



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **OCT 02 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition and supporting documents, the petitioner describes itself as a health care provider established in 2002. In order to employ the beneficiary in what it designates as a clinical health educator position, the petitioner seeks to classify him 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the 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.

For the reasons that will be discussed below, the AAO agrees with the director's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The primary issue for consideration is 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 employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college

professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In the petition signed on April 4, 2012, the petitioner indicates that it is seeking the beneficiary's services as a clinical health educator on a part-time basis (20-25 hours per week) at the rate of pay of \$357.75 per week (\$18,603 per year).¹ In the March 28, 2012 letter of support, the petitioner states that the beneficiary "will be responsible for planning, designing and implementing health education programs, nursing reinforcement training, and respond to the learning needs of its healthcare employees." The petitioner further states that "[t]he job does not require the employee to provide direct nursing care to patients nor will she participate in any treatment plan."² In addition, the petitioner states that the beneficiary will be responsible for the following duties:

% of Time	Detailed Description of Duties and Responsibilities
25%	<ul style="list-style-type: none"> • Plan, develop and implement all training and clinical skill-building activities related to the maintenance of the company's staff competency standards and continuing learning education program • Consult with the Nurse Director in assessing the clinical skills and training needs of new and existing employees;
20%	<ul style="list-style-type: none"> • Establish appropriate curriculum of training, seminars, procedures and manuals for the annual survey and nursing reinforcement training requires by State and Federal Laws;

¹ The AAO notes that in the Form I-129 and LCA, the petitioner claims that the position is part-time. However, in its letter of support, the petitioner provides inconsistent information regarding the position. Specifically, the petitioner states, "To further expand its operations while maintaining profitability, [the petitioner] requires the services of a *full-time Health Educator* (emphasis added)." Thereafter, the petitioner claims that it "requires the services of a *part-time Clinical Health Educator* (emphasis added)." No explanation was provided by the petitioner for the variance.

² The petitioner mistakenly referenced the beneficiary in the feminine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question whether the information provided is correctly attributed to this particular position and beneficiary.

20%	<ul style="list-style-type: none"> • Prepare a syllabus of the course materials, which will outline the objectives of the training, the methodologies to be used, and the expected results. It may cover a wide range of topics, including basic to advanced nursing management, wound management, safety in the workplace, case management, discharge planning, healthcare policies and procedures, compliance regulations, proper use of medical equipment, clinical certification programs, utilization review, etc.
20%	<ul style="list-style-type: none"> • Prepare and obtain educational materials for use in teaching and demonstrating skilled nursing procedures;
10%	<ul style="list-style-type: none"> • Regularly participate in conference and seminars that formulate progressive and professional staff development programs designed to meet the changing needs of the healthcare community.

The AAO observes that the percentage of time spent on each duty only totals 95%. No explanation was provided.

Further, the petitioner states, "Because this is a professional position, the person filling the position of Clinical Health Educator with our company must possess at least a Bachelor's degree in a health-related field or its equivalent through work experience." The AAO observes that the petitioner does not indicate that the minimum academic requirement for the position is a bachelor's degree *in a specific specialty*, or its equivalent.

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, as well as a credential evaluation from Educational Assessment, Inc. The evaluation states that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in nursing.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Health Educators" – SOC (ONET/OES Code) 21-1091, at a Level I (entry level) wage.

Furthermore, in support of the petition, the petitioner submitted: (1) copies of its Income Tax Returns from 2008 to 2010; (2) job vacancy announcements; (3) a one-page brochure; (4) quarterly wage reports; and (5) an H-1B notice for a different beneficiary, [REDACTED] along with related documents from the petition.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 4, 2012. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

On October 15, 2012, counsel for the petitioner submitted a brief and additional evidence. In the

brief, counsel provided a revised description of the duties of the proffered position.³ In addition, counsel submitted documents in support of the petition, including: (1) an H-1B approval notice by another employer, along with a copy of the H-1B petition, LCA, support letter, and academic credentials of another individual (not the beneficiary);⁴ (2) printouts from the American Association for Health Education website; (3) a job posting by the petitioner; (4) two job vacancy announcements; (5) an H-1B notice for a different beneficiary, [REDACTED] along with documentation regarding the H-1B petition filing; (6) a tax return and quarterly wage reports; (7) printouts from the petitioner's website; (8) the petitioner's information packet; and (9) documentation regarding the beneficiary's credentials and work experience as a nurse.

The director reviewed the information provided by counsel to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on January 31, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal brief, counsel submitted a

³ The brief is printed on counsel's letterhead. It is noted that this revised description of the duties and the requirements of the proffered position is not probative evidence as the information was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the revised duties and responsibilities that counsel attributes to the proffered position. 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).

Moreover, in the letter of support submitted with the initial petition, the petitioner states, "Because this is a professional position, the person filling the position of Clinical Health Educator with our company must possess at least a Bachelor's degree in a *health-related field* or its equivalent through work experience (emphasis added)." Notably, the requirements for the proffered position as stated by counsel do not correspond to the petitioner's stated requirements for the proffered position. That is, counsel claims, "The services of an individual who possess a college degree or its equivalent in the *Nursing* field are required for the Health Educator position *A Health Educator who is a Nurse . . . [is] needed in educating its patients on the basic health risk management, wound management, among others.*" Thereafter, throughout the brief, counsel indicates that a degree in nursing is necessary for the proffered position. No explanation was provided for altering the job requirements.

In response to an RFE, a petitioner (or counsel) cannot materially change the job requirements of the proffered position in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978).

⁴ The AAO observes that the record of proceeding does not contain authorization from the other employer consenting to counsel's submission of the copy of the H-1B documents in the instant case. As the documentation becomes incorporated into the instant record of proceeding, submission of such documentation may raise privacy concerns.

brief, along with a copy of previously submitted documentation and new evidence.⁵

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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."

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The petitioner stated that the beneficiary would be employed in a clinical health educator position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly

⁵ With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. 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).

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 Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence requested in the RFE but submitted for the first time on appeal. Nevertheless, the AAO reviewed the documentation but finds that it fails to establish eligibility that the proffered position qualifies as a specialty occupation under the applicable statutory and regulatory provisions.

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.

In the instant case, the petitioner claims that its proffered position requires at least a "Bachelor's degree in a health-related field or its equivalent through work experience." As a preliminary matter, the AAO notes that, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, the petitioner states that its minimum educational requirement for the proffered position is a "Bachelor's degree in a health-related field or its equivalent through work experience." The issue here is that "a health-related field" is a broad category that covers numerous and various specialties, some of which are only related through the basic principles regarding functional or metabolic efficiency of a living organism. Therefore, it is not readily apparent that a general degree in "a health-related field" is directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, fails to establish either any and all "health-related" degrees are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

The AAO will now discuss the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter the *Handbook*), which it recognizes as an authoritative source on the duties

and educational requirements of the wide variety of occupations that it addresses.⁶ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Health Educators." When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁷ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

The AAO reviewed the chapter of the *Handbook* entitled "Health Educators" but did not find that the duties of the proffered position correspond to this occupational classification.⁸ The *Handbook* describes the duties of "Health Educators" in the subsection entitled "What Health Educators Do" and states, in part, the following about the duties of this occupation:

Health educators teach people about behaviors that promote wellness. They develop programs and materials to encourage people to make healthy decisions.

Duties

Health educators typically do the following:

⁶ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁷ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁸ For additional information regarding the occupational category "Health Educators," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Health Educators, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-1> (last visited September 30, 2013).

- Assess the needs of the people they serve
- Develop programs and events to teach people about health topics
- Create and distribute health-related posters, pamphlets, and other educational materials
- Evaluate the effectiveness of programs and materials
- Help people find health services or information
- Supervise staff who implement health education programs
- Collect and analyze data to learn about their audience and improve programs
- Advocate for improved health resources and policies

The duties of health educators vary based on where they work. Most work in health care facilities, colleges, public health departments, nonprofits, and private businesses. Health educators who teach health classes in middle and high schools are considered teachers. For more information, see the profiles on middle school teachers and high school teachers.

In *health care facilities*, health educators often work one-on-one with patients and their families. They teach patients about their diagnoses and about necessary treatments or procedures. They direct people to outside resources, such as support groups and home health agencies. Health educators in health care facilities also help organize health screenings, such as blood pressure checks, and health classes on topics such as correctly installing a car seat. They also train medical staff to interact better with patients. For example, they may teach doctors how to explain complicated procedures to patients in simple language.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Health Educators, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-2> (last visited September 30, 2013).

In the section of the *Handbook* entitled "Work Environment," the *Handbook* states that health educators work in the following industries:

Health educators held about 63,400 jobs in 2010. Health educators work in a variety of settings, including hospitals, non-profit organizations, government, doctors' offices, private business, and colleges.

Although most health educators work in an office, they may spend a lot of time away from the office to carry out programs or attend meetings.

The following industries employed the most health educators in 2010:

Health care	37%
Government	21
Religious,	15

grantmaking,
civic,
professional,
and similar
organizations

Social
assistance 12

Educational
services;
state, local,
and private 9

Handbook, 2012-13 ed., Health Educators, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-3> (last visited September 30, 2013).

In its letter of support dated March 28, 2012, the petitioner stated that it "engages in the business of providing coordinated and comprehensive home health nursing services." The petitioner submitted a brochure regarding its operations, which indicates that its services are limited to "homebound individuals, in their place of residence."

The AAO notes that in the Form I-129 the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 621610 – "Home Health Care Services."⁹ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments primarily engaged in providing skilled nursing services in the home, along with a range of the following: personal care services; homemaker and companion services; physical therapy; medical social services; medications; medical equipment and supplies; counseling; 24-hour home care; occupation and vocational therapy; dietary and nutritional services; speech therapy; audiology; and high-tech care, such as intravenous therapy.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 621610 – Home Health Care Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited September 30, 2013).

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category for health educator positions. The *Handbook* indicates that the academic background for this occupation is in health education or

⁹ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited September 30, 2013).

health promotion. Notably, the *Handbook* does not state that a degree in any "health-related field" (as stated by the petitioner) or a degree in nursing (as stated by counsel) are acceptable fields of study for these positions. According to the *Handbook*, programs in health education and health promotion teach students theories and methods of health education and help students gain the knowledge and skills to develop health education materials and programs. The *Handbook* continues by stating that some employers hire only health educators who are Certified Health Education Specialists (CHES) and that such certification offered by the National Commission for Health Education Credentialing, Inc. There is no indication in the record of proceeding that the petitioner requires an individual to be certified under CHES. Rather counsel claims that that a "Health Educator who is a nurse . . . [is] needed." Moreover, although a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, the AAO notes that the beneficiary does not possess a degree in health education or health promotion.

Upon review of the record of proceeding and the chapter regarding "Health Educators" in the *Handbook*, the AAO finds that the petitioner has not provided sufficient evidence to demonstrate that its clinical health educator position has the same or similar duties, tasks, knowledge, work activities, requirements, etc. that are generally associated with "Health Educators." For example, the AAO notes that the petitioner does not claim that the beneficiary will assess the needs of the people they serve. In addition, the petitioner does not claim that the beneficiary will develop programs and events to teach people about health topics. Further, the petitioner does not claim that the beneficiary will create and distribute health-related posters, pamphlets, and other educational materials. The petitioner also does not claim that the beneficiary will work one-on-one with patients and their families, and teach patients about their diagnoses and about necessary treatments or procedures. This is further exemplified by the fact that the petitioner states in the March 28, 2012 letter of support that the proffered position "does not require the employee to provide direct nursing care to patients nor will she participate in any treatment plan." Further, the duties of the proffered position do not indicate that the beneficiary will help organize health screenings, such as blood pressure checks, and health classes on topics such as correctly installing a car seat. The duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may perform a few tasks in common with this occupational group, but not that the beneficiary's duties would constitute a health educator position, and not that they would require the range of specialized knowledge that characterizes this occupational category.

As the petitioner has not demonstrated that the proffered position falls under the occupational category of "Health Educators," the AAO will not further address this occupational category as it is not relevant to this proceeding.

The director reviewed the job description provided by the petitioner and found that the proffered position falls under the occupational classification of "Registered Nurses." The *Handbook* states, in part, the following about this occupational category:

Registered nurses (RNs) provide and coordinate patient care, educate patients and the public about various health conditions, and provide advice and emotional support to patients and their family members.

Duties

Registered nurses typically do the following:

- Record patients' medical histories and symptoms
- Give patients medicines and treatments
- Set up plans for patients' care or contribute to existing plans
- Observe patients and record the observations
- Consult with doctors and other healthcare professionals
- Operate and monitor medical equipment
- Help perform diagnostic tests and analyze results
- Teach patients and their families how to manage their illnesses or injuries
- Explain what to do at home after treatment

Some registered nurses oversee licensed practical nurses, nursing aides, and home care aides. For more information, see the profiles on licensed practical and licensed vocational nurses; nursing aides, orderlies, and attendants; and home health and personal care aides.

Registered nurses sometimes work to promote general health by educating the public on warning signs and symptoms of disease. They might also run general health screenings or immunization clinics, blood drives, or other outreach programs. Most registered nurses work as part of a team with physicians and other healthcare specialists.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

Registered nurses' duties and titles often depend on where they work and the patients they work with. They can focus on the following specialties:

- A specific health condition, such as a diabetes management nurse who helps patients with diabetes or an oncology nurse who helps cancer patients
- A specific part of the body, such as a dermatology nurse working with patients who have skin problems
- A specific group of people, such as a geriatric nurse who works with the elderly or a pediatric nurse who works with children and teens
- A specific workplace, such as an emergency or trauma nurse who works in a hospital or stand-alone emergency department or a school nurse working in an elementary, middle, or high school rather than in a hospital or doctor's office.

Some registered nurses combine one or more of these specialties. For example, a pediatric oncology nurse works with children and teens who have cancer.

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Handbook, 2012-13 ed., Registered Nurses, on the Internet at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-2> (last visited September 30, 2013).

The subchapter of the *Handbook* entitled "How to Become a Registered Nurse" states, in part, the following about this occupation:

Registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. Registered nurses must also be licensed.

Education

In all nursing education programs, students take courses in nursing, anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take four years to complete; ADN and diploma programs usually take two to three years to complete.

All programs also include supervised clinical experience in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in extended and long-term care facilities, public health departments, home health agencies, or ambulatory (walk-in) clinics.

Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse.

Many registered nurses with an ADN or diploma find an entry-level position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

Handbook, 2012-13 ed., Registered Nurses, on the Internet at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-2> (last visited September 30, 2013).

The *Handbook* states that some registered nurses work as nurse educators. While the occupational category registered nurses as described in the *Handbook* does not fully encompass all of the duties of the proffered position, the AAO observes that there are numerous aspects that correspond to the description of the proffered position, including attributes regarding the duties and requirements as

stated by counsel. Moreover, as previously mentioned that a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, the AAO notes that counsel indicated that the beneficiary is qualified to serve in the proffered position as a result of his qualifications as a nurse.

It is further noted that the *Handbook* does not report that, as an occupational group, "Registered Nurses" require at least a bachelor's degree in a specific specialty, or its equivalent. More specifically, the *Handbook* states that there are three general paths for becoming a registered nurse, i.e., a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program. The *Handbook* states that associate's degrees and diploma programs for this occupation usually take two to three years to complete. The narrative of the *Handbook* indicates that generally, licensed graduates of any of the three types of educational programs (bachelor's, associate's, or diploma) qualify for entry-level positions. Thus, for this occupation, a baccalaureate or higher degree in a specific specialty, or its equivalent, is not normally the minimum requirement for entry.

The AAO reviewed the record of proceeding regarding the proffered position and the *Handbook* and finds that the *Handbook* does not support the proposition that the proffered position, as described in the record of proceeding, is one that meets the statutory and regulatory provisions of a specialty occupation. As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or its equivalent, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. As previously noted, 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." 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 notes that the petitioner and counsel submitted copies of H-1B approval notices for two individuals, along with copies of the H-1B petition filings, as evidence that USCIS has previously approved H-1B petitions submitted by the petitioner. However, 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. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they 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'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

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).

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

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter.

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

In the Form I-129 petition, the petitioner describes itself as a health care provider established in 2002, with 80 employees. The petitioner claims that it has a gross annual income of \$4.1 million and a net annual income of "varies." The petitioner designated its business operations under the

NAICS code 621610 – "Home Health Care Services." In the Form I-129 petition, the petitioner claimed that the proffered position falls under the Dictionary of Occupational Titles (DOT) code 019, which refers to "Other Occupations in Architecture, Engineering, and Surveying." No explanation was provided by the petitioner for selecting this code.

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the petitioner submitted documentation regarding H-1B petitions filed by two other employers. The AAO observes that the support letters submitted from by these two other employers are almost identical to the support letter from the petitioner, including identical job duties. More specifically, the wording of the letters match – virtually verbatim, including grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity.

In addition, the AAO notes that one of the employers designated its business operations under the NAICS code 623110 – "Nursing Care Facilities." The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments primarily engaged in providing inpatient nursing and rehabilitative services. The care is generally provided for an extended period of time to individuals requiring nursing care. These establishments have a permanent core staff of registered or licensed practical nurses who, along with other staff, provide nursing and continuous personal care services.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 623110 – Nursing Care Facilities, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited September 30, 2013). Thus, the employer and petitioner do not claim to fall under the same industries according to their primary business activities as represented by their NAICS codes.

Moreover, the documentation does not indicate the total number of employees currently or in the past employed in the positions by these employers. Accordingly, it cannot be determined how representative the documentation for one individuals at each place of employment is of the employers' actual hiring practices.¹⁰

¹⁰ As previously noted, 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. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they 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'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Moreover, it does not appear that the adjudicators were aware that counsel has submitted multiple petitions for various employers, with support letters that are virtually identical. Had this information been available, the adjudicators would likely have required additional information to establish eligibility for H-1B employment.

In addition, the petitioner and counsel submitted copies of job advertisements as evidence that the degree requirement is common amongst similar organizations for parallel positions in the home health care services industry. The AAO notes that the petitioner and counsel did not provide any independent evidence of how representative the job posting are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

Upon review of the documentation, the petitioner and counsel fail to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. For example, the advertisements do not appear to be for parallel positions. That is, the positions do not appear to have similar duties and requirements to the proffered position. For example, the petitioner submitted a job posting for a health educator position, which indicates that the candidate will be "[r]esponsible for developing and delivering the educational empirical and behavioral program to patients participating in the [REDACTED]." In addition, the petitioner provided a posting for a community health educator position, which indicates that the candidate will develop, coordinate, implement and evaluate community health education programs and prevention activities. There is no indication that the beneficiary will have a similar role in his work with the petitioner. In addition, counsel provided a posting for a position for a nurse/clinical educator position with [REDACTED] which requires a degree and licensure, plus "3-5 years [of] experience in areas of responsibility." Further, counsel provided a posting for a position with the [REDACTED] which requires a degree, a registered nursing license, plus "3 to 5 years [of] operating room experience." (As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as an entry-level position.) Upon review of the advertisements, the AAO finds that the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisement was submitted, one of the postings states that a "Bachelor's degree [is] preferred or experience equivalent may be considered" for the position. Obviously, a preference for a degree is not an indication of a requirement for such a credential. The advertisement does not indicate that a bachelor's degree in a specific specialty, or its equivalent, is required.

Moreover, the petitioner and counsel have submitted advertisements that are devoid of information regarding the employers' operations. Moreover, some of the employers do not appear to be similar to the petitioner. The job postings include positions with [REDACTED] ("a network of 22 primary-care physician practices and health centers"); [REDACTED] (for which no information was provided); and [REDACTED] (for which no information was provided). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Consequently, the record does not contain sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner. The petitioner and counsel failed to supplement the record of proceeding to establish that the

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advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with these advertising organizations.

The AAO reviewed all of the advertisements submitted in support of the petition.¹¹ However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.

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

In response to the director's RFE, counsel submitted printouts from the American Association for Health Education website. Notably, the printouts do not provide sufficient information regarding the association, (e.g., primary function, size of association, requirements for membership). Further, the printouts provide information regarding careers in the field, and states that 250+ colleges and university offer programs, however, the printouts do not indicate that a bachelor's degree in a specific specialty, or its equivalent, is required for entry into the occupation.

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

¹¹ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

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To begin with and as discussed previously, the petitioner itself does not require a baccalaureate or higher degree in a specific specialty, or its equivalent (stating that it requires at least a bachelor's degree in "a health-related field" or the equivalent in work experience). Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

In the instant case, the record of proceeding contains information regarding the petitioner's business operations, including a brochure, copies of the petitioner's tax returns and quarterly reports, printouts from the petitioner's website, the petitioner's information packet, as well as other documentation regarding the proffered position. The AAO acknowledges that the petitioner and counsel may believe that the duties of the proffered position are complex or unique. However, the petitioner failed to demonstrate how the clinical health educator duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a clinical health educator position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Health Educators" at a Level I (entry level) wage. The wage level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.¹²

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Moreover, the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

¹² For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The AAO observes that the petitioner has indicated that the beneficiary's educational background will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner and counsel do not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a

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body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

As previously noted, the petitioner claims that USCIS has previously approved H-1B cases submitted by the petitioner for the proffered position. 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). 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).

In response to the RFE, counsel submitted the petitioner's job vacancy announcement (dated October 12, 2011) for the proffered position. Notably, the announcement indicates "Bachelor degree-related field – ENTRY-LEVEL POSITION." The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties and responsibilities of the position. The petitioner did not provide any further information in the advertisement as to which disciplines of study it would consider to be "related fields." The AAO will not attempt to "guess" what the petitioner means by "related." The petitioner must establish eligibility for the benefit sought.

Moreover, the petitioner stated in the Form I-129 petition that it was established in 2002 (approximately 10 years prior to the submission of the H-1B petition). The petitioner did not provide the total number of people it currently or in the past has employed to serve in the proffered position. Consequently, it cannot be determined how representative the petitioner's submission of *one job announcement (and a few documents from two prior H-1B petitions) over a 10 year period* is of the petitioner's normal recruiting and hiring practices. The petitioner has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

The AAO reviewed the record of proceeding but finds that the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Counsel asserts that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. However, the AAO again notes that the petitioner itself does not require a baccalaureate or higher degree *in a specific specialty*, or its equivalent.

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

Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category. The petitioner designated the position as a Level I position (the lowest of four possible wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."

Upon review of the record, the AAO finds that the petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. The petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.