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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 27 2014 OFFICE: VERMONT SERVICE CENTER FILE [redacted]

IN RE: Petitioner: [redacted]
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 (AAO) in your case.

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

I. BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 4-employee Orthopedic Medical Services Practice, established in 2006. In order to employ the beneficiary in what it designates as a full-time Orthopedic Surgical Assistant at a salary of $31.74 per hour, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Physician Assistants" occupational classification, SOC (O*NET/OES) Code 29-1071, at a Level I (entry-level) prevailing wage rate.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for additional evidence (RFE) on May 8, 2013. Within the RFE, the director outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation. Additionally, the director noted in the RFE that the proffered position appeared to be "based on an occupation that may require a license," and requested evidence from the appropriate licensing authority. U.S. Citizenship and Immigration Services (USCIS) received counsel's response on August 2, 2013, which contained additional evidence to contextualize the nature of the proffered position. The director denied the petition on August 30, 2013, concluding that the evidence of record failed to establish that the proffered position qualifies for classification as a specialty occupation.

On appeal, the petitioner submits a brief and contends that the director's findings were erroneous. Specifically, the petitioner submits that the director mischaracterized the proffered position as demonstrating qualities of a handful of occupational classifications,[1] when in fact it is most akin to the Surgical Assistants[2] occupational classification.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the

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[1] The director determined in the decision that the petitioner had described duties that appeared to be associated with the following SOC (O*NET/OES) occupational classifications: Surgical Technologists, Medical Assistants, Physicians Assistants, and Orthopedic Surgeons, as described by the U. S. Department of Labor's *Occupational Outlook Handbook*.

[2] Counsel correctly points out that the Surgical Assistants occupational classification reported on O*NET OnLine is an occupation for which data collection is currently underway. *See* O*NET Summary Report for "Surgical Assistants" - SOC (ONET/OES Code) 29-2099.07, available on the Internet at http://www.onetonline.org/link/details/29-2099.07.

director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Based upon a complete review of the record of proceeding, we find that the evidence does not overcome the director's denial and does not sufficiently establish that the position as described constitutes a specialty occupation.[3] Accordingly, the appeal will be dismissed, and the petition will be denied.

II. THE PROFFERED POSITION AND ITS CONSTITUENT DUTIES

In a letter dated March 27, 2013, the petitioner described the proffered position's duties as follows:

> This offered position requires the service of a specialized physician assistant who can act as First Assistant to our surgeons during complex orthopedic surgical procedures. The Orthopedic Surgical Assistant must perform the following specific duties:
>
> - Prepares patients for examination and surgery.
> - Responsible for identification of anatomical landmarks, securing blood vessels, recognition of pathological situations, furnishing and securing an adequate and proper exposure of the operative field and performing any and all duties delegated by the operating surgeon.
> - Selects and applies wound dressing, inserts drainage tubes, and closes all wound layers per surgeon's directive.
> - Responsible for post-operative care including wound care, dressing changes, brace prescription and evaluation, reviewing operative photographs and procedures.
> - Administering of injections into joints.
> - Interpretation of x-rays and MRI films.
> - May be on-call to address emergency surgical needs on weekends with physician back-up.
> - Participation in research documentation and patient participation where indicated.
> - Perform physical examinations, record medical histories, and formulate accurate diagnosis under surgeon/physician supervision.
> - Review patient records and establish presumptive diagnosis.
> - Surgical assisting in the operating room, including retraction of tissues, holding of limbs, preparing of grafts and suture closure of skin and other soft tissues.
> - Consult with surgeon/physician when warranted to assess patient condition and treatment.

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[3] The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)).

- Assist in the education of ancillary staff to maximize patient care coordination.
- Assist in moving and positioning the patient.
- Confirms all procedures with surgeon.

The petitioner also stated the following with respect to the requirements of the proffered position:

> The Orthopedic Surgical Assistant must possess an appropriate Bachelor's degree in a field of applied sciences, a Surgical Assistant or Physician's Assistant degree[,] and several years of experience in the operating room. [The petitioner] also accepts candidates with foreign medical degrees. All candidates must also have certification from the American Board of Surgical Assistants Association.

III. THE LCA SUBMITTED IN SUPPORT OF THE PETITION

Before addressing the director's determination that the proffered position is not a specialty occupation, we will first address our supplemental finding on appeal, which independently precludes approval of this petition, namely, our finding that the petition as developed by counsel in response to the RFE and on appeal does not correspond to the LCA submitted by the petitioner. In this case, the petitioner initially stated that the position's primary and essential tasks and activities are generally associated with the occupational category of "Physician Assistants" as demonstrated by the LCA.

In response to the RFE and on appeal, however, counsel characterized the position as one most closely associated with the "Surgical Assistants" occupational classification, with the corresponding SOC (O*NET/OES) Code 29-2099.07. Counsel stated in response to the RFE that the proffered position "does not reflect an offer of employment for a …physician assistant." In addition, counsel submitted evidence concerning the educational and licensing eligibility requirements for entry into positions in the Surgical Assistants occupational classification.[4] The record of proceeding does not contain an adequate explanation for this material change when describing the proffered position as one that falls within the Surgical Assistants occupational classification.

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). Also, a petitioner must obtain a certified LCA from the DOL in the occupational specialty in which the H-1B nonimmigrant will be employed before the filing of the Form I-129. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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[4] Of note, counsel submitted evidence relating to the Surgical Technologists occupational classification to distinguish it from the occupational classification of Surgical Assistants.

DOL guidance specifies that when ascertaining the proper occupational classification, a determination should be made by "consider[ing] the particulars of the employer's job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected." *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), *available at* http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Here, counsel's characterization of the position as one within the "Surgical Assistants" occupational classification is a material change to the petition. This material change adversely affects the merits of the petition, because it undermines the credibility of the petition's statements therein with regard to the nature of work that the beneficiary would perform.

Next, we will discuss the burden of proof in establishing the proffered position as a specialty occupation.

IV. SPECIALTY OCCUPATION

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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.

We will now apply each of the supplemental, alternative criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

First, we will discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which is satisfied by establishing 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. As noted above, the LCA submitted by the petitioner was certified for a job offer in the "Physician Assistants" occupational category.

We recognize the *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.[5]

The *Handbook* states the following with regard to the duties of physician assistants:

> Physician assistants, also known as PAs, practice medicine on a team under the supervision of physicians and surgeons. They are formally educated to examine patients, diagnose injuries and illnesses, and provide treatment.
>
> **Duties**
>
> Physician assistants typically do the following:
>
> - Review patients' medical histories
> - Conduct physical exams to check patients' health
> - Order and interpret diagnostic tests, such as x rays or blood tests
> - Make diagnoses concerning a patient's injury or illness
> - Give treatment, such as setting broken bones and immunizing patients

[5] The *Handbook*, which is available in printed form, may also be accessed online at http://www.stats.bls.gov/oco/. Our references to the *Handbook* are from the 2014-15 edition available online.

- Educate and counsel patients and their families—for example, answering questions about how to care for a child with asthma
- Prescribe medicine when needed
- Record a patient's progress
- Research the latest treatments to ensure the quality of patient care
- Conduct or participate in outreach programs; talking to groups about managing diseases and promoting wellness

Physician assistants work under the supervision of a physician or surgeon; however, their specific duties and the extent to which they must be supervised differ from state to state.

Physician assistants work in all areas of medicine, including primary care and family medicine, emergency medicine, and psychiatry. The work of physician assistants depends in large part on their specialty and what their supervising physician needs them to do. For example, a physician assistant working in surgery may close incisions and provide care before and after the operation. A physician assistant working in pediatrics may examine a child and give routine vaccinations.

In rural and medically underserved areas, physician assistants may be the primary care providers at clinics where a physician is present only 1 or 2 days per week. In these locations, physician assistants confer with the physician and other healthcare workers as needed and as required by law.

Some physician assistants make house calls or visit nursing homes to treat patients, reporting back to the physician afterward.

Physician assistants are different from medical assistants. Medical assistants do routine clinical and clerical tasks and they do not practice medicine.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Physician Assistants," http://www.bls.gov/ooh/healthcare/physician-assistants.htm#tab-2 (last visited June 17, 2014).

We note that many of the proffered position's duties are aligned with physician assistants' duties reported in the *Handbook*. The *Handbook* states the following with regard to the educational requirements necessary for entrance into this occupational category:

> Most applicants to physician assistant education programs already have a bachelor's degree and some healthcare-related work experience. While admissions requirements

> vary from program to program, most programs require two to four years of undergraduate coursework with a focus in science.
>
> Many applicants already have experience as registered nurses or as EMTs and paramedics before they apply to a physician assistant program.
>
> Physician assistant education programs usually take at least 2 years of full-time study. In 2012, the Accreditation Review Commission on Education for the Physician Assistant, Inc. (ARC-PA) accredited 170 education programs. Most of these accredited programs offer a master's degree.
>
> Physician assistant education includes classroom and laboratory instruction in subjects such as pathology, human anatomy, physiology, clinical medicine, pharmacology, physical diagnosis, and medical ethics. The programs also include hundreds of hours of supervised clinical training in several areas, including family medicine, internal medicine, emergency medicine, and pediatrics.
>
> Sometimes students serve in one or more of these areas under the supervision of a physician who is looking to hire a physician assistant. In this way, the rotation may lead to permanent employment.

Id. at http://www.bls.gov/ooh/healthcare/physician-assistants.htm#tab-4 (last visited June 17, 2014).

The *Handbook* does not report that a baccalaureate or higher degree in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. According to the section quoted above, "[w]hile admissions requirements vary from program to program, most programs require two to four years of undergraduate coursework with a focus in science." It does not find that a bachelor's or higher degree in a specific specialty or its equivalent is required to matriculate or that individuals who complete these programs thereby possess such a degree or its equivalent. Although the *Handbook* acknowledges that many candidates possess college degrees prior to entry into the occupation, it does not state that a bachelor's degree in a specific specialty or its equivalent is a prerequisite for entry into the occupation.

Where, 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.[6] It is the petitioner's responsibility to provide probative evidence

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[6] We again observe that counsel's strategy in response to the RFE and on appeal was to classify the position as one in the Surgical Assistants category. In doing so, counsel references a variety of occupational summary reports for occupations other than the one selected by the petitioner on the LCA supporting the instant H-1B petition and, therefore, these reports do not have probative value. More specifically, the petitioner submitted documentation from the State of Texas Occupations Code for Surgical Assistants; O*NET OnLine Summary Reports for Surgical Assistants and Surgical Technologists; the Commission on Accreditation of Health Education Programs occupational descriptions for Surgical Assisting and Surgical

(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 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 a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the physician assistants occupational classification. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, 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 described 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Technology; a Federal Register Department of Homeland Security Final Rule Announcement concerning Certificates for Certain Health Care Workers; and a variety of educational and association summaries for the occupational classification of Surgical Assistant as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the orthopedic medical services industry. Some of the documentation provided establishes that a bachelor's degree is generally a *preference*, but not that at least a bachelor's degree in a *specific specialty* or the equivalent is required for entry into the Surgical Assistants occupational classification.

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 relevant to the Physician Assistants occupational classification 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. Finally, as briefly addressed above, the petitioner's reliance upon evidence concerning the educational eligibility requirements for entry into positions in the Surgical Assistants occupational classification is misplaced.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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 evidence of record also does 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." To begin with, the petitioner by its own admission does not require at least a baccalaureate degree in a specific specialty or its equivalent, as the petitioner would accept any degree in applied sciences.

In addition, the evidence of record does not establish that this position is significantly different from other physician assistant positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred courses of training acceptable for physician assistant positions, including two-year degrees, and degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than physician assistant or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

We observe that the petitioner has indicated that the beneficiary's educational background and experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the proffered position's duties, if any, would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner did not demonstrate 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 addition, we note that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level physician assistant relative to others within this occupation. This factor is inconsistent with the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that

the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), *available at* http://www.foreignlaborcert.doleta.gov/pdf/ NPWHC_Guidance_Revised_11_2009.pdf.

As the evidence of record fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, in a specific specialty, or the equivalent, 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 in a specific specialty or its equivalent for the position.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree, in a specific specialty or its equivalent, in its prior recruiting and hiring for the position. Additionally, 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.

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* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In support of its assertion that the petitioner has a history of requiring a bachelor's or higher degree in a specific specialty (or its equivalent) in its prior recruiting and hiring for the position, the petitioner submitted W-2 Wage and Tax Statements, a copy of an educational evaluation and foreign medical degree, and an H-1B approval notice for a former employee of the petitioner.[7] We do not accord any

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[7] The director's decision does not indicate whether she reviewed the prior approval of this other nonimmigrant petition. If the previous nonimmigrant petition were approved for a position in the same occupation based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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

probative weight to this evidence because the record does not establish whether the position for which the former employee had been employed is the same as the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).[8] Even if this evidence were relevant, as noted above, the petitioner by its own admission does not require at least a baccalaureate degree in a specific specialty or its equivalent, as the petitioner would accept any degree in applied sciences.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree *in a specific specialty*, or its equivalent, for the proffered position. Simply 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. at 165.

As the evidence in the record of proceeding has not demonstrated that the petitioner normally requires a bachelor's or higher degree in a specific specialty or its equivalent for the proffered position, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Next, we find that the evidence of record does not satisfy 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 specific specialty, or its equivalent.

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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, even for the same beneficiary, 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 this prior nonimmigrant petition on behalf of the same 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).

[8] Neither the director nor the AAO was required to request and/or obtain a copy of any prior petitions filed by the petitioner. In addition to being impractical and inefficient, such a requirement would 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.

The petitioner provides a general overview of the duties of the proposed position in the initial letter of support and in response to the RFE. The petitioner, however, has not demonstrated that the duties to be performed exceed in scope, specialization, or complexity those usually performed by physician assistants, an occupational category that has not been established as normally requiring at least a baccalaureate degree in a specific specialty or its equivalent for entry. We find insufficient evidence in the record demonstrating that the beneficiary, in his role, would face duties or challenges any more specialized and complex than those outlined in the *Handbook*.

To the extent that it is depicted in the record, the nature of the proffered position's duties does not appear to be so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, in a specific specialty, or its equivalent. Aside from the claims of the petitioner and its counsel, there is insufficient information in the record to support a finding that the nature of the proposed position's duties is particularly specialized and complex. 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. at 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Here, we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II) when compared to other positions within the same occupation. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), *available at* http://www.foreignlaborcert.doleta.gov/pdf/ NPWHC_Guidance_Revised_11_2009.pdf.

For all of these reasons, 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*).

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

V. BENEFICIARY QUALIFICATIONS

Furthermore, we will also address an additional, independent ground for denial of the petition, not identified by the director's decision, that also precludes approval of this petition. Specifically, beyond the decision of the director, we find that even if the proffered position had been deemed a specialty occupation, the petition could not be approved since the evidence of record does not establish that the beneficiary possesses the requisite license to perform the duties associated with the occupation of physician assistant in the state of intended employment.

Title 8 C.F.R. § 214.2(h)(4)(v)(A) states:

> General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

According to the *Handbook,* all states require physician assistants to possess the appropriate license. Specifically, the *Handbook* states:

> **Licenses, Certifications, and Registrations**
>
> All states and the District of Columbia require physician assistants to be licensed. To become licensed, they must pass the Physician Assistant National Certifying Examination (PANCE) from the National Commission on Certification of Physician Assistants (NCCPA). A physician assistant who passes the exam may use the credential "Physician Assistant-Certified (PA-C)."
>
> To keep their certification, physician assistants must complete 100 hours of continuing education every 2 years. Beginning in 2014, the recertification exam will be required every 10 years.

Id. at http://www.bls.gov/ooh/healthcare/physician-assistants.htm#tab-4 (last visited June 17, 2014).

In this case, the beneficiary holds a Doctorate in Medicine and Surgery from the in Mexico City Mexico, in addition to specialized medical residency training, and a post-graduate degree in Plastic Surgery and Reconstruction from the We observe that the beneficiary possesses extensive education in the field of medicine.[9] Without addressing whether his educational credentials are sufficient to satisfy the educational entry requirements of a physician assistant position, the petitioner has not claimed nor submitted evidence to demonstrate that the beneficiary possesses the appropriate licensure to practice as a physician assistant under the laws of the State of Texas or that he has passed the Physician Assistant National Certifying Examination. As such, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the appeal shall be dismissed and the petition denied for this additional reason.

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[9] We note that the petitioner did not submit an evaluation of his foreign degree or sufficient evidence to establish that his degree is the equivalent of a U.S. bachelor's or higher degree in a specific specialty as required by 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*).

VI. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.

The petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g.*, *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.