



U.S. Citizenship  
and Immigration  
Services

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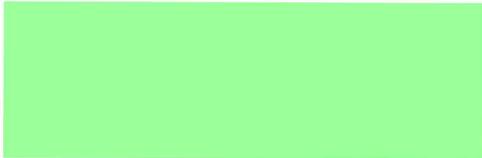


DATE: **AUG 26 2014** Office: VERMONT SERVICE CENTER File:

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 (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,

*for Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on August 15, 2013. On the Form I-129 petition, the petitioner describes itself as a "jewelry wholesaler." In order to extend the employment of the beneficiary in a position to which it assigned the job title of "Manager of Administrative Support," the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on December 20, 2013, 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 asserts that the director's basis for denial was erroneous, and contends that the evidence submitted in support of the petition establishes that the proffered position is a specialty occupation.<sup>1</sup>

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

For the reasons that will be discussed below, we agree with the director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

### **I. Evidentiary Standard**

As a preliminary matter, and in light of counsel's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

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<sup>1</sup> Although counsel indicated on the Form I-290B that a brief and/or additional evidence would be submitted to our office within 30 days, no further submissions have been received. Consequently, the record will be considered complete as currently constituted.

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

*Id.*

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

## II. The Law

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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 (5<sup>th</sup> 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), 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.

### III. Factual and Procedural History

In this matter, the petitioner stated on the Form I-129 petition that it is a jewelry wholesaler, and that it seeks to extend the beneficiary's employment in a position that it designates as a "Manager of Administrative Support" to work on a full-time basis with an annual salary of \$34,507. The petitioner was established in 1995 and has 13 employees and a gross annual income of approximately \$17 million.

The petitioner 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 "First-Line Supervisors of Office and Administrative Support Workers" - SOC (ONET/OES) Code 43-1011, at a Level I (entry-level) wage.

The petitioner provided the following description of the duties performed by the beneficiary in the proffered position in a letter dated August 2, 2013:

[The beneficiary] supervises the work of customer service employees to ensure adherence to proper procedures. She provides employees with guidance in handling difficult or complex problems and in resolving escalated complaints or disputes.

She implements corporate and departmental policies, procedures, and service standards in conjunction with management. She interprets and communicates work procedures and company policies to staff.

The petitioner concluded by stating that the proffered position "is a specialty occupation requiring a minimum of a Bachelor's degree in Business Administration." The petitioner claimed that the beneficiary was qualified to perform the duties of the proffered position by virtue of her foreign academic credentials deemed equivalent to a U.S. bachelor's degree in Business Administration with a concentration in accounting. In support of this contention, the petitioner submitted a copy of an academic credentials evaluation by [redacted] dated September 3, 2010.

In further support of eligibility, the petitioner submitted (1) copies of the beneficiary's foreign diploma and transcripts; (2) a copy of the beneficiary's resume; and (3) a copy of the petitioner's directory listing from [redacted]

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 16, 2013. In the RFE, the director asked the petitioner to provide additional evidence to establish that the proffered position qualifies as a specialty occupation. The notice included a request to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, the level of responsibility, hours per week of work, etc. The director outlined the evidence to be submitted.

Counsel for the petitioner responded to the director's RFE and submitted a response letter and additional evidence. That response letter, dated December 9, 2013, included an additional description of the duties of the described position. Specifically, counsel listed the duties in chart format as follows:

| <b>Job Duties</b>   | <b>% of Daily Time</b> | <b>Bachelor of Business Administration with a concentration in Accounting – Classes taken by [the beneficiary] that required [sic] to perform her job duties</b>               |
|---|------------------------|--|
| <b><u>Supervises the work of customer service employees to ensure adherence to proper procedures.</u></b>                                   | 37.5                   | <b><u>Management of Human Resources Development</u></b><br>She applies how to communicate, motivate, instruct, persuade and advise employees to follow established procedures. |
| <b><u>Provides employees with guidance in handling difficult or complex problems and in resolving escalated complaints or disputes.</u></b> | 20                     | <b><u>Business Communication</u></b><br>She applies conflict resolution in solving the problems that arises [sic] during the business day.                                     |

|  |      |   |
|--|------|---|
| <u>Implements corporate and departmental policies, procedures, and service standards in conjunction with management.</u> | 25   | <u>Business Communication / Operations / Business Law</u><br>She communicates any policies and procedures to the employees she supervises per management's direction and compliance with all applicable laws and regulations. |
| <u>Interprets and communicates work procedures and company policies to staff.</u>  | 17.5 | <u>Business Communication</u><br>She learned how to effectively communicate with staff members regarding company policies and procedures, whether oral or written.  |

Counsel for the petitioner also provided copies of job postings for positions it claimed were parallel to the proffered position within similar organizations. In addition, counsel referenced an April 23, 2004 memorandum authored by William R. Yates (hereinafter Yates memo) as establishing that USCIS must give deference to the prior approval in this matter. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (Apr. 23, 2004).

The director denied the petition on December 20, 2013, concluding that the petitioner did not establish that the proffered position qualifies as a specialty occupation.

On appeal, counsel for the petitioner asserts on the Form I-290B that the director's denial was erroneous. Counsel contends that the director's finding that the proffered position was not a specialty occupation was contrary to the evidence submitted in the record. Counsel also asserts once again that the director should have given deference to the prior approval in this matter under the Yates memorandum.

#### IV. Analysis

As a preliminary matter, the petitioner's claim that a bachelor's degree in "business administration" is a sufficient minimum requirement for entry into 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. *Cf. 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).<sup>2</sup>

Again, the petitioner in this matter 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.

Moreover, it also cannot be found that the proffered position is a specialty occupation due to the petitioner's failure to satisfy any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). To reach this conclusion, we first turned to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), 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 that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>3</sup>

As we have already noted, the petitioner submitted an LCA that had been certified for use with a position within the occupational classification of "First-Line Supervisors of Office and Administrative Support Workers" - SOC (ONET/OES) Code 43-1011. Upon review of the entire record of proceeding, it appears to us that the more appropriate occupational

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<sup>2</sup> 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.*

<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. Our references to the *Handbook* are to the 2014-2015 edition available online.

classification for the proffered position would be "Administrative Services Managers," - SOC (ONET/OES) Code 11-3011, and we shall evaluate the proffered position accordingly.

However, in the interests of comprehensive review, we will comment on the information provided in the *Handbook* and the O\*NET with regard to the First-Line Supervisors of Office and Administrative Support Workers occupational group. The *Handbook* does not address this occupational group. However, we note that the Educational Section of the O\*NET Summary Report for this occupational group provides the following information with regard to persons within this occupational group that responded to the O\*NET voluntary survey:

**Education**

| Percentage of Respondents | Education Level Required          |
|---------------------------|-----------------------------------|
| 28                        | High school diploma or equivalent |
| 26                        | Bachelor's degree                 |
| 16                        | Some college, no degree           |

See Occupational Information Network (O\*NET) Summary Report for 43-1011.01 – First-Line Supervisors of Office and Administrative Support Workers, at <http://www.onetonline.org/link/summary/43-1011.00> (last visited August 19, 2014).

By contrast, we note that the Education section in the O\*NET Summary Report for the Administrative Services Managers occupational group reads as follows:

**Education**

| Percentage of Respondents | Education Level Required          |
|---------------------------|-----------------------------------|
| 28                        | Bachelor's degree                 |
| 19                        | High school diploma or equivalent |
| 19                        | Associate's degree                |

See Occupational Information Network (O\*NET) Summary Report for 11-3011.01 – Administrative Services Manager, at <http://www.onetonline.org/link/summary/11-3011.00> (last visited August 19, 2014).

A review of the *Handbook* demonstrates that the proffered position, as described, is most akin to that of an Administrative Services Manager. In pertinent part, the *Handbook* states the following with regard to the general duties of positions within the Administrative Services Managers occupational group:

Administrative services managers plan, direct, and coordinate supportive services of an organization. Their specific responsibilities vary by the type of organization and may include keeping records, distributing mail, and planning and maintaining facilities. In a small organization, they may direct all support services and may be called the business office manager. Large organizations may have several layers of administrative managers who specialize in different areas.

### **Duties**

Administrative services managers typically do the following:

- Buy, store, and distribute supplies
- Supervise clerical and administrative personnel
- Set goals and deadlines for the department
- Develop, manage, and monitor records
- Recommend changes to policies or procedures in order to improve operations, such as changing what supplies are kept or how to improve recordkeeping
- Plan budgets for contracts, equipment, and supplies
- Monitor the facility to ensure that it remains safe, secure, and well maintained
- Oversee the maintenance and repair of machinery, equipment, and electrical and mechanical systems
- Ensure that facilities meet environmental, health, and security standards and comply with government regulations
- Administrative services managers plan, coordinate, and direct a broad range of services that allow organizations to operate efficiently. An organization may have several managers who oversee activities that meet the needs of multiple departments, such as mail, printing and copying, recordkeeping, security, building maintenance, and recycling.

The work of administrative services managers can make a difference in employees' productivity and satisfaction. For example, an administrative services manager might be responsible for making sure that the organization has the supplies and services it needs. In addition, an administrative services manager who is responsible for coordinating space allocation might take into account employee morale and available funds when determining the best way to arrange a given physical space.

Administrative services managers also ensure that the organization honors its contracts and follows government regulations and safety standards.

Administrative services managers may examine energy consumption patterns, technology usage, and office equipment. For example, managers may recommend buying new or different equipment or supplies in order to lower energy costs or improve indoor air quality.

Administrative services managers also plan for maintenance and the future replacement of equipment, such as computers. A timely replacement of equipment can help save money for the organization, because eventually the cost of upgrading and maintaining equipment becomes higher than the cost of buying new equipment.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Administrative Services Managers," <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-2> (last accessed August 8, 2014).

Although we find that the petitioner's description of the proffered position is akin to those of an Administrative Services Manager as described above, the *Handbook* does not support a conclusion that this occupation normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

More specifically, the subchapter of the *Handbook* entitled "How to Become an Administrative Services Manager" states the following about this occupational category:

A high school diploma or a General Educational Development (GED) diploma is typically required for someone to become an administrative services manager. However, some administrative services managers need at least a bachelor's degree. Those with a bachelor's degree typically study business, engineering, or facility management.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Administrative Services Managers," <http://www.bls.gov/ooh/management/administrative-services-managers.htm#tab-4> (last accessed August 8, 2014).

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty or its equivalent is normally the minimum requirement for entry into this occupation. Although the *Handbook* states that some administrative services managers need a bachelor's degree to enter the occupation, the *Handbook* indicates that the duties of this occupational category can be performed by an individual with a high school diploma or GED diploma. In addition, the narrative of the *Handbook* reports that for those positions where a bachelor's degree may be necessary, a variety of disparate fields (such as business, engineering, and facility management) would be acceptable.

Thus, for the reasons discussed above, the *Handbook* does not support a claim that "Administrative Services Managers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Upon review of the totality of the evidence in the entire record of proceeding, we conclude that the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry into the occupation is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find 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 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) 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)).

As previously 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 for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

The petitioner designated its business operations under the corresponding North American Industry Classification System (NAICS) code 423940 designated for "Jewelry, Watch, Precious Stone, and Precious Metal Merchant Wholesalers" on the LCA.<sup>4</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

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<sup>4</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is

This industry comprises establishments primarily engaged in the merchant wholesale distribution of jewelry, precious and semiprecious stones, precious metals and metal flatware, costume jewelry, watches, clocks, silverware, and/or jewelers' findings.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 423940 – Jewelry, Watch, Precious Stone, and Precious Metal Merchant Wholesalers on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last accessed August 8, 2014).

The petitioner must establish that similar organizations in fact routinely require specialty-degreed individuals in parallel positions. 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, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted copies of two advertisements in support of the petition and in response to the RFE. We find, however, that the petitioner fails 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.

The first advertisement is for the position of Assistant Store Manager with [REDACTED] a multinational luxury jewelry retailer. We note first that the job title in this posting is different from that of the proffered position, and a review of the responsibilities of the advertised position demonstrates that the position of "Assistant Store Manager" requires management and oversight of sales personnel and profitability targets. These duties are easily differentiated from those of the proffered position, which require the supervision of administrative support personnel. Moreover, whereas [REDACTED] is a world famous luxury jewelry retailer with many locations around the world, the petitioner is a 13-person jewelry wholesaler with one location in Houston Texas. Therefore, in addition to the differences in title and duties between the posted position and the proffered position in this matter, the two companies appear distinguishable in size and scope of operations, and the petitioner has not provided any probative evidence to suggest otherwise.

The second posting is for the position of Retail Operations Manager with [REDACTED] a jewelry designer and retailer with, according to the job posting, has "over 10,000 points of sale, including close to [REDACTED] branded concept stores." It further indicates in the job posting that it employs over 5,000 people.

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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 <http://www.census.gov/eos/www/naics/> (last accessed August 8, 2014).

At the outset, it appears that this company, like [REDACTED], is also distinguishable from the petitioner, in that [REDACTED] also is a multinational company with locations worldwide, as opposed to the petitioner's 13-person wholesale location in Texas. Therefore, this posting is also not representative of an organization similar to the petitioner within its industry.

In addition, the posting is for the position of "Retail Operations Manager," which again, like the job offered by [REDACTED] is distinguishable in both job title and responsibilities. This job posting is for a retail manager who will work closely with and supervise sales representatives, merchandisers, and franchisees, not administrative support personnel. For this additional reason, this posting likewise is not sufficient to establish a common degree requirement for parallel position within the petitioner's industry.

We need not discuss the educational requirements stated in these postings, since both postings advertise jobs that are not akin to the proffered position, and are posted by companies dissimilar in size and scope to the petitioner. Nevertheless, we note that the position with [REDACTED] states simply a "preference" for a college/university degree, and the posting by [REDACTED] although requiring a bachelor's degree, does not denote a specific specialty in which the degree must be obtained. Accordingly, we find that both advertisements actually weigh against a favorable finding under this criterion, because the terms of the advertisements indicate no requirement for a degree in a specific specialty.

The petitioner has failed to supplement the record of proceeding to establish that the 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 the advertising organizations. Moreover, for the reasons discussed above, the advertisements are not for parallel positions. The evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>5</sup>

Thus, 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 in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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<sup>5</sup> USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Specifically, the petitioner failed to demonstrate that the proffered position's duties as described comprise a position that is so complex or unique that it can only be performed by a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent.

In addition to this decisive evidentiary deficiency, we also find that the content of LCA submitted into the record weighs against a favorable finding here. The LCA indicates a wage level based upon the occupational classification "First-Line Supervisors of Office and Administrative Support Workers" at a Level I (entry) wage.<sup>6</sup> This wage-level designation is appropriate for positions for which the petitioner expects the beneficiary to only have a basic understanding of the occupation.<sup>7</sup> That is, in accordance with the relevant DOL explanatory

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<sup>6</sup> Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received. See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009), available on the Internet at: [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required

information on wage levels, this wage rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is sufficiently complex or unique to satisfy this criterion. In fact, 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 example, 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."<sup>8</sup> Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

In other words, the record lacks sufficiently detailed information to distinguish the proffered position as so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn next to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that 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 the performance requirements of the position.

While a petitioner may believe and 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

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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.

<sup>8</sup> For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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").

Moreover, to satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation 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 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.

The petitioner states that it has not previously employed an individual in the proffered position. Since the petitioner has not provided evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, we find that the petitioner has not satisfied the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which requires the petitioner to establish that the nature of the proffered position's duties is 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.

Upon review of the entire record of the proceeding, we find that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations.

We again refer the petitioner to our earlier discussions with regard to the generalized and relatively abstract information provided about the nature of the proposed duties. As there reflected, the evidence of record simply does not provide sufficient details about the nature of the proposed duties to establish the level of specialization and complexity required to satisfy this particular criterion.

By the same token, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of positions in the First-Line Supervisors of Office and Administrative Support Workers occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, we also here incorporate into this analysis our earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is appropriate for a low, entry-level position relative to others within the occupational category of "First-Line Supervisors of Office and Administrative Support Workers" and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

As the evidence of record has not established that the nature of the duties of the proffered position is 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 petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

We conclude that 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.

## V. Prior Approvals

On appeal, counsel emphasizes that the proffered position is the same position in job title and duties as the previously approved H-1B petition filed by the petitioner on behalf of the beneficiary. Counsel also references, as previously noted, the April 23, 2004 Yates memo as establishing that USCIS must give deference to those prior approvals or provide detailed explanations why deference is not warranted.

First, it must be noted that the Yates memo 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, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. Although counsel's assertions regarding the "subjective findings" of prior adjudicators should be given deference, this is not the case here. On the contrary, the memorandum's language quoted immediately above acknowledges that an extension petition should not be approved, where, as here, the evidence of record has not demonstrated that the position which is the subject of the petition is a specialty occupation.

Again, as indicated in the Yates memo, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petition was 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, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

## VI. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons. 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. The petition is denied.