienist, loss prevention specialist, occupational safety and health inspector, or a similar position.

The duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may, at best, perform a few tasks in common with this occupational group, but not that the beneficiary's duties would constitute an occupational health and safety specialist position, and not that the tasks would require the range of specialized knowledge that characterizes this occupational category.

Moreover, in response to the NOID, the petitioner states that "[i]n the proffered position, the beneficiary will work as a Continuous Quality Improvement Supervisor, not as an occupational health and safety specialist." In response to the petitioner's assertion, we note that DOL provides guidance for selecting the most relevant occupational classification. The "Prevailing Wage Determination Policy Guidance" issued by DOL, states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification. . . .

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.

Further, the Standard Occupational Classification (SOC) System is used by DOL for classifying occupations. Under the SOC system, workers are classified at four levels of aggregation: (1) major group; (2) minor group; (3) broad occupation; and (4) detailed occupation. Occupations are

classified based upon work performed, skills, education, training, and credentials. See <http://www.bls.gov/soc/> (last accessed on November 19, 2014).

The SOC system includes residual categories within the various levels of the system to permit the reporting of occupations not identified at the detailed level. That is, if an occupation is not included as a distinct detailed occupation in the structure, it is classified in the appropriate residual occupation. Residual occupations contain all occupations within a major, minor or broad group that are not classified separately. Thus, for the less populous occupations, residual categories (that is, "All Other" categories) have been created within most levels of the SOC system. Residual categories provide a complete accounting of all workers employed within an establishment and allow aggregation and analysis of occupational employment data at various levels of detail. For instance, an example of a residual category is: "Managers, All Other" – SOC Code 11-9199. Approximately 5 percent of all employment falls under categories for which little meaningful information could be developed (i.e., "All Other" residual categories). For additional information regarding the SOC system and residual categories, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., on the Internet at <http://www.bls.gov/home.htm> (last visited November 19, 2014). Thus, if the petitioner believed that its proffered position did not fall under an occupational category identified at a distinct detailed level, it should have classified the position under the appropriate residual occupation.

In the instant case, the petitioner has not demonstrated that the proffered position falls under the occupational category of "Occupational Health and Safety Specialists." Therefore, we will not further address this occupational category as it is not relevant to this proceeding.

The petitioner submitted a copy of the beneficiary's H-1B approval notice as evidence that USCIS has previously approved the proffered position of continuous quality improvement supervisor.⁵ However, the petitioner did not submit copies of the petitions and supporting documents. The documentation provided by the petitioner does not contain key information regarding the referenced position, including the job title, day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, or the amount of supervision received to make a legitimate comparison of the referenced positions to the proffered position. Furthermore, as acknowledged by the petitioner, the approval of that petition was later revoked by the director.

If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

As the record of proceeding does not contain copies of the petition, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to

⁵ This petition was filed by [REDACTED] on behalf of the beneficiary; however, the petitioner asserts that it was the end-client for that petitioner and the position was the same as the proffered position.

determine what facts, if any, were analogous to those in this proceeding. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, we are not required to request and/or obtain a copy of the petition cited by the petitioner.

As indicated above, the director later revoked the approval of that petition. However, even if the previous nonimmigrant petition's approval was not revoked, if the approval was based on the same unsupported and contradictory assertions that are contained in the current record, the approval of that petition would have constituted 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. 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition, 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).

In response to the director's NOID, the petitioner submitted a position evaluation from [REDACTED] from [REDACTED]. The letter is dated September 23, 2013. In the letter, Ms. [REDACTED] claims that the position of continuous quality improvement supervisor "is a specialty occupation requiring a bachelor's level education in Healthcare Administration, Nursing, or a closely related field such as Healthcare Management."

Ms. [REDACTED] provided a summary of her qualifications, including her educational credentials and professional experience. She claims that she is qualified to comment on the position based upon her education and professional experience. However, Ms. [REDACTED] fails to provide any further information regarding any expertise or specialized knowledge of the instant matter. Her opinion letter does not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that she has published any work or conducted any research or studies pertinent to the educational requirements for continuous quality improvement supervisor positions (or parallel positions) in the petitioner's industry for similar

organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by Ms. [REDACTED] in the specific area upon which she is opining. In reaching this determination, Ms. [REDACTED] provides no documentary support for her ultimate conclusion regarding the education required for the position (i.e., statistical surveys, authoritative industry publications, or professional studies).

Upon review of the letter, there is no indication that Ms. [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. Moreover, she does not discuss the duties of the proffered position in any substantive detail. To the contrary, she simply lists the tasks with little discussion. Ms. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the business enterprise. Her opinion does not relate her conclusion to specific, concrete aspects of the petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. For instance, there is no evidence that Ms. [REDACTED] has visited the place of employment, observed the employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Ms. [REDACTED] provides general conclusory statements regarding continuous quality improvement supervisor positions, but she does not provide a substantive, analytical basis for her opinion and ultimate conclusions.

Also, it must be noted that there is no indication that the petitioner advised Ms. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position relative to others within the occupation (as indicated by the wage-level on the LCA). It appears that Ms. [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that Ms. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, we conclude that the letter rendered by Ms. [REDACTED] is not probative evidence to establish that the proffered position qualifies as a specialty occupation. The conclusions reached by Ms. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. There is an inadequate factual foundation established to support the opinion and we find that it is not in accord with other information in the record.

We may, in our discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion, and for

the reasons discussed above, we find the position evaluation as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).⁶

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1102).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source) reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference our previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement.

We acknowledge that the record of proceeding contains a position evaluation from Ms. [REDACTED]. However, as previously discussed in detail, we find that the position evaluation does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In response to the director's NOID, the petitioner submitted copies of job advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, we find that the petitioner's reliance on the job announcements is misplaced.

⁶ For efficiency's sake, we hereby incorporate the above discussion and analysis regarding Ms. [REDACTED] position evaluation into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the Form I-129 petition, the petitioner describes itself as a nursing care facility established in [REDACTED] with 280 employees. The petitioner claims that it has a gross annual income of over \$20 million. Although requested in the Form I-129 petition, the petitioner did not state its net annual income.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

We reviewed the three job advertisements submitted by the petitioner. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

In addition, the advertisements include positions with [REDACTED] ("a general medical and surgical hospital"), [REDACTED] (a not-for-profit organization that includes "a medical center, regional community hospitals, a dedicated children's hospital, a multispecialty medical group and a nationally recognized health plan, [REDACTED]"), and [REDACTED] (a "permanent placement firm retained by hospitals seeking to hire highly-skilled permanent full-time employees"). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Consequently, the record does not contain sufficient information regarding the advertising organization to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. Upon review, we find that the petitioner has not provided any information regarding which aspects or traits (if any) it shares with these advertising organizations.

Moreover, these advertisements do not appear to be for parallel positions. More specifically, the position with [REDACTED] requires a degree without specifying a specialty (the announcement states "healthcare area of focus strongly preferred"), "2-3 years of work background in Lean Six Sigma projects and training and/or in management," "Green Belt level Lean-Six Sigma certification," and "Black Belt certification recommended." The position with [REDACTED] requires a bachelor's degree in "health care, engineering, or business administration" with "5 years of experience [in] quality improvement/facilitation and/or equivalent combination of education, training, and experience in healthcare or manufacturing, working in an organization of size and complexity comparable to [REDACTED]." The job announcement with [REDACTED] requires a "minimum of 5 or more years of previous acute care clinical experience." As previously discussed, the petitioner designated the proffered position on the LCA through the

wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

In addition, contrary to the purpose for which the advertisements were submitted, some job postings do not indicate that a bachelor's degree in a directly related specific specialty is required. For example, [REDACTED] requires a bachelor's degree, but it does not indicate a specific specialty.⁷ In addition, the petitioner submitted an advertisement ([REDACTED]) that states that degrees in disparate fields are acceptable.⁸

We reviewed all of the advertisements submitted in support of the petition.⁹ However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

Thus, based upon a complete review of the record, we find that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position;

⁷ As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

⁸ 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 disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

⁹ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

and (2) located in organizations that are 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 the instant case, we acknowledge that the petitioner may believe that the duties of the proffered position are complex or unique. However, we reviewed the record in its entirety and find that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

More specifically, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. 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 of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a continuous quality improvement supervisor 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 petitioner's proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, we incorporate by reference and reiterate our earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; her work will be closely supervised and monitored; she will receive specific instructions on required tasks and expected results; and her work will be reviewed for accuracy.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing

wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁰

Moreover, 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 sufficient probative evidence 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.

We observe that the petitioner has indicated that the beneficiary's educational and professional background 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 requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not sufficiently 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. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 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. We usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, 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 petitioner 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 388. In

¹⁰ For additional information regarding wage levels as defined by DOL, 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.

other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 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.

As previously noted, the petitioner claims that USCIS has previously approved an H-1B case for the beneficiary for the same or similar position.¹¹ The petitioner further claims that although this petition was submitted by another company, the position was with the petitioner. However, the petitioner did not submit copies of the prior H-1B petition and the respective supporting documents. As the record of proceeding does not contain sufficient evidence of the prior petition to determine whether it is the same or similar position, there are no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approval of the prior H-1B petition was not warranted. Furthermore, even if the petitioner was able to demonstrate that the prior petition was for the same or a similar position with the petitioner, one prior hiring for the same or similar position is not sufficient to demonstrate the petitioner's normal recruiting and hiring practices. It must be noted that without further information, the submission of *the educational credentials of one individual* is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position. Again, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

We reviewed the record of proceeding but find that the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or

¹¹ As indicated earlier, the approval of this petition was later revoked.

its equivalent, for the proffered position. Thus, 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.

The petitioner asserts 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. However, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. Further, there is a lack of evidence substantiating the petitioner's assertions.

Moreover, we incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category. The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Upon review of the record, we find that the petitioner has submitted insufficient probative evidence to satisfy this criterion of the regulations. The petitioner has not established that the duties of the position are 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 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 AND ORDER

As stated above, the matter will be remanded to the director for review and issuance of a new decision.

(b)(6)

NON-PRECEDENT DECISION

Page 21

ORDER: The director's January 28, 2014 decision is withdrawn. The matter is remanded to the director for action consistent with this decision.