



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[REDACTED]

DATE: JUL 24 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Michael T. Kelly*

for 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. The appeal will be dismissed. The petition will be denied.

In the Form I-129 visa petition, the petitioner describes itself as a software publisher established in 2001. In order to employ the beneficiary in what it designates as a translator/technical writer position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on November 18, 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 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 us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

For the reasons that will be discussed below, the record supports the conclusion 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. FACTUAL AND PROCEDURAL HISTORY

The petitioner indicated on the Form I-129 that it wishes to employ the beneficiary as a translator/technical writer from October 1, 2013 to September 13, 2016, on a part-time basis at wage of \$20 per hour. The petitioner also submitted a Labor Condition Application (LCA) certified for the job prospect of "Translator/Technical Writer." The LCA designation selected by the petitioner for the clinic manager position corresponds to the occupational classification "Interpreters and Translators" - SOC (ONET/OES) code 27-3091, at a Level I (entry level) wage.

In support of the petition, the petitioner submitted a letter of support dated March 26, 2013. The petitioner claimed that it specializes in high-quality software products such as EmEditor, its "flagship" software product.

Regarding the proffered position, the petitioner stated that it wished to employ the beneficiary in the position of translator/technical writer on a part-time basis. The petitioner stated that her job duties would be broken down as follows:

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<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- Translation: 30%
- Localization: 25%
- Technical Writing: 25%
- Software testing: 10%
- Other incidental duties: 10%

The petitioner further described the duties of the position as follows:

As Translator/Technical Writer, [the beneficiary] is responsible for writing technical documentation such as Help, online documents and web sites for our text editing software called [REDACTED]. The documents include command reference, macro reference, plug-in reference, how-to reference, frequently asked questions (FAQs), and other related documents. She is also responsible for translating localizing user interfaces, technical documentation, Help, and web sites from English to Korean. Further, she is responsible for communicating with other internal freelance translator/localization specialists. The documentation must be accurate, up-to-date and provide enough contents and samples to satisfy the software customers. She is responsible for planning the project to provide high-quality translation and localization to our clients' software, technical documentation, Help and marketing materials. She is also required to communicate directly with our clients.

The petitioner concluded by stating that the proffered position requires a bachelor's degree in Psychology, linguistics, or a related discipline as well as experience in editing software for Microsoft Windows and Software Testing in JavaScript and C#. The petitioner further stated that native fluency in Korean, basic fluency in Japanese, and translation skill from English to Korean and Japanese is also required. The petitioner concluded that the beneficiary was qualified for the proffered position by virtue of her bachelor's degree in psychology from the [REDACTED] as well as her prior work experience with the petitioner.

In addition to the statement of duties and the LCA, the petitioner also submitted an excerpt from its website and a copy of the beneficiary's resume and academic credentials.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 26, 2013. The director outlined the evidence to be submitted.

Counsel for the petitioner responded to the director's RFE and provided additional evidence, including a more detailed summary of the beneficiary's duties. In summary, counsel stated the following regarding the proposed duties of the beneficiary:

The position of Translator/Technical Writer might also be called Technical Translator or Localization Specialist or Localization Translator because the majority of the duties involve translation of technical materials for use in localization of software. The breakdown of the duties, as noted in the Exhibit, is as follows:

**30%** - 1. Program Documentation Translation – this is translation of technical (IT) documentation, requiring a deep understanding of technical terms, organization, and technical writing skills – further breakdown is translation 17% and technical writing 13%;

**25%** - 2. Website Translation – using a text editor and Microsoft Expression Web, requires knowledge of graphic creating software, also – further breakdown is translation 13% and technical writing 12%;

**25%** - 3. Program Localization – involves translating and locating the User Interface. Includes 20% translation within a cultural context, and 5% technical writing[;]

**10%** - 4. Program Testing – software testing to ensure that the localized software responds as intended;

**10%** - 5. Incidental Duties – supporting customers with technical and/or sales questions; using and querying SQL database; coordinating translators; and organizing source code, translations and localizations. – includes 5% translation related work.

To summarize, the fundamental job duties breakdown as 55% translation, 30% technical writing, and 15% other job duties. Because the technical writing is incidental to the performance of the technical translation, we used the translator as the primary occupation for purposes of the prevailing wage.

In addition to the updated list of duties cited above, counsel also submitted: (1) an excerpt from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook's (Handbook's)* section discussing the occupation of Interpreters and Translators; (2) copies of job postings for positions the petitioner deems similar to that of the proffered position within the petitioner's industry; (3) a printout from Appendix A to Preamble of Perm Regulation and from Appendix 1603.D.1 of Annex 1603 of the North American Free Trade Agreement (NAFTA); and (4) samples of technical documents translated by the beneficiary as examples of her work product.

Counsel also cited to several unpublished decisions by our office in which he claims we determined that positions combining technical writing and translation in software qualified as specialty occupations based on the complex duties involved.

The director reviewed the information provided by the petitioner. Although the petitioner and counsel 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 November 18, 2013. Counsel filed an appeal of the denial of the H-1B petition,

asserting that the director's decision was erroneous. In support of the appeal, counsel submits a 10-page brief.

For the reasons that will be discussed below, we agree with the director 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.

## II. EVIDENTIARY STANDARD APPLIED ON APPEAL

As a preliminary matter, on appeal, counsel for the petitioner indicates that the "preponderance of the evidence" standard is relevant to this matter, and that the petitioner clearly established, through the evidence presented, that the proffered position is a specialty occupation.

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part 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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The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination 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.

Applying the preponderance of the evidence standard, we conclude that the petitioner has not established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

### III. LAW AND ANALYSIS

#### A. Preliminary Findings

As a preliminary matter, we will first address the evidentiary value of the proposed duties as presented in the list of duties quoted above from the record. The petitioner should note that we are making this assessment mindful of and with due consideration to the totality of the evidence bearing upon the proffered position and the constituent duties that the petitioner has ascribed to it.

As reflected in the list quoted above, the duties are sufficiently described to show that the proffered position and its duties generally comport with the petitioner's attestation that the beneficiary would serve as a translator/interpreter in a software publishing company where Japanese and Korean fluency would be critical requirements. The statement of duties specifies "software" testing and use of some computer-related skills that do not appear to require a related degree. Otherwise, the record's descriptions of the duties and responsibilities are limited to general statements of translating, localization, and interpreting functions as well as general statements regarding technical writing. None of the duties are presented with sufficient detail to establish the substantive nature and educational level of any body of highly specialized knowledge in any specific specialty that the beneficiary would have to apply. Also, the evidence of record does not establish that the stated Korean and Japanese language fluency and cultural awareness requirements are such that their performance would require a related degree or degree-equivalency.

By the same token, we find that the evidence of record fails to substantiate the accuracy of counsel's claim that the nature of the beneficiary's duties, by virtue of the requirement that she translate IT related items, are so specialized and complex that knowledge required to perform them requires at least a bachelor's degree in psychology. In this regard, we also find that while the record's descriptions of the proposed duties, and, by extension, the proffered position are indicative of a job that would require some familiarity with writing, those descriptions lack substantive content sufficient to establish that the duties' performance would more likely than not require the practical and theoretical application of at least a bachelor's degree level a body of highly specialized knowledge in psychology, or, for that matter, any other specific specialty.

We also find that the samples of the translating work produced by the petitioner as samples of the beneficiary's work product do not indicate any particular level of complexity, uniqueness, and/or specialization that would support a reasonable finding of a need for a particular level of educational or education-equivalency attainment in psychology or any other specific specialty.

The petitioner should note that we hereby incorporate the above comments and findings into this decision's analysis of each of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

#### B. Specialty Occupation Issue

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 following statutory and regulatory requirements.

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

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

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

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and 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 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 H-1B petition, the petitioner stated that the beneficiary would be employed in a translator/technical writer position, and stated that the proffered position was broken down as follows: 55% translation, 30% technical writing, and 15% other duties. The petitioner selected the occupational category of Interpreters and Translators on the certified LCA accompanying this petition.

We recognize the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>2</sup> Based on the petitioner's claims above, we will review the *Handbook's* section pertaining to Interpreters and Translators.

The *Handbook's* section "What Interpreters and Translators Do" includes the following information:

Interpreters and translators convert information from one language into another language. Interpreters work in spoken or sign language; translators work in written language.

\* \* \*

*Translators* convert written materials from one language into another language. The goal of a translator is to have people read the translation as if it were the original. To do that, the translator must be able to write sentences that maintain or duplicate the structure and style of the original meaning while keeping the ideas and facts of the original meaning accurate. Translators must properly transmit any cultural references, including slang, and other expressions that do not translate literally.

Translators must read the original language fluently. They usually translate only into their native language.

Nearly all translation work is done on a computer, and translators receive and submit most assignments electronically. Translations often go through several revisions before becoming final.

Translation is usually done with computer-assisted translation (CAT) tools, in which a computer database of previously translated sentences or segments (Translation Memories) may be used to translate new text. CAT tools allow translators to work more efficiently and consistently.

Interpretation and translation services are needed in virtually all subject areas. Although some interpreters and translators do not to specialize in any particular field or industry, many focus on one or several areas of expertise.

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**Localizers** adapt text for a product or service from one language into another, a task known as localization. Localization specialists work to make it appear as though the

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<sup>2</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

product originated in the country where it will be sold. They must know not only both languages, but they must also understand the technical information they are working with and the culture of the people who will be using the product or service.

Localization may include adapting websites, software, marketing materials, user documentation, and various other publications. Usually, these adaptations are related to products and services in manufacturing and other business sectors.

Localization may be helped by computer-assisted translation, in which a computer program develops an early draft of a translation for the localization translator. Also, translators may use computers to compare previous translations with specific terminology.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Interpreters and Translators," <http://www.bls.gov/ooh/Media-and-Communication/Interpreters-and-translators.htm#tab-2> (accessed July 15, 2014).

Accordingly, the petitioner has correctly identified the proffered position as belonging within the "Interpreters and Translators" occupational classification.

The section "How to Become an Interpreter or Translator" What Interpreters and Translators Do" includes the following information:

Although interpreters and translators typically need at least a bachelor's degree, the most important requirements are that they be fluent in two languages (English and at least one other language). Many complete job-specific training programs. It is not necessary for interpreters and translators to have been raised in two languages to succeed in these jobs, but many grew up communicating in the languages in which they work.

### **Education**

The educational backgrounds of interpreters and translators vary widely, but it is essential that they be fluent in English and at least one other language.

High school students interested in becoming an interpreter or translator should take a broad range of courses that focus on English writing and comprehension, foreign languages, and computer proficiency. Other helpful pursuits for prospects include spending time in a foreign country, engaging in direct contact with foreign cultures, and reading extensively on a variety of subjects in English and at least one other language. Through community organizations, students interested in sign language interpreting may take introductory classes in American Sign Language (ASL) and seek out volunteer opportunities to work with people who are deaf or hard of hearing.

Beyond high school, people interested in becoming interpreters or translators have many educational options. Although many jobs require a bachelor's degree, majoring in a language is not always necessary. Rather, an educational background in a particular field of study can provide a natural area of subject-matter expertise.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Interpreters and Translators," <http://www.bls.gov/ooh/Media-and-Communication/Interpreters-and-translators.htm#tab-4> (accessed July 15, 2014).

As evident in the excerpts above, the information from the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is normally required for entry into the pertinent occupational category. Accordingly, the proffered position's inclusion within the Interpreters and Translators occupational group is not sufficient in itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, 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 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 at 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* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to

the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

To establish that an organization is similar to it, the petitioner must demonstrate that it and the other 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 job-posting organization share the same general characteristics, 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) 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 sound factual basis for such an assertion.

On the Form I-129 petition, the petitioner describes itself as a software publisher established in 2001, with three employees and two contractors. The petitioner claims that it has a gross annual income of approximately \$158,000. As noted previously, on the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 5112 – "Software Publishers."<sup>3</sup>

To support the assertion that the proffered position satisfies this criterion of the regulations, counsel submitted copies of several job vacancy announcements for positions it deems are similar to that of the proffered position, which we will address below.

A review of these postings reveals, however, that none of the companies advertising the vacancies are software publishers. Instead, the employers are either translation service providers or localization services. For this reason alone, the postings are not considered persuasive evidence, since they do not reflect employers within the petitioner's industry seeking to hire individuals for positions similar to the proffered position.

Aside from the industry-identity issue, however, the content of the submitted advertisements weigh against satisfaction of this criterion: none of the postings require a degree in a specific specialty. Instead, they simply state that a bachelor's degree or a four year degree is required.

Thus, while the petitioner may have submitted job vacancy announcements in support of this criterion, they do not appear to have been published for positions in the petitioner's industry that are both (1) located in organizations that are similar to the petitioner, and (2) parallel to the proffered position; and, further, they do not weigh in the petition's favor under this alternative prong. Therefore, 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>3</sup> 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 July 15, 2014).

Next, we find that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

We incorporate into our analysis and findings with regard to this criterion our earlier comments and findings with regard to lack of probative value of (1) the record's descriptions of the proposed duties and (2) the sample translations submitted into the record of proceeding. As reflected in those earlier comments and findings, the evidence of record does not establish relative complexity or uniqueness as aspects of the proffered position, let alone as so aspects so elevated as to materially distinguish the proffered position from other positions in the pertinent occupation whose performance does not require a bachelor's degree in a specific specialty or the equivalent. Rather, we find, the evidence of record has not distinguished either the proposed duties, or the position that they comprise, from the various types of translator or interpreter work described in the *Handbook*, which that publication indicates does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Although the petitioner's generalized description of the proposed job duties does appear to contain some tasks beyond those normally performed by interpreters and translators (including, for instance, the technical writing associated with the position) the petitioner has failed to explain these duties with sufficient, probative, detail so as to persuasively convey that such duties would in fact require the services of a person with at least a bachelor's degree, or the equivalent, in psychology, or, for that matter, any specific specialty.

Consequently, as the evidence in the in the record of proceeding does not show that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, 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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

Our review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 proffered position. In the instant case, while the record does not establish a prior history of recruiting and hiring for the proposed position of only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

It should be noted that while a petitioner may believe and assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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 at 387. 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 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 proposed 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.

We will here expand the discussion of why the wide spectrum of degree majors and concentrations that would have been accepted by the petitioner for the proffered position is, without more, inadequate to establish that the proposed position qualifies as a specialty occupation. 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 two 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," we do 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.

The petitioner claims that it requires degrees in psychology, linguistics, or a related field for entry into the proffered position. Given this broad spectrum, it is not apparent that, had the petitioner established a prior hiring history for the proffered position, it could satisfy this criterion given the absence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position. As explained above, 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. USCIS has consistently stated that, 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).

In any event, because the petitioner submits no evidence to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, the petitioner has also not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, we find that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), 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 them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

Here again we incorporate into our analysis of the criterion this decision's earlier comments and findings with regard to the insufficiency of the record's descriptions of the proposed duties.

As indicated above, the duties of the position are similar to those outlined in the *Handbook* as normally performed by translators, and the petitioner's description of those duties simply does not establish that they surpass or exceed the duties performed by typical interpreters and translators, including those employed in the software field in terms of specialization and complexity. As discussed above, the *Handbook* indicates that interpreters and translators perform these duties routinely and, as discussed above, it does not indicate that interpreters and translators are normally required to possess a bachelor's degree, or the equivalent, in a specific specialty. The evidence of

record has simply failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved 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.

Accordingly, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

In closing, we will discuss two particular aspects of the appeal regarding which we reached adverse determinations. The first aspect is counsel's reliance upon nonprecedent decisions issued by our office; and the second is the petitioner's invocation of *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that the specialized study need not be in a single academic discipline.

We note that counsel's response to the RFE cited to prior, non-precedent decisions by our office. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; see also *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, we were not required to obtain copies of the unpublished decisions cited by counsel.

In the instant case, the petitioner has not submitted copies of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the substantially the same evidence as contained in the current record, it appears that those approvals would have been erroneous. 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). 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).

Finally, we note that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that the specialized study need not be in a single academic discipline.

As previously stated, while we agree that "[t]he knowledge and not the title of the degree is what is important," 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 two 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). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>4</sup> We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

#### IV. CONCLUSION

For the reasons related in the preceding discussions, the evidence in the record of proceeding has not satisfied at least one 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. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition is denied.

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<sup>4</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to our office. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.