

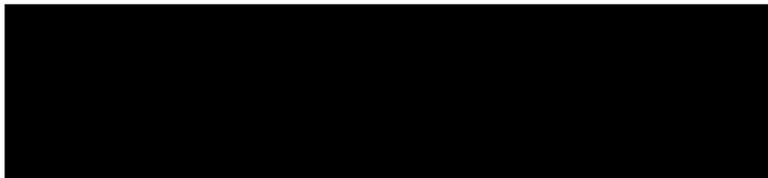
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **MAR 02 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 Director, California 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. The petition will remain denied.

The petitioner is engaged in the food service industry as a licensee and franchisee of McDonald's Corporation. It was established in 1995 and claims to employ 450 personnel and to have had a gross annual income of \$22 million when the petition was filed. It seeks to employ the beneficiary as a training and development specialist 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, concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for Nonimmigrant Worker, and supporting documentation; (2) the director's request for additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, Notice of Appeal or Motion, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The central issue is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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 one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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 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.

In this matter, the petitioner seeks the beneficiary's services as a training and development specialist. The petitioner, in a letter dated June 12, 2006¹ in support of the petition, described the duties of the proffered position as:

Direct, coordinate and supervise, monitor the job skills level and qualifications of the company's employees; Create and update employee handbook in accord with McDonald's policies. Develop and conduct employee training programs in accord with McDonald's standards; Organize, schedule and hold instruction seminars for employees on McDonalds' policies and procedures, such as business operations, customer service, food safety, employee safety, equipment care, all levels of store management classes, McDonald's franchising. Organize and develop training procedures into manuals, guidelines, periodical handouts and video materials mandatory for all staff. Staff, train and develop restaurant managers, management staff and hourly employees through orientation. ongoing feedback, establishment of performance expectations and by conducting performance reviews. – 25 percent

Serve as a link between management and employees. Communicate goals and plans to management and other employees. Ensure customer service in all areas meets McDonald's standards. Develop employee skills to enhance productivity thus, increase sales. Ensure the accident reports are promptly completed in the events of employee or customer injury. At all times provide a favorable image of McDonald's and to promote its goals and objectives, foster and enhance public recognition and acceptance of all of its areas of endeavor. – 25 percent.

Coordinate the store managers' daily activities and its personnel. Direct hiring, assignment of personnel schedule, supervise work, and evaluate performance of employees. Make recommendations to management regarding promotion of employees. Inform management of issues, problems and take prompt corrective action when necessary or suggest alternative courses of action. Create a positive working environment. Maintain a favorable working relationship with all company employees to foster and promote a cooperative and harmonious working climate that will be conducive to maximum employee morale, productivity and efficiency/effectiveness. Ensure that all employees and management candidates are interviewed and hired through the company's selection process. Oversee orientation and training of all management and hourly employees. Ensure responsibilities, goals and plans of managers in training are adhered to the McDonald's standards. Determine applicability of experience and qualifications for management position of job applicants. – 25 percent.

¹ The petitioner notes that the beneficiary in this matter was approved for H-1B classification on two previous occasions for Que Nexus, Inc., a business that was subsequently merged into the petitioner due to corporate restructuring. The petitioner in this matter asserts that no changes were made to the job title or duties of the proffered position and that the proffered position is the same position as the position approved in 2006 and again in 2008 for H-1B classification. It appears because of the date of the letter in support of the petition that the petitioner used the same letter submitted with the previous petitions.

Control overtime to reduce potential labor problems. In accord with the goals of the company, divide the staff training solutions into individual steps and separate procedures. Provide an in-depth analysis and determine whether the specific training program is advisable and best suited within the existing system. Devise ways to apply existing resources to additional operations[,] establish methods to improve work performance. Create and revise procedures as needed. Review diagrams/workflow charts analyzing in more detail operations to be performed by managers and other employees. – 25 percent.

The petitioner stated that the above described position required the education and training of a person with a bachelor's degree in business administration, psychology, management or its equivalent.

On September 23, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, including a more detailed job description and any evidence demonstrating factors that distinguished the proffered position from those positions that did not require a degree in a specific field of study. The RFE also requested additional information regarding the nature of the petitioner's business.

In an October 26, 2009 response to the RFE, counsel for the petitioner referenced the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* to support the assertion that a training and development specialist occupational category is a specialty occupation. Counsel also referenced the DOL's *Occupational Information Network (O*NET)* Online Summary Report and the *Preamble –Professional Recruitment Operations* to demonstrate the proffered position is a specialty occupation.

Counsel claimed that a review of job postings online demonstrated that a bachelor's degree is a common requirement for the position of training and development specialist. Counsel attached five advertisements in support of the claim. The job postings provided identified the advertised positions as a training and development specialist. Two of the advertisements listed a general bachelor's degree as required and one of those indicated an advanced degree was preferred but that an associate degree or high school diploma with experience might be acceptable. The three remaining advertisements required a bachelor's degree with each advertisement listing a number of possible disciplines as acceptable, including industrial and organizational psychology, training and development, organizational development, instructional system design or equivalent bachelor's or master's degree, education, human resources, instructional design, organization development, or a related field.

Counsel noted that the individual in the proffered position would be in charge of the full staff of the company including restaurant managers, assistant managers, and swing managers and would be responsible for developing skills and enhancing productivity and quality of work of the petitioner's employees. Counsel asserted that the petitioner required the individual in this position to possess at a minimum a bachelor's degree or its equivalent. Counsel contended that the duties of the position are highly complex and provided an October 15, 2009 position evaluation report prepared by [REDACTED] Program Director and Faculty Member at

South University in West Palm Beach, Florida. [REDACTED] repeated the petitioner's description of the duties of the proffered position and opined: "an individual would need the knowledge obtained by acquiring a Bachelor's degree in Business Administration, Management or its equivalent" to perform the duties described. [REDACTED] noted that she had conducted a thorough review of employment websites and listed six examples of companies requiring a bachelor's degree "in a related field of work" for their training specialists. She concluded that the employment listings demonstrated that a bachelor's degree is the industry-standard requirement for the advertised positions. [REDACTED] further concluded, based on her analysis of the proffered position, the job responsibilities and her expertise in the field of higher education, "the position of Training and Development Specialist at [the petitioner] would require a Bachelor's degree in Business Administration, Management or its equivalent in order to adequately perform the complex duties required for the position."

The petitioner also provided a similar position description of the proffered position that expanded somewhat on the beneficiary's duties and noted that the individual in the proffered position must possess at least a bachelor's degree in business administration, psychology, management or its equivalent.

Upon review of the evidence submitted, the director denied the petition on December 4, 2009.

On appeal, counsel for the petitioner observes that the position of training and development specialist for the beneficiary's previous employer had been recognized as an H-1B specialty occupation on two previous occasions. Counsel notes that the proffered position is the exact position that had been previously approved and that the change of employer was necessitated only because of a corporate restructuring. Counsel asserts that the director failed to give deference to the previous approvals contrary to agency guidance and cites a USCIS interoffice memorandum issued by [REDACTED] Associate Director of Operations on April 23, 2004 ([REDACTED] memo) regarding the significance of prior approvals on extension petitions. Counsel contends that the proffered position is complex and unique and involves specific duties that are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Counsel observes that the petitioner employs hundreds of personnel and that to provide training and career skill development to such a complex organization clearly involves job duties that are specialized and complex.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns first 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 DOL's *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)).

As a preliminary matter, it must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in "Business Administration, Psychology, Management or its equivalent" for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. 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, a petitioner must establish 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 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).²

In this matter, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

This conclusion is consistent with and is supported by the information on the Training and Development Specialist occupational category addressed in the *Handbook* (2010-2011 online edition) – "Human Resources, Training, and Labor Relations Managers and Specialists."

² Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

The *Handbook* first notes under “Significant Points”: “[t]he educational backgrounds of these workers vary considerably, reflecting the diversity of duties and levels of responsibility.” In the section on education and training, the *Handbook* states in pertinent part:

In filling entry-level jobs, many employers seek college graduates who have majored in human resources, human resources administration, or industrial and labor relations. Other employers look for college graduates with a technical or business background or a well-rounded liberal arts education.

Because an interdisciplinary background is appropriate in this field, a combination of courses in the social sciences, business administration, and behavioral sciences is useful.

* * *

The duties given to entry-level workers will vary, depending on whether the new workers have a degree in human resource management, have completed an internship, or have some other type of human resources-related experience. Entry-level employees commonly learn by performing administrative duties—helping to enter data into computer systems, compiling employee handbooks, researching information for a supervisor, or answering phone calls and handling routine questions. Entry-level workers often enter on-the-job training programs in which they learn how to classify jobs, interview applicants, or administer employee benefits; they then are assigned to specific areas in the human resources department to gain experience. Later, they may advance to supervisory positions, overseeing a major element of the human resources program—compensation or training, for example.

* * *

Many employers prefer entry-level workers who have gained some experience through an internship or work-study program while in school. Employees in human resources administration and human resources development need the ability to work well with individuals and a commitment to organizational goals. This field demands skills that people may have developed elsewhere—teaching, supervising, and volunteering, among others. Human resources work also offers clerical workers opportunities to advance to more responsible or professional positions. Some positions occasionally are filled by experienced individuals from other backgrounds, including business, government, education, social services administration, and the military.

The *Handbook* finds a number of fields of study suitable for entry into the position of training and development specialist. Thus, while many employers may seek college graduates who have majored in human resources, human resources administration, or industrial and labor relations, the *Handbook* does not state that many employers require these specific fields of study for entry into the position of training and development specialist. Rather, as the *Handbook* notes entry-

level employees may have degrees in human resource management, may have completed an internship, or may have other types of human resources-related experience. Some have developed the skills necessary for this position by teaching, supervising or volunteering or by advancement from clerical positions. The diversity in the acceptable methods for preparing to work in this position precludes a determination that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the position. As the *Handbook* recognizes a wide spectrum of degrees and experiences as acceptable for employment as a training and development specialist, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty.

The AAO acknowledges the petitioner's reference to DOL's Online (*O*NET*) summary report for the occupation of training and development specialist. However, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) *in a specific specialty*. The *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. Its rating does not describe how the years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

The AAO has also reviewed the opinion of [REDACTED] and finds that her opinion does not assist in establishing that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the training and development specialist. [REDACTED] appears to acknowledge that many companies, while requiring a bachelor's degree, do not specify a particular discipline but rather indicate generally that the degree should be "in a related field of work." Such a broad requirement does not establish a normal minimum requirement in a specific specialty for entry into a training and development specialist position. Moreover, [REDACTED] concluded that based on her analysis of the proffered position, the job responsibilities and her expertise in the field of higher education, "the position of Training and Development Specialist at [the petitioner] would require a Bachelor's degree in Business Administration, Management or its equivalent in order to adequately perform the complex duties required for the position."

Again, even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. 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 or management, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558. In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. §

214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. As noted above, USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular 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 at 147. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. A review of the five job postings submitted confirms the *Handbook's* report that a diverse number of degrees, including degrees of general application, are acceptable for employment as a training and development specialist. As noted above two of the five advertisements did not list any specific fields of study and three of the advertisements listed a number of diverse degrees that would be acceptable for employment in the occupation. Thus, the advertisements do not provide a basis for concluding that there is an industry standard for bachelor's degrees in a specific specialty in order to perform the duties of a training and development specialist occupation. In addition, the job postings do not include sufficient information regarding the duties of the advertised position to establish that the listings are parallel to the petitioner's described position. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.³

³ According to the *Handbook's* detailed statistics on human resource training, and labor relations managers and specialists, there were approximately 904,900 persons employed in this field in 2008 of which 216,200 persons were employed as training and development specialists. *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed December 2011). Based on the size of

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 refute the *Handbook’s* information to the effect that there is a spectrum of degrees acceptable for a training and development, including degrees not in a specific specialty.

Specifically, even though the petitioner claims that the proffered position’s duties are so complex and unique that a bachelor’s degree in a specific specialty is required, 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 complex and unique duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, 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. While a few diverse courses in business and management may be beneficial in performing certain duties of a training and development specialist, the petitioner has failed to demonstrate how an established curriculum of such courses elevates the proffered position to a specialty occupation. The AAO again acknowledges that a general-purpose bachelor’s degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, however 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 at 147.

this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the job postings it provided with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the food franchise industry. 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 cannot 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”). As such, even if the job announcements supported the finding that the job of training and development specialist for the petitioner’s food franchise organization required a bachelor’s or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Further, as noted above, the petitioner's claim in this matter that the duties of the proffered position may be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration is tantamount to an admission that the proffered position is not in fact a specialty occupation. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than a training and development specialist position that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

On appeal, the petitioner emphasizes that the proffered position is the same position in job title and duties and that it is essentially the same petitioner as the petitioner in the two previously approved petitions. Counsel also references the [REDACTED] as establishing that USCIS must give deference to those prior approvals or provide detailed explanations why deference is not warranted.

First, the [REDACTED] guidance does not apply in situations where, as here, the petitioner is not filing a petition extension. The memorandum's "Purpose" section indicates that the memorandum's guidance applies "during adjudication of a . . . request for petition extension."⁴ The petitioner in this matter, however, does not request an extension of the beneficiary's previous employment but checks the box on the Form I-129 indicating there has been a change in employer. Therefore, as the present petition was filed as a "Change of employer" request and not as a petition extension, the [REDACTED] is not relevant to this matter.⁵

Second, it must be noted that the [REDACTED] specifically states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, even if the instant petition had been filed as an extension petition, the [REDACTED] does not advise adjudicators to approve an extension petition when the facts of the record do not

⁴ The memorandum's "Purpose" section states, in full:

This memorandum provides guidance on the process by which an adjudicator, during adjudication of a subsequent request for petition extension, may question another adjudicator's prior approval of a petition where there is no material change in the underlying facts.

⁵ The petitioner has also not provided documentary evidence that it is even the successor to the petitioner of the previously petitions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the petition should be granted.

Again and as indicated in the [REDACTED] 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'r 1988). If the two previous nonimmigrant petitions were approved based on the same description of duties and assertions that are contained in the current record, they 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 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 on behalf of a 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).

Third, the memorandum clearly states that each matter must be decided according to the evidence of record. In the appeal, counsel suggests that USCIS was required to look at the prior records of proceeding dealing with the separate adjudications of the approved H-1B petitions filed on behalf of the beneficiary and provide a reason why deference is not warranted.

Copies of these allegedly approved petitions, however, were not included in the record and, therefore, this claim is without merit. If a petitioner wishes to have prior 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).

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; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of

proceeding.⁶ Accordingly, the director was not required to request and obtain a copy of the prior H-1B petitions.

Again, the petitioner in this case failed to submit copies of the prior H-1B petitions and their respective supporting documents and approval notices. As the record of proceeding does not contain any evidence of the allegedly approved petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approvals of the prior two H-1B petitions was not warranted. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. For this additional reason, the Yates memorandum does not apply in this instance.

As the record has not established the petitioner's prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).⁷

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's 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 assessing the actual duties of the position, not the occupation or the industry-wide standard associated with the occupation, the record does not include probative evidence that the duties of the proffered position contain elements different from that of a general training and development specialist, an occupation that does not require a bachelor's or higher degree in a specific specialty, or its equivalent, to perform the duties of the position. Neither does the position, as described, represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a general training and development specialist. The AAO acknowledges the petitioner's claimed number of employees, however, the petitioner in this matter does not provide evidence or explanation of how the number of employees impacts the proffered position and makes it distinguishable from that of other training and development specialists, again, an occupation that does not require a bachelor's

⁶ USCIS does not engage in the practice of reviewing previous nonimmigrant petitions when adjudicating extension petitions. Given 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.

⁷ While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

degree in a specific discipline.⁸ To the extent that they are described in the record of proceeding, the duties of the proffered position do not appear more specialized and complex than a training and development specialist position not associated with the attainment of at least a bachelor's degree in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as satisfying the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

The petition will be denied and the appeal dismissed. 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 remains denied.

⁸ Furthermore and as noted above, it is simply not credible that the position is one with specialized and complex duties, given the Level I designation on the LCA submitted in support of the petition. If the proffered position did in fact involve specialized and complex duties as compared to general training and development specialists, it would be a higher-level position classified as a Level IV position, requiring a significantly higher prevailing wage.