



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **OCT 30 2014** Office: VERMONT SERVICE CENTER File:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on June 13, 2013. On the Form I-129 petition, the petitioner describes itself as an "educational institution." In order to extend the employment of the beneficiary in a position to which it assigned the job title of "Assistant Registrar," the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). As noted above, the petition seeks to extend the beneficiary's stay in the United States.

The petitioner previously secured nonimmigrant H-1B status for the beneficiary (the prior petition's receipt number is [REDACTED] and at that time was granted an exemption from the numerical cap under INA § 214(g)(5)(A) because the petitioner was a "nonprofit entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965." With the instant petition, the petitioner seeks exemption from the numerical cap because the beneficiary is extending the beneficiary's "current H-1B classification." The director found the petitioner no longer qualified for the prior numerical cap exemption classification and extending the beneficiary's under that provision visa was prohibited by INA § 214(g)(6).

The director denied the petition on January 10, 2014, 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 and that the petition did not qualify for a numerical cap exemption.

On appeal, counsel asserts that the director's bases for denial were erroneous. Counsel contends that the evidence submitted in support of the petition is sufficient to both (1) establish the proffered position as a specialty occupation, and (2) show that the petition is eligible for cap exemption.

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

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

Beyond the decision of the director, there is an aspect of this record of proceeding that, although not directly addressed by the director's decision, precludes approval of this petition even if the evidence of record had overcome the grounds of the director's decision – which, of course, is not the case

here. That aspect is the fact that the petitioner had not submitted into the record a Labor Condition Application (LCA), certified prior to the petition's filing that corresponds to the petition. The pertinent, and material, non-corresponding aspects of the petition and the LCA filed in its support reside in the fact that the LCA submitted with the petition was certified for a position within a different occupational group and commanding a significantly lower prevailing-wage level than what the proposed duties and petitioner's assertions indicate for the proffered position. That is, the LCA was certified for a position within the Educational, Guidance, School, and Vocational Counselors occupational group, but the evidence of record indicates, and counsel affirms, that the proffered position actually belongs within the Education Administrators, Postsecondary occupational group.

I. EVIDENTIARY STANDARD

As a preliminary matter, to assure counsel that we are applying the correct standard of proof, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

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

* * *

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

* * *

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

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

Id.

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

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

II. FACTUAL AND PROCEDURAL HISTORY

The petitioner stated on the Form I-129 petition that it is an educational institution, and that it seeks to extend the beneficiary's employment in a position that it designates as an "Assistant Registrar" to work on a full-time basis with an annual salary of \$49,000. The petitioner was established in 1998 and has 178 employees and a gross annual income of approximately \$22 million.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Educational, Guidance, School, and Vocational Counselors" - SOC (ONET/OES) Code 21-1012, at a Level I (entry-level) wage.

The petitioner provided a letter on the May 21, 2013 wherein it described itself as a "major international university that offers accredited educational programs at the undergraduate, master and doctoral levels." The letter went on to describe the duties of the proffered position, and it stated the beneficiary would:

- Ensure that the UNVA admissions and registration team provides fair and efficient service in accordance with UNVA, legal and regulatory requirements [5% of time];
- Interview, counsel and advise students and families about admissions, transfer credits, registration status and university policies and requirements [5% of time];
- Compare transcripts of courses with school entrance to the requirements and prepare evaluation reports listing courses for graduation [10% of time];
- Prepare evaluation reports, recommendation for admission or denial, and submit reports for approval by admissions committee [5% of time];
- Collect, record, maintain and report on student records within FERPA guidelines, e.g. grades, registration data and transcripts [15% of time];
- Analyze applicant's needs and refer them to appropriate persons for advice about courses of study, academic counseling or other specialized information [10% of time];
- Organize and administer the records, registration and graduation functions, including transcript evaluations [10% of time];

- Maintain communication via telephone, correspondence, and/or electronic mail with prospective and current students through all stages of the registration process [15% of time];
- Assist with the preparation of, and implementation of, admissions and registration related policies and procedures [10% of time]; and
- Maintain dossiers, program files, file systems, project controls, program status controls, databases and reports [15% of time].

The petitioner concluded by stating that the proffered position required a bachelor's degree in "educational administration, business management or a related discipline."

In further support of eligibility, the petitioner submitted (1) a copy of the beneficiary's foreign diploma and transcripts; (2) a copy of the beneficiary's Master of Business Administration from the [REDACTED] (petitioner) dated June 28, 2008; and (3) a document showing the petitioner was an accredited educational institution at the time the beneficiary graduated, but lost accreditation on August 6, 2008.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 3, 2013. In response to the RFE, the petitioner provided a certificate of Authorization to Provide Postsecondary Education from the state of South Dakota dated October 15, 2013, which is a date after the filing of the present petition. As noted above, evidence supplied by the petitioner in the record established that the petitioner was not an accredited institution of higher education as of August 6, 2008. Thus, the record contains no evidence that at the time the petition was filed the petitioner was an accredited post-secondary educational institution or otherwise eligible for that category of numerical cap exemption.

Counsel for the petitioner also provided copies of job postings for positions it claimed were parallel to the proffered position within similar organizations.

The director denied the petition on January 10, 2014, concluding that the petitioner did not establish that the proffered position qualifies as a specialty occupation and alternatively that the petitioner did not qualify for a numerical cap exemption.

III. PROFFERED POSITION NOT A SPECIALTY OCCUPATION

A. The Law

As this section of the decision will reflect, counsel's view that establishing a general bachelor's degree requirement is sufficient to meet the statutory and regulatory requirements for an H-1B specialty occupation is erroneous.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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

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

of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

B. Analysis

As a preliminary matter, we note again the petitioner's assertion that performance of the proffered position requires at least a bachelor's degree in "educational administration, business management or a related discipline."

The beneficiary possesses a Master's of Business administration from the petitioner, and a bachelor's of Marketing from [REDACTED], Malaysia, issued in 2007.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business management or business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). To prove that a job requires the theoretical

and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As 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).¹

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

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

To reach this conclusion, we first turned to 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.²

¹ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Id.

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

As we have already noted, the petitioner submitted an LCA that had been certified for use with a position within the occupational classification of "Educational, Guidance, School, and Vocational Counselors" - SOC (ONET/OES) Code 21-1012. The *Handbook's* pertinent information about the general duties and educational requirements of this occupational group appear in the *Handbook's* chapter entitled "School and Career Counselors." That chapter includes the following information about the general duties usually associated with that occupational group:

Duties

School counselors typically do the following:

- Help students understand and overcome social or behavioral problems through individual and group counseling
- Provide individual and small group counseling based on student needs
- Work with students to develop skills, such as organization, time management, and effective study habits
- Help students set realistic academic and career goals and develop a plan to achieve them
- Evaluate students' abilities and interests through aptitude assessments, interviews, and individual planning
- Collaborate with teachers, administrators, and parents to help students succeed
- Deliver classroom guidance lessons on topics, such as bullying, drug abuse, and planning for college or careers after graduation
- Identify and report possible cases of neglect or abuse
- Refer students and parents to resources outside the school for additional support

The specific duties of school counselors vary with the ages of the students they work with.

Elementary school counselors focus on helping students develop skills, such as decision-making and study skills, that they need to be successful in their social and academic lives. They meet with parents or guardians to discuss their child's strengths, weaknesses, and any possible special needs and behavioral issues. School counselors also work with teachers and administrators to ensure the curriculum addresses both the developmental and academic needs of students.

Middle school counselors work with students and parents to help students develop and achieve career and academic goals. They help students develop the skills and strategies necessary to succeed academically and socially.

High school counselors advise students in making academic and career plans. Many help students with personal problems that interfere with their education. They help students choose classes and plan for their lives after graduation. Counselors provide information about choosing and applying for colleges, training programs, financial aid, and apprenticeships. They may present career workshops to help students search and apply for jobs, write résumés, and improve interviewing skills.

Career counselors typically do the following:

- Use aptitude and achievement assessments, to help clients evaluate their interests, skills, and abilities
- Evaluate clients' background, education, and training, to help them develop realistic goals
- Guide clients through making decisions about their careers, such as choosing a new profession and the type of degree to pursue
- Help clients learn job search skills, such as interviewing and networking
- Assist clients in locating and applying for jobs, by teaching them strategies to find openings and how to write a résumé
- Advise clients on how to resolve problems in the workplace, such as conflicts with bosses or coworkers
- Help clients select and apply for educational programs, to obtain the necessary degrees, credentials, and skills

Career counselors work with clients at various stages in their careers. Some work in colleges to help students choose a major. They also help students determine what jobs they are qualified for with their degrees. These counselors also work with people who have already entered the workforce. Career counselors develop plans to improve their client's current career and provide advice about entering a new profession. Some career counselors work in outplacement firms and assist laid-off workers with transitioning into new jobs or careers. Others work in corporate career centers to assist employees in making decisions about their career path within the company.

Some career counselors work in private practice. These counselors must spend time marketing their practice to prospective clients and working with clients to

receive payments for their services.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "School and Career Counselors," <http://www.bls.gov/ooh/community-and-social-service/school-and-career-counselors.htm#tab-2> (last visited Oct. 29, 2014).

Comparison of this information with the descriptions of the proposed duties provided in the record leads us to find that the position which is the subject of the petition, as described in the record of proceeding, does not align with the Educational, Guidance, School, and Vocational Counselors occupational classification which, by virtue of the certified LCA submitted into the record, the petitioner attested to be the occupational category to which the position belongs and by which the petitioner's minimum pay obligations should be determined. Consequently, as we shall discuss at greater length towards the end of this decision, the petition cannot be approved because it is not supported by an LCA certified for the type of position for which petition was filed. Aside and in addition to that materially adverse aspect of the record of proceeding, we find that even if the proffered position were correctly identified as belonging to the Educational, Guidance, School, and Vocational Counselors occupational group (which is not the case), the proffered position's inclusion in that group would not be sufficient in itself to satisfy this first criterion, that is, by establishing this particular proffered position as one for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry. This latter fact is obvious upon reading the following *Handbook* excerpt regarding education requirements for this occupational group:

Most school counselors must be credentialed, which most often requires a master's degree. Many employers prefer that career counselors have a master's degree. Career counselors who work in private practice may also need a license.

Education

Most states require school counselors to have a master's degree in school counseling or a related field. Programs in school counseling teach students about fostering academic development; conducting group and individual counseling; and working with parents, teachers, and other school staff. These programs often require students to gain experience through an internship or practicum.

Most employers prefer that career counselors have a master's degree in counseling with a focus on career development. Career counseling programs prepare students to teach career development techniques and assess clients' skills and interests. Many programs require students to have a period of supervised experience, such as an internship.

Licenses, Certifications, and Registrations

Public school counselors must have a state-issued credential to practice. This credential can be called a certification, a license, or an endorsement, depending on the state. Licensure or certification typically requires a master's degree in school

counseling and an internship or practicum completed under the supervision of a licensed professional school counselor.

Some states require applicants to have 1 to 2 years of classroom teaching experience or to hold a teaching license, prior to being certified. Other states allow full-time teaching experience to be substituted, in place of the internship requirement.

Most states require a criminal background check, as part of the credentialing process.

Information about requirements for each state is available from the American School Counselor Association.

Although some employers prefer to hire licensed career counselors, a license is not required in many settings. Career counselors in private practice, however, generally must be licensed. Licensure requires a master's degree and 2,000 to 3,000 hours of supervised clinical experience. In addition, counselors must pass a state-recognized exam and complete annual continuing education credits. Contact information for state regulating boards is available from the National Board for Certified Counselors.

Work Experience in a Related Occupation

Although most states do not require work experience in a related occupation, some states require school counselors to have 1 to 2 years of classroom teaching experience or to hold a teaching license, prior to being certified.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "School and Career Counselors," <http://www.bls.gov/ooh/community-and-social-service/school-and-career-counselors.htm#tab-4> (last visited Oct. 29, 2014).

That "most" states require at least a Master's degree "in school counseling or a related field" does not establish that such a requirement is normal for the position. For instance, the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of positions within an occupational group require at least a bachelor's degree in a specific specialty or a closely related field, it could be said that "most" positions within that occupational group require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

We further find that, if indeed, the above-quoted educational requirements applied to the proffered position, not only would they materially conflict with the petitioner's assertions about the job's requirements, but they would render the beneficiary unqualified, as the record reflects that the beneficiary does not possess at least a Master's degree in school counseling or a related field. Further, we see that counsel for the petitioner contends that USCIS should assess the proffered position as one within an entirely different occupational category, that is, Postsecondary Administrators, identified by the SOC code 11-9033.

As we review the *Handbook's* information, we also note as a relevant fact that, according to the record of proceeding, the beneficiary would work in only in an assistant capacity.

The *Handbook's* pertinent information about the general duties and educational requirements of the Postsecondary Administrators occupational group appears in the *Handbook's* chapter with the title "Postsecondary Education Administrators." That chapter includes the following information about positions within that occupational category (with the registrar-office information italicized by us):

Postsecondary education administrators oversee student services, academics, and faculty research at colleges and universities. Their job duties vary depending on the area of the college they manage, such as admissions, the office of the registrar, or student affairs.

Duties

Postsecondary education administrators who work in *admissions* decide whether potential students should be admitted to the school. They typically do the following:

- Determine how many students to admit to fill the available spaces
- Prepare promotional materials about the school
- Meet with prospective students and encourage them to apply
- Review applications to determine if each potential student should be admitted
- Analyze data about applicants and admitted students

Many admissions counselors are assigned a region of the country and travel to that region to speak to high school counselors and students.

In addition, admissions officers often work with the financial aid department, which helps students determine if they are able to afford tuition and creates packages of federal and institutional financial aid if necessary.

Postsecondary education administrators who work in the registrar's office maintain student and course records. They typically do the following:

- *Schedule and register students for classes*
- *Schedule space and times for classes*
- *Ensure that students meet graduation requirements*
- *Plan commencement ceremonies*
- *Prepare transcripts and diplomas for students*
- *Produce data about students and classes*
- *Maintain the academic records of the institution*

How registrars spend their time varies depending on the time of year. Before students register for classes, registrars must prepare schedules and course offerings. Then during registration and for the first few weeks of the semester, they help students sign up for, drop, and add courses. Toward the end of the semester, they plan graduation and ensure that students meet the requirements to graduate. Workers in a registrar's office need advanced computer skills to create and maintain databases.

Postsecondary education administrators who work in *student affairs* are responsible for a variety of co-curricular school functions, such as student athletics and activities. They typically do the following:

- Advise students on topics such as housing issues, personal problems, or academics
- Communicate with parents and families
- Create, support, and assess nonacademic programs for students
- Schedule programs and services, such as athletic events or recreational activities

Postsecondary education administrators in student affairs can specialize in student activities, housing and residential life, or multicultural affairs. In student activities, education administrators plan events and advise student clubs and organizations. In housing and residential life, education administrators assign students rooms and roommates, ensure that residential facilities are well maintained, and train student workers, such as residential advisers. Education administrators who specialize in multicultural affairs plan events to celebrate different cultures and diverse backgrounds. Sometimes, they manage multicultural centers on campus.

Other postsecondary education administrators are *provosts* or *academic deans*. Provosts, also sometimes called chief academic officers, help college presidents develop academic policies, participate in making faculty appointments and tenure decisions, and manage budgets. Academic deans direct and coordinate the activities of the individual colleges or schools. For example, in a large university, there may be a dean who oversees the law school.

Education administrators have varying duties depending on the size of their college or university. Small schools often have smaller staffs who take on many

different responsibilities, but larger schools may have different offices for each of these functions. For example, at a small college, the Office of Student Life may oversee student athletics and other activities, whereas a large university may have an Athletics Department.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Postsecondary Education Administrators" <http://www.bls.gov/ooh/management/postsecondary-education-administrators.htm#tab-2> (last visited October 29, 2014).

Based upon the above information, we find that the proffered position as described within the record of proceeding generally comports with a registrar's office position within the Postsecondary Education Administrators occupational group. (It follows, then, that the petition was not accompanied by an LCA that corresponds to it, as required by regulation.)

Although a bachelor's degree may be sufficient for some entry-level positions, a master's or higher degree is often required. Work experience in a related occupation is typically needed, particularly for such occupations as registrars and academic deans.

Education

Educational requirements vary for different positions. Although a bachelor's degree may be sufficient for some entry-level positions, a master's or higher degree is often required. Degrees can be in a variety of disciplines, such as social work, accounting, or marketing.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Postsecondary Education Administrators" <http://www.bls.gov/ooh/management/postsecondary-education-administrators.htm#tab-4> (last visited October 29, 2014).

The director noted that the proffered job most closely matched the *Handbook's* definition of Post-Secondary Education Administrators, and on appeal the petitioner agrees with this determination. However, the *Handbook's* comment that "degrees can be in a variety of disciplines, such as social work, accounting, or marketing" indicates that the proffered position's inclusion within this occupational group is not in itself sufficient to establish the proffered position as one for which at least a bachelor's degree, or the equivalent, in a specific specialty is the minimum requirement for entry. The *Handbook's* remarks clearly indicate that there is no specific limit to the range of majors or academic concentrations that would qualify a degreed person for entry in the occupational group.

Thus, for the reasons discussed above, the *Handbook* does not support a claim that the instant job is in an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. We here refer the petitioner back to our discussion, in the Law section of this decision, about the requirements for recognition of a position as a specialty occupation in accordance with the definition of "specialty occupation" at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii).

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Upon review of the totality of the evidence in the entire record of proceeding, we conclude that the petitioner has not established that the particular position here proffered is one for which the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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

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

The petitioner designated its business operations under the corresponding North American Industry Classification System (NAICS)³ code 611310 – Academies, college or university.⁴

³ According to the U.S. Census Bureau, the North American Industry Classification System (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 <http://www.census.gov/eos/www/naics/> (last accessed August 8, 2014).

The petitioner must establish that similar organizations in fact routinely require specialty-degreed individuals in parallel positions. For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted copies of nine advertisements in support of the petition and in response to the RFE. We find, however, that the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

The first advertisement is for the position of Assistant Registrar with [REDACTED] a for profit educational institution. The minimum educational experience for the advertised position is an "Associates degree with at least three years of progressively related experience." Not only does the advertisement not specify a bachelor's degree, but it also does not even require that a qualifying Associate's degree be in a specific field.

The next advertisement was for an Associate University Registrar with [REDACTED]. This position is a supervisory job which requires a master's degree. However, the advertisement does not require a degree in a specific field or specialty.

The third advertisement was for the University Registrar at [REDACTED] main campus. The position requires a master's degree and significant management experience. The advertisement does not require a degree in a specific field or specialty.

The fourth advertisement is for a Registrar with [REDACTED]. This position requires a "Master's degree in a related field" although it does not articulate what types of degrees it considers related. This position, like those above and unlike the proffered position, is also a management position and not an entry level position. Thus, the position is not similar to the proffered job – which, we note again, is an assistant's position.

The fifth advertisement is for an Assistant Director of Advising and Student Success with the [REDACTED]. Although the minimum educational requirement is a bachelor's degree, the advertisement does not require a degree in a specific field or specialty.

The sixth advertisement is for a Transcript Evaluator with [REDACTED]. It too requires a bachelor's degree, although the advertisement does not require a degree in a specific field or specialty.

⁴ See <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last accessed October 19, 2014)

The seventh advertisement is for an Admissions and Financial Aid Specialist with the [REDACTED]. This position requires a general bachelor's degree or eight years of experience in the proffered job. Again, a degree in a specific specialty is not the minimum educational requirement for entry.

The eighth advertisement is for an Associate Registrar with the [REDACTED]. It too has a general degree requirement, and does not require a degree in a specific specialty.

The ninth advertisement is for an Assistant Registrar with [REDACTED]. It too only has a general degree requirement, and it does not require a degree in a specific specialty.

We note that many of the positions above were for management jobs, and not entry-level positions. Notwithstanding that distinction, none of the advertisements provided by the petitioner show that the industry requires at least a bachelor's degree in a specific specialty to perform the duties of the proffered job.

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

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

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

In addition to this decisive evidentiary deficiency, we also find that the content of LCA submitted into the record weighs against a favorable finding here. The LCA indicates a wage level based upon the occupational classification at a Level I (entry) wage.⁵ This wage-level

⁵ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering

designation is appropriate for positions for which the petitioner expects the beneficiary to only have a basic understanding of the occupation.⁶ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is sufficiently complex or unique to satisfy this criterion. In fact, such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁷ Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received. See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at: http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁶ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

⁷ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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

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

To satisfy this particular criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position.

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

Moreover, to satisfy this criterion, the record must establish that the specific performance requirements of the position generated the requisite recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate

or higher degrees. *See id.* at 388.

We see that to support its claim of the requisite recruiting and hiring history the petitioner submits information about only one employee. That evidence is insufficient to establish the requisite history of exclusively recruiting and hiring for the position only persons with at least a bachelor's degree, or the equivalent in a specific specialty. We further find that the evidence of record does not establish that the actual performance requirements of the proffered position would compel the recruiting and hiring of only persons with at least a bachelor's degree in a specific specialty.

For all of the reasons discussed above, we find that the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), either.

Next, we find that the petitioner has not satisfied the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

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

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

By the same token, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the Post-Secondary Education Administrators occupational group whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

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

As the evidence of record has not established that the nature of the duties of the proffered position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

C. Prior Approvals Are Not Determinative

We note that the instant petition is to extend the beneficiary's previously approved visa for the same position. For clarity's sake, we note the April 23, 2004 Yates memo.

According to the Yates memo:

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

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

Again, as indicated in the Yates memo, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petition was approved based on the same description of duties and assertions that are contained in the current record, they would constitute material and gross error on the part of the director. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound

to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

IV. THE H-1B NUMERICAL LIMITATION (CAP) ISSUE

In addition to the specialty occupation ground, the appeal must also be dismissed on the other, independent ground specified by the director. As noted earlier, when the first petition [REDACTED] was filed the petitioner may have qualified for numerical limitation exemption as an accredited post-secondary institution of higher learning. However, at the time the instant petition was filed the petitioner was not accredited; and the record does not establish that that the petitioner was related or affiliated with such an institution at the time of this petition's filing.

According to INA § 214(g)(5)(A) a petitioner who is a “nonprofit entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965” does not count against the annual numerical limit on H-1B visas. However, if a beneficiary tries to renew a cap exempt visa it must do so with another cap exempt employer or compete for one of the statutorily limited number of visas. *See* INA § 214(g)(6).

The petitioner claims that its asserted affiliation with [REDACTED] on October 10, 2013, qualifies the instant petitioner for exemption for the numerical limitation. However, we need not address whether or not that claimed affiliation would meet the pertinent statutory and regulatory requirements, as the evidence of record indicates that the claimed affiliation postdates the petition's filing. Thus, at the time of filing, the petitioner was not a qualifying entity under section 214(g)(5)(A).

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). 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.

Consequently, the petition is to be counted against the numerical cap for 2013. All numerical limited visas for 2013 have been used, and the instant visa petition cannot be approved. For this reason also, the appeal will be dismissed, and the petition will be denied.⁸

Also, a petitioner may not make material changes to its petition in an effort to make a deficient petition conform to statutory and regulatory requirements. *See Matter of Izummi*, 22 I & N Dec. 169 (BIA 1998). The petitioner's purported change in status from a nonexempt employer on June 10, 2013 to a qualifying entity under the Higher Education Act on October 10, 2013, is a material change.

⁸ We note that the beneficiary could have been eligible for the United States Master's degree numerical cap exemption if the petition had been filed earlier in the year. However, at the time the petition was filed, the 2014 fiscal year cap had already been met for H-1B and the United States Master's degree cap exemption.

V. ADVERSE IMPLICATION OF THE SUBMISSION OF AN LCA NOT CERTIFIED FOR THE TYPE OF POSITION PROFFERED IN THE PETITION

We here refer the petitioner back to our earlier comments and findings about the fact that the LCA submitted to support this petition had been certified for a position within an occupational group other than the occupational group within which the proffered position actually belongs. We here incorporate and adopt those comments and findings as the factual foundation of this determination that we are making beyond the director's decision. On the basis of this present determination and the aspects of the record of proceeding upon which we base this determination, the petition could not be approved even if the petitioner had established the proffered position as a specialty occupation (which is not the case).

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the LCA. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that has been certified, before the petition's filing, for a position within the pertinent occupational group, that is, Postsecondary Education Administrators. One impermissible consequence of approval of this petition with the LCA submitted to support it would be to allow the petitioner's wage obligations to be less than that actually required by the appropriate prevailing-wage standards for the proffered position for the pertinent employment period and location.

As earlier discussed, the LCA submitted to support the petition had been certified for a position within the Educational, Guidance, School, and Vocational Counselors occupational group - SOC (ONET/OES) Code 21-1012. From DOL's Foreign Labor Certification Data Center's OnLine

Wage Library (FLCDC OWL) site, we retrieved the following wage information for Educational, Guidance, School, and Vocational Counselors for the time and location relevant to this petition:

Online Wage Library - FLC Wage Search Results

Wednesday, October 29, 2014

You selected the All Industries database for 7/2012 - 6/2013. Your search returned the following:

Area Code: 47894
Area Title: Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
GeoLevel: 1
OES/SOC Code: 21-1012
OES/SOC Title: Educational, Guidance, School, and Vocational Counselors
Level 1 Wage: \$20.39 hour - \$42,411 year
Level 2 Wage: \$26.56 hour - \$55,245 year
Level 3 Wage: \$32.72 hour - \$68,058 year
Level 4 Wage: \$38.89 hour - \$80,891 year
Mean Wage (H-2B): \$32.72 hour - \$68,058 year

U.S. Dep't of Labor, Office of Foreign Labor Certification, OnLine Wage Library Search Wizard, "Educational, Guidance, School, and Vocational Counselors," <http://www.flcdatacenter.com/OesPrintResults.aspx?area=47894&code=21-1012&year=13&source=1> (last visited October 29, 2014).

However, as counsel acknowledged, the proffered position as described in the record of proceeding more closely comports with a different occupational group, and one which commands substantially higher prevailing-wage levels, namely, Postsecondary Education Administrators, identified by the SOC code 11-9033.

We retrieved the following data from the FLCDC OWL data for that occupational group for the pertinent period and location:

Online Wage Library - FLC Wage Search Results

Wednesday, October 29, 2014

You selected the All Industries database for 7/2012 - 6/2013. Your search returned the following:

Area Code: 47894

Area Title:	Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
GeoLevel:	1
OES/SOC Code:	11-9033
OES/SOC Title:	Education Administrators, Postsecondary
Level 1 Wage:	\$24.24 hour - \$50,419 year
Level 2 Wage:	\$34.80 hour - \$72,384 year
Level 3 Wage:	\$45.37 hour - \$94,370 year
Level 4 Wage:	\$55.93 hour - \$116,334 year
Mean Wage (H-2B):	\$45.37 hour - \$94,370 year

U.S. Dep't of Labor, Office of Foreign Labor Certification, OnLine Wage Library Search Wizard, "Postsecondary Administrators"
<http://www.flcdatacenter.com/OesPrintResults.aspx?area=47894&code=11-9033&year=13&source=1> (last visited October 29, 2014).

For this reason also, the petition must be denied.

V. CONCLUSION

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 143, 145 (3d Cir. 2004) (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 will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative 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, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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