

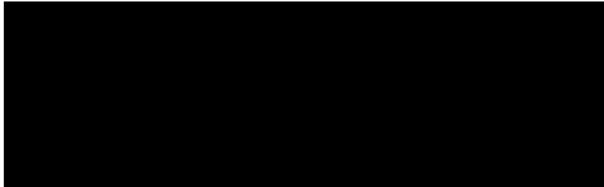
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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Date: **APR 04 2012** Office: CALIFORNIA SERVICE CENTER

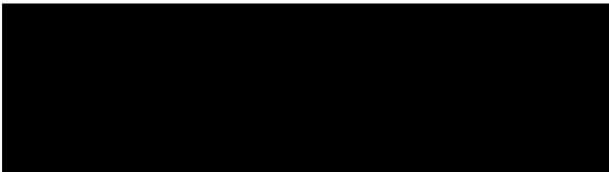
FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner states that it is a nursing registry business with 110 employees and a gross annual income of \$1,846,795.¹ It seeks to employ the beneficiary as a nursing services administrator and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation and that there exists a reasonable and credible offer of employment.

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

The AAO will first address whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

¹ It must be noted for the record that the Form I-129 indicates that the petitioner employs 110 employees. The petitioner's Quarterly Wage and Withholding Report of 2009, Quarter 3, however, indicates that the petitioner had 10 employees at that time. It remains unexplained how at the time the Form I-129 was filed on December 3, 2009 the petitioner could realistically hire an additional 100 employees within a two month time period.

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 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 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner states that it is seeking the beneficiary's services as a nursing services administrator. In the November 25, 2009, letter of support, the petitioner states that the beneficiary will:

be responsible for the overall functions of the Nursing Services Department in accordance with federal, state and local standards governing patient care policies to ensure that the highest degree of quality care can be provided to patients at all times with the hospitals, nursing homes, and other medical facilities of which we have contractual relationships to supply healthcare personnel. [The beneficiary] will oversee that there is strict compliance with the standards of patient care and advice [sic] medical staff and department heads in matters related to the nursing service. [The beneficiary] will be responsible for revising patient care policies; developing organizational structure and standards of performance; will establish personnel qualification requirements; draft procedure manual; initiate in-service programs; install record and reporting systems, [sic] [and] will establish procedures to reconcile and assure for policy integrity. [The beneficiary] will discuss operational issues and update staff on new or changed regulations and review documentation requirements, standards, and procedures to ensure regulatory compliance. [The beneficiary] will assist in the preparation of departmental budget. [The beneficiary] will conduct studies to evaluate effectiveness of [the petitioner's] nursing service in relation to the objectives of [the petitioner]; [c]onduct meetings to ensure proper communication between hospital clinical staff, [the petitioner's] health care personnel, and [the petitioner]; [and] [p]articipate in and encourage quality assessment and improvement activities, and determine or implement staff disciplinary actions as needed. [The beneficiary will] direct staff recruitment and development activities and conduct ongoing skill evaluations to ensure the quality and accuracy of their work. [The beneficiary will] monitor staff and schedules, matching staff to medical facilities based on individual needs.

The support letter also states that the proffered position requires at least a bachelor's degree in nursing or health administration, or its equivalent. The petitioner submitted copies of the beneficiary's foreign degrees and college transcripts, as well as a credential evaluation finding that the beneficiary's education is equivalent to a U.S. bachelor's degree in business management and a U.S. bachelor's degree in nursing.

On December 18, 2009, the director issued an RFE requesting the petitioner to submit, *inter alia*, (1) a more detailed description of the work to be performed by the beneficiary; (2) a line-and-block organizational chart showing the petitioner's hierarchy and staffing levels; (3) copies of the petitioner's present and past job vacancy announcements; (4) evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher in a specific specialty, to perform the duties of the proffered position; (5) evidence to establish that a specialty occupation exists for the beneficiary such as copies of signed contracts between the petitioner and the beneficiary; and (6) copies of the petitioner's 2007 and 2008 Federal income taxes.

On January 29, 2010, in response to the director's RFE, counsel for the petitioner submitted, in part, (1) a copy of the petitioner's 2008 income tax return; (2) a copy of the Quarterly Wage and Withholding Reports for the first three quarters in 2009; (3) a copy of the petitioner's business license; and (4) a copy of the petitioner's lease agreement.

Counsel also included the following regarding the proffered position's duties:

In addition to those duties as outlined in the original filing, please be informed that the [b]eneficiary will also be performing services in the areas of financial budgeting and contract negotiations. The Beneficiary will be working on a full-time 40 hour basis and the person she will report to is the Petitioner's Chief Executive Officer. The percent of time the Beneficiary will be spending on one of her particular tasks as enunciated in the Petitioner's letter of November 25, 2009 will vary each day depending upon that days work assignment.

Please take notice that the proffered position is differentiated from other related non-specialty occupation positions due to the nature of the specialized job duties such as the drafting of nursing procedure manuals; conducting studies and surveys which evaluate the effectiveness of the ongoing nursing services and the making of recommendations for changes; in preparing budgets; and insuring all federal and state mandated guidelines are adhered to, all of which requires not only a baccalaureate degree but a nursing background.

The director denied the petition on March 1, 2010.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

On appeal, counsel claims that the proffered position is a specialty occupation. In addition, counsel states that the director erroneously classified the proffered position as an administrative services manager position. Although counsel claims that the proffered position was erroneously

classified as an administrative services manager position, counsel also claims that the *Handbook's* chapter on "Administrative Services Manager" indicates that large companies with multiple locations, equipment, and technologies to coordinate, such as the petitioner, need administrative services managers to possess at least a bachelor's degree. Counsel also submits a copy of a previously approved H-1B petition for the proffered position, a copy of the petitioner's floorplan, and copies of contract agreements between the petitioner and its clients.²

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³

² Although counsel claims on appeal that the previous H-1B petition (albeit for a different beneficiary) was approved "for the same position at issue herein," the record lacks sufficient evidence of the exact duties of that approved position such that counsel's assertion can be corroborated. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the limited description of duties provided on page 8 of the approved Form I-129, however, it appears that that position may have been more senior in that the person filling it would have been "responsible for the overall functions of the Nursing Services Department" as opposed to the beneficiary's position, which would only be "responsible for functions of the Nursing Services Department." Such a finding is also supported by the fact that the position in the approved H-1B petition was a Level II position (with an annual salary of \$82,500.00 per year, \$319 more than the prevailing wage for a Level II position at the time it was filed) and the proffered position in this matter is an entry-level, Level I position (with an annual salary of \$62,400.00, \$2,101 more than the prevailing wage for a Level I position at the time the instant petition was filed). Therefore, it cannot be found that the position in the approved H-1B petition is "the same position at issue herein."

Lastly, in submitting a copy of the previously approved H-1B petition, counsel claims that it is "information and confirmation the Service Center has always had if they were interested in taking the effort to confirm same." Contrary to counsel's claims to the contrary, however, a review of USCIS electronic records reveals that the record of proceeding for the previously approved H-1B petition was no longer at the California Service Center at the time the instant petition was filed on December 3, 2009. Specifically, electronic records show that the file was transferred to a record storage facility on September 3, 2009.

Nevertheless, it must be noted that USCIS does not routinely engage in the practice of reviewing previous nonimmigrant petitions when adjudicating petitions filed by the same petitioner. Given file transfers as well as the various and changing jurisdiction over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, 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.

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

A review of the *Handbook* reveals that the proffered position is not an administrative services manager position. Instead, the AAO finds that the duties described by the petitioner reflect the duties of a medical and health services manager. The “Medical and Health Services Managers” chapter at the 2010-2011 edition of the *Handbook* describes the duties of a medical and health services manager, in part, as follows:

Healthcare is a business and, like every business, it needs good management to keep the business running smoothly. *Medical and health services managers*, also referred to as *healthcare executives* or *healthcare administrators*, plan, direct, coordinate, and supervise the delivery of healthcare. These workers are either specialists in charge of a specific clinical department or generalists who manage an entire facility or system.

The structure and financing of healthcare are changing rapidly. Future medical and health services managers must be prepared to deal with the integration of healthcare delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work, and an increased focus on preventive care. They will be called on to improve efficiency in healthcare facilities and the quality of the care provided.

Large facilities usually have several *assistant administrators* who aid the top administrator and handle daily decisions. Assistant administrators direct activities in clinical areas, such as nursing, surgery, therapy, medical records, and health information.

In smaller facilities, top administrators handle more of the details of daily operations. For example, many *nursing home administrators* manage personnel, finances, facility operations, and admissions, while also providing resident care.

* * *

Medical and health services managers in managed care settings perform functions similar to those of their counterparts in large group practices, except that they could have larger staffs to manage. In addition, they might do more community outreach and preventive care than do managers of a group practice.

Some medical and health services managers oversee the activities of a number of facilities in health systems. Such systems might contain both inpatient and outpatient facilities and offer a wide range of patient services.

Under the section on "Training, Other Qualifications, and Advancement," the *Handbook* states that:

A master's degree in one of a number of fields is the standard credential for most generalist positions as a medical or healthcare manager. A bachelor's degree is sometimes adequate for entry-level positions in smaller facilities and departments. In physicians' offices and some other facilities, on-the-job experience may substitute for formal education.

Education and training. Medical and health services managers must be familiar with management principles and practices. A master's degree in health services administration, long-term care administration, health sciences, public health, public administration, or business administration is the standard credential for most generalist positions in this field. However, a bachelor's degree is adequate for some entry-level positions in smaller facilities, at the departmental level within healthcare organizations, and in health information management. Physicians' offices and some other facilities hire those with on-the-job experience instead of formal education.

Id. By designating the proffered position as Level I on the submitted Labor Condition Application, the petitioner indicates that it is an entry-level position for an employee who has only basic understanding of the occupation. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, as the proffered position is an entry-level position at a smaller facility, the *Handbook* indicates that a general bachelor's degree or, alternatively, on-the-job experience is sufficient to perform its duties. Because the *Handbook* indicates that working as a medical and health services manager does not normally require at least a bachelor's degree in a specific specialty or its equivalent, the *Handbook* does not support the proffered position as being a specialty occupation.⁴

⁴ Although the *Handbook* indicates that the "standard credential for most generalist positions" is a "master's degree in health services administration, long-term care administration, health sciences, public health, public administration, or business administration," such a conclusion does not support the finding that these positions qualify as specialty occupations. Specifically, the *Handbook's* conclusion that a degree in "business administration" is a sufficient minimum requirement for entry into most generalist positions is inadequate to establish such positions as categorically qualifying as specialty occupations. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, it must be established that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent.

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

The petitioner also does not provide any job-vacancy advertisements evidencing a common degree-in-a-specific-specialty requirement in the petitioner's industry for positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

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." Here, the

position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Furthermore, the fact that the petitioner itself does not require a master's degree in one of the fields listed in the *Handbook* indicates that the proffered position is not in fact a generalist position in this occupation but is likely a lower-level position for a smaller facility. In addition, the petitioner's claim that the position can be performed by someone with a bachelor's degree in nursing does not accord with any of the information provided by the Handbook with regard to the standard training, other qualifications, and advancement of medical and health services managers.

petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of nursing services administrator.

Specifically, even though the petitioner and its counsel claim that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the nursing services administrator 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 it claims are so complex and unique. While one or two courses in health services administration may be beneficial in performing certain duties of a nursing services administrator 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 are required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other entry-level medical and health services manager positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than medical and health services manager positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of nursing services administrator is so complex or unique relative to other medical and health services manager positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. The AAO notes counsel's claim that USCIS approved a petition that had been previously filed by the petitioner for the position of nursing services administrator. As noted above, however, it has not been established that the previous H-1B petition was approved for the same position as the proffered position. On the contrary, even though a complete copy of the previously approved petition was not provided, based on what was provided, the evidence of record indicates that the two positions are in fact different. Nevertheless, if the two positions were the same and if previous nonimmigrant petition were approved based on the same description of duties and assertions that are contained in the current record, it would constitute material and gross error on the part of the director.

It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent

petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying even an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, 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 nonimmigrant petitions filed by a petitioner for the same positions, 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).

Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).⁵

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. The *Handbook* describes the duties of the proffered position as analogous to that of a medical and health services manager, a position that does not require a bachelor's degree in a specific specialty, or its equivalent. There is no evidence in the record that would show that the duties of the proffered position rise beyond this level. Consequently, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).⁶

⁵ While a petitioner may believe or otherwise assert that a proffered position requires a 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 employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

⁶ Counsel argues on appeal that the proffered position qualifies as a specialty occupation on the basis that its duties are so specialized and complex. However, the duties as described lack sufficient specificity to distinguish the proffered position from other medical and health services manager positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties.

Moreover and as noted above, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage (i.e., at least \$105,706.00 per year at the time the instant petition was filed). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent

The petitioner has therefore failed to establish that it has satisfied any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). As such, the petitioner has not established that the proffered position qualifies as a specialty occupation, and the appeal must be dismissed and the petition denied for this reason.

The AAO will next consider whether the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment.

As previously discussed, on December 18, 2009, the director issued an RFE requesting the petitioner to submit (1) a more detailed job description; (2) an organizational chart; (3) the petitioner's past and present job vacancy announcements (4) evidence of past employment practices; and (5) evidence concerning the nature of the petitioner's business, such as business plans, promotional materials, advertisements, etc. As the petitioner did not provide any of the requested evidence listed above, the director was unable to (1) determine whether the position offered to the beneficiary qualifies as a specialty occupation; (2) substantiate the beneficiary's listed job duties that require involvement with the other staff in the company; and (3) determine to what extent the beneficiary's job duties will be involved with the medical facilities that the petitioner claims to have contractual relationships with to supply health care personnel. As such, the director could not find that a reasonable and credible offer of employment exists.

On appeal, counsel states that the materials submitted in response to the director's RFE were sufficient to demonstrate that there exists a reasonable and credible offer of employment. In addition, counsel submits the petitioner's floor plan, copies of the petitioner's contracts with their clients, the petitioner's job vacancy announcement, and a job fair flyer as evidence of the petitioner's attendance.

The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence 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), (8), and (12). The 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 detailed above, the requested evidence was material to an eligibility determination in this matter as the beneficiary's alleged duties involve working with other staff in the company as well as the provision of services to medical facilities. Therefore, as the petitioner failed to provide this requested, material evidence, the appeal must be dismissed and the petition denied for this additional reason. 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).

objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the AAO notes that counsel submits for the first time on appeal the petitioner's floor plan, copies of the petitioner's contracts with their clients, the petitioner's job vacancy announcement, and a job fair flyer as evidence of the petitioner's attendance for the first time on appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal. Consequently, the appeal will be dismissed and the director's denial of the petition will be affirmed on the basis that the petitioner failed to establish a reasonable and credible offer of employment.

Finally, the AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed 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. § 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.