

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

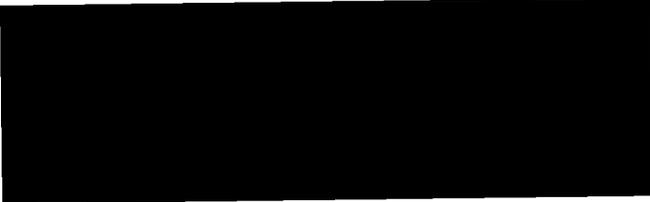
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2



FILE: WAC 07 122 50288 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 2010**

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

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

To continue to employ the beneficiary in what the petitioner designates as a Computer Programmer Analyst, the petitioner seeks to continue his classification and extend his stay as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on two independent grounds, namely, her findings that the evidence of record failed to establish: (1) that the petitioner is qualified to file an H-1B petition, that is, as either (a) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); and (2) that the proffered position is a specialty occupation.

Based upon its review of the entire record of proceedings as supplemented on appeal by the Form I-290B, the petitioner's brief, and the other documents submitted in support of the appeal, the AAO affirms the director's decision, finding that the director was correct in denying the petition on each of the two grounds that she cites. Accordingly, the appeal will be dismissed, and the petition will be denied. The AAO will further address only the specialty occupation issue, which is crucial in the adjudication of any H-1B petition.

In determining whether a proffered position qualifies as an H-1B specialty occupation, the AAO applies the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, the position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), 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) (hereinafter referred to as *Defensor*). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the

criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

By its own description, the petitioner is a software services/development company whose business is to provide solutions to customer companies with specific software needs. The record reflects that the substantive nature of the services that the beneficiary would perform, and hence the educational credentials required to perform them, would be determined by the particular client projects to which the petitioner would be assigned. In such circumstances, documents such as contracts, work orders, work specifications, and petitioner-client correspondence are material to establishing the substantive nature of the specific projects to which the petitioner would be assigned is material. The petitioner, however, declined to comply with the section of the request for additional evidence (RFE) that sought such evidence. As will now be discussed, the petitioner's contention that the request for contractual documents exceeded the authorized scope of an RFE is without merit.

For the proposition that requests for contracts exceed the scope authorized for RFEs, the petitioner relies, mistakenly, on the memorandum from Louis Crocetti Jr., Associate Commissioner, INS Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995) (hereinafter referred to as the Crocetti memo).

First and foremost, the memorandum does not have the force of law. USCIS memoranda articulate internal guidelines for agency personnel; they do not establish judicially enforceable standards. Agency interpretations that are not arrived at through precedent decision or notice-and-comment rulemaking - such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines - lack the force of law and do not warrant *Chevron*-style deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987)). Agency policy memorandum and unpublished decisions do not confer substantive legal benefits upon aliens or bind USCIS. *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); *see also Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004). In contrast to agency memoranda, a legacy INS or USCIS decision is binding as a precedent decision once it is published in accordance with 8 C.F.R. § 103.3(c).

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." Moreover, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts to establish that the

services to be performed by the beneficiary will be in a specialty occupation. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

While the Crocetti memo states that requests for contracts should not be a normal requirement for the approval of an H-1B petition from an employment contractor, the memo does not prohibit such RFE requests. Read as a whole, the memo counsels against issuing RFEs for contracts from employment contractors without a specific need that the requesting officer can articulate for the requesting the documents. The memo, the AAO notes, does not require the requesting officer to actually articulate the need. Nor does the memo purport to bar agency officers from issuing RFEs to any category of H-1B petitioners. Further, this internal memo must be read in the context of the regulations that invest USCIS officers with broad authority to pursue such evidence as they determine necessary in the exercise of their responsibility to adjudicate H-1B petitions in accordance with the applicable statutes and regulations.

The record reflects that the projects upon which the beneficiary would work would be generated by client entities contracting for the services to be provided by the beneficiary. As such, it is important to note that the substantive nature of the work actually to be performed by the beneficiary of this petition depends upon the specific requirements generated by such client entities, which would ultimately determine what the beneficiary would do and, by extension, whatever practical and theoretical knowledge the beneficiary would have to apply. In these circumstances, documentary evidence from client entities generating the projects upon which the petitioner would work are relevant and material to establishing the specific work that the beneficiary would perform and, consequently, whether the proffered position is a specialty occupation. However, when the RFE was issued for contract documents, the record was devoid of any substantive evidence from client entities, although their needs directly determine what the beneficiary would actually do on a day-to-day basis. In this context, the AAO finds that the RFE request for contract documents was a proper exercise of the director's discretionary authority reflected in the above referenced regulations.

Where, as here, the substantive nature of the work to be performed is determined not by the petitioner but by its clients, it is both reasonable and prudent, and in this case necessary, for USCIS to focus on whatever documentary evidence the client entities generating the work have issued or endorsed about the work, such as specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few examples. The logic and reasonableness of this approach is self-evident.¹ In the context of the record of proceedings as it

¹ The soundness of the approach is illustrated in *Defensor*, which USCIS routinely cites for the material relevance of documentary evidence from client entities regarding their projects to which the beneficiary is assigned. In *Defensor*, an examination of the ultimate employment of the beneficiary

existed at the time the RFE was issued, the scope of the RFE was appropriate, in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition. The RFE's request for contractual documents was, therefore, a reasonable measure towards remedying a material evidentiary deficiency.

Separate and apart from the issue of the service center's authority to request contract documents, the director was constrained to base her decision exclusively on the evidence in the record of proceeding. As will now be discussed, that evidence was insufficient for approval of the petition.

Discussion of the merits of this petition will begin with the fact that the relevant chapters of the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicate that a position's inclusion in the Computer Programmer Analysts occupation does not establish it as requiring, or being usually associated with, at least a bachelor's degree, or the equivalent, in a specific specialty.² Therefore, it is incumbent upon the petitioner to provide substantive evidence that its particular programmer analyst position does require such a degree.

The Programmer Analyst occupational category is discussed in the *Handbook* chapters entitled "Computer Programmers" and "Computer Systems Analysts." These chapters do not support the petitioner's contention that programmer analyst positions categorically qualify as specialty occupation positions. The *Handbook's* information on educational requirements in the programmer

was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources, was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that legacy INS had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

² The AAO recognizes the *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. All references are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials, as indicated in the following excerpt from the "Educational and training" subsection of the *Handbook's* "Computer Systems Analysts" chapter:

When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred.

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank should have some expertise in finance, and systems analysts who wish to work for a hospital should have some knowledge of health management.

As evident above, the *Handbook* does not indicate that programmer analyst positions normally require at least a bachelor's degree in a specific specialty. The *Handbook* only indicates that employers often seek or prefer at least a bachelor's degree level of education in a technical field for this type of position. In light of the range of educational credentials indicated by the *Handbook* as associated with the programmer analysts occupation, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a programmer analyst, but also that he would do so at a level that requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do. The evidence of record regarding the particular position proffered

here does not convey the level of specialized computer-related knowledge that the beneficiary would have to apply theoretically and practically.

Not only does the *Handbook* not support the programmer analyst occupation as one that normally requires at least a bachelor's degree in a specific specialty, but the evidence about the duties that the beneficiary would perform is insufficient to satisfy any specialty-occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The record of proceeding indicates that the substantive nature of the beneficiary's services, and hence the educational attainment required to perform them, will be determined by the specific performance requirements of the particular client projects to which the beneficiary will be assigned. These project requirements will be determined by each business entity defining the particular project or project parts upon which the beneficiary will be employed. The best evidence of such requirements is the related contractual documents and contract-related correspondence generated in the ordinary course of business between or among the parties involved in the project. As already noted, the petitioner has declined to provide such evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As will now be discussed, the documentary evidence that the petitioner did submit with regard to the proffered position and its duties has little or no evidentiary value.

The petitioner's March 15, 2007 letter, filed with the Form I-129, reflects the critical importance of client-defined projects in determining the substantive nature of the beneficiary's services, stating in part:

[The petitioner] provides solutions to sophisticated companies with specific custom software needs. Often, these needs arise from projects that strain the existing technologies. In such cases, [the petitioner] supplies the software/systems solutions and programming knowledge to tailor existing resources enabling clients to meet new challenges efficiently and cost effectively. . . .

The "Terms of Proposed Employment" section of this March 15, 2007 letter states that the beneficiary "will work on projects in Dallas, TX and may provide onsite professional services to [the petitioner's] clients at additional locations, always in accordance with a Department of Labor certified Labor Condition Application." However, the letter provides no information about any particular project upon which the beneficiary would work. Also, neither the letter nor any other documents submitted into the record identify any work locations other than the petitioner's address and the Dallas address specified in the Form I-129.

The AAO finds that the most the petitioner's March 15, 2007 letter of support contributes about the proffered position is the assertion that the proposed position will require the beneficiary to "analyze, design, develop, test and implement computer software programs using Oracle, DBA/8i,9i, Cognos ReportNet, Workflow Manager, Business Objects, and PL/SQL." However, the petitioner has submitted no evidence that corroborates this assertion. As the assertion is not repeated, adopted, or

in any way endorsed by any client that would generate the projects upon which the beneficiary would work and ultimately determine the projects' work requirements, it has insufficient weight to meet the petitioner's burden of proof. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO further notes, however, that establishing that the beneficiary would use "Oracle, DBA/8i,9i, Cognos ReportNet, Workflow Manager, Business Objects, and PL/SQL" would not affect the outcome of this appeal, because the educational, training, and/or experience credentials required for proficiency with those technical tools are neither self-evident nor established anywhere in the record.

The documents filed with the Form I-129 do not include submissions from any business entity relating work the beneficiary would perform for it. In its RFE response, the petitioner provided one submission from a project-generating client, namely, a letter from the Director, Information Technology at Compucom (hereinafter referred to as the Compucom letter). This letter, dated June 22, 2007, reads as follows:

I confirm that [the beneficiary] has been working as a contractor in the position of Programmer/Analyst with our company since June 23, 2006. He is working in our corporate facilities, which are located at [REDACTED]

[The beneficiary's] duties in this position included:

- ✓ Developing specifications Data Warehouse and Reporting Applications;
- ✓ Design and Analysis; Performing program development;
- ✓ Build and test procedures;
- ✓ Performing duties of a technical team leader.

Would there be any need for further information [on the beneficiary], please feel free to contact us.

Together, the petitioner's March 15, 2007 letter and the Compucom letter indicate that the Compucom project requires some technical knowledge; but they do not establish the educational credentials signifying the attainment of that knowledge. As with the petitioner's March 2007 letter in support of the petition, the Compucom letter's comments about the proffered position are limited to generalized descriptions of generic functions (namely: "Developing specifications"; "Data Warehouse and Reporting Applications"; "Design and Analysis"; "Performing program development"; and "Build and test procedures"). The AAO notes that these asserted functions generally comport with the Computer Programmer Analyst occupation as discussed in the *Handbook*. However, as reflected in this decision's earlier discussions of relevant sections of the *Handbook*, a position's inclusion in the Computer Programmer Analyst occupation is not in itself a sufficient basis for inferring the educational requirements of that position.

Whether a programmer analyst position merits specialty occupation classification is dependent upon the extent and quality of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of specialized knowledge in a specific specialty necessary for or usually associated with such performance requirements. As already reflected in this decision's discussions regarding the generalized and generic nature of the record's evidence about the proffered position and its duties, the evidence of record in these areas is materially deficient and does not provide a sufficient foundation for the AAO to determine that the proffered position is a specialty occupation.

While the record's descriptions of the duties comprising the proffered position generally comport with the Programmer Analyst occupational category as discussed in the 2008-2009 edition of the *Handbook*, neither the record's descriptions of the duties comprising the proffered position nor any other evidence of record distinguishes the proffered position from those computer programmer analyst positions which do not require at least a bachelor's degree or the equivalent in a specific specialty closely related to their duties. Given the absence of evidence about the particular client projects designated for the beneficiary and the actual performance requirements of those projects, the petitioner has failed to establish both the substantive nature of the actual services that the beneficiary would perform and the educational credentials required to perform them.

As the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO also finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the petitioner's industry 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a U.S. 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. As reflected in this decision's earlier comments, the *Handbook* does not indicate that a programmer analyst position as so generally described in this petition would require at least a bachelor's degree in a specific specialty.

Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

As the evidence of record does not establish a bachelor's degree or higher in a specific specialty as an industry-wide requirement for positions substantially similar to the one proffered in this petition, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not develop relative complexity or uniqueness as an aspect of the position. Rather, the information about the position and the duties comprising it is limited to generalized functional descriptions. This generalized information is not supplemented by documentation identifying specific projects in which the duties would be applied, describing the particular components of those projects that are so complex or unique as to satisfy this criterion, and explaining why those components are so complex or unique that their performance necessitates a person with at least a bachelor's degree in a specific specialty.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent for the position. To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position.³ This petition's record of proceeding does not contain such evidence.

³ It is important to note that, to satisfy this criterion, the record must also establish that a petitioner's historical imposition of a degree requirement in its recruiting and hiring is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor*, 201 F. 3d at 387-388. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. To satisfy this third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) in the context of the present petition, which involves the beneficiary's performing work on client projects, the petitioner must establish that performance of those projects

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

As noted earlier in this decision, the petitioner has limited the record's duty descriptions to generalized and generic terms. They lack the specificity necessary to establish whatever level of specialization and complexity resides in the proposed duties. Consequently, the AAO can reasonably determine no more than that the duties of the proffered position generally comport with those of the programmer analyst occupation as described in the *Handbook*. The educational requirements for positions in this occupation are so varied, as noted in this decision's earlier discussion of the relevant *Handbook* observations, and the record's duty descriptions are so generalized and non-specific, that there is no basis for the AAO to find the degree association required by this criterion.

For the reasons discussed above, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). As noted above, the petition must also be denied due to the petitioner's failure to respond to a material request for evidence. As these bases for denial alone are dispositive of the appeal, the AAO will not further address its additional basis for dismissing the appeal, namely, its affirmance of the director's denial of the petition due to the petitioner's failure to establish its standing to file this petition.

The AAO recognizes that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS 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, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior

requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a particular specialty.

approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The appeal will be dismissed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 petition is denied.