



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **JAN 02 2015** OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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 Director, Vermont Service Center, revoked the previously approved nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a three-employee "Check Cashing and Tobacco" business established in [REDACTED]. In order to employ the beneficiary in a position it designates as a "Financial Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director revoked the approval of the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) after conducting an onsite visit at the beneficiary's work location as designated on the petition.

After issuance of a Notice of Intent to Revoke (NOIR) and upon review of the petitioner's submissions in response to this notice, the service center director revoked approval of the petition on April 23, 2014. The director determined that the petitioner had not overcome the grounds of revocation in that the petitioner had not submitted evidence it is employing the beneficiary in a specialty occupation position.

The record of proceeding before this office contains: (1) the Form I-129 and supporting documentation; (2) the director's Request for Evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's NOIR; (5) the petitioner's response to the NOIR; (6) the director's notice of revocation (NOR); and (7) the Form I-290B, Notice of Appeal or Motion, the appeal brief, and previously submitted documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

## I. GROUNDS FOR REVOCATION

We turn first to the basis for the director's revocation, and whether this basis provided the director with sufficient grounds for revoking the H-1B petition on notice under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A).

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or

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

- (2) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

We find that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B). As will be discussed below, we further find that the director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding (ROP), and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, we shall not disturb the director's decision to revoke approval of the petition.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The Form I-129 petition was filed by the petitioner on March 7, 2011. In its letter of support dated January 20, 2011, the petitioner provided an overview of the beneficiary's duties in the position of financial analyst. The petitioner indicated the job duties included:

1. Recommend actions to ensure compliance with laws and regulations, to protect company from penalties during state/federal audits; Prepare reports, exhibits, and other supporting schedules that detail the company's safety and soundness, compliance with laws and regulations, and recommend solutions to questionable financial conditions; Review audit reports from external auditors in order to monitor adequacy of scope of reports or to discover specific weaknesses in internal routines.
2. Responsible for the examination, analysis and interpretation of financial reports and accounting records for the purpose of giving advice and preparing financial

- position statements and reports[.]
3. Responsible for the analysis and management of financial information detailing assets, liabilities and capital[.]
  4. Coordinate annual business plans including volume, price, and operating expenses, in addition to the preparation of profit/loss statements and other reports used to review current performance evaluations and projected company financial positions[.]
  5. Maintaining, modifying, documenting, and coordinating the implementation of accounting information systems and internal controls to evaluate efficiency of operations[.]
  6. Develop and execute a marketing plan to grow market share; develop pricing strategies, balancing company objectives and customer satisfaction; Negotiate contracts with vendors to manage product distribution and pricing.
  7. Evaluate the financial aspects of product developments, such as budgets, expenditures, return on investments and profit and loss projections.
  8. Direct and coordinate financial activities of workers of the company, this includes recruiting staff members, overseeing training programs, performing evaluations and terminating staff.

The petitioner stated that it "require[s] a Bachelor's degree in Business Administration, Accounting, Finance or a related field" to perform the duties of the position.

The petitioner also submitted a Labor Condition Application (LCA) with the job prospect certified for the occupational title of "Financial Analysts," SOC (ONET/OES) Code 13-2051.00 at a Level I wage, the lowest of the four assignable wage levels.

The petitioner also submitted, among other items: (1) a printout from the Florida Department of State Divisions of Corporations showing [REDACTED] as the registered agent and president of the petitioner; (2) copies of its 2008 and 2009 Internal Revenue Services (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, including Schedule K-1 which identified [REDACTED] as the petitioner's 100 percent shareholder; (3) a copy of the beneficiary's diploma, a letter from a prior employer, and an evaluation of his academic and work experience; and (4) a notice of prior H-1B approval, and copies of the beneficiary's pay statements.

The director issued an RFE requesting among other things, evidence that the beneficiary would be employed in a specialty occupation. The director provided a summary of the type of documentation that could be provided.

In response, counsel for the petitioner provided over two pages of text describing the beneficiary's job duties.<sup>2</sup> The petitioner submitted, previously provided evidence, and among other items: (1)

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<sup>2</sup> In response to the RFE, counsel provided a letter on the law firm's letterhead which includes a revised description of the proffered position. It is noted that the revised job description provided by counsel is not probative evidence. The description was submitted by counsel, not the petitioner, and counsel's letter was not endorsed by the petitioner. The record of proceeding does not indicate the source of the expanded duties

information regarding the petitioner's employee, [REDACTED] including his H-1B approval notice, his degree, pay statements, and USCIS's acknowledgement of the petitioner's request to withdraw the petition received on January 4, 2011; (2) advertisements for a financial analyst from various companies; and (3) two additional evaluations of the beneficiary's academic and work experience.

Upon review of this information, the director approved the petition on July 7, 2011.

On November 16, 2011, USCIS conducted a site visit at the beneficiary's work location as indicated on the petition and LCA. The USCIS officer interviewed [REDACTED] at the location. Ms. [REDACTED] identified herself as the wife of the signatory on the Form I-129 petition and the co-owner of the petitioner. According to the officer, Ms. [REDACTED] described the beneficiary's duties as taking care of the cash register, overall sales of merchandise, and taking care of customers visiting the store. She explained that she was filling in for the beneficiary who had to run some personal errands.

On September 25, 2013, the director issued a NOIR advising the petitioner of the results of the site visit, as stated above. The director noted that USCIS could not verify that the beneficiary is employed in the specialty occupation at the location established in the approved petition and that the petitioner appeared to be in violation of the terms and conditions of the approved petition. The director requested evidence that the petitioner is employing the beneficiary in a specialty occupation consistent with the terms and conditions of the approved petition. The director outlined evidence that could be submitted and invited the petitioner to submit any evidence that would overcome the grounds of revocation.

In rebuttal to the NOIR, counsel for the petitioner repeated the description of duties provided in response to the RFE and submitted a declaration signed by [REDACTED] Ms. [REDACTED] attested:

[The petitioner] is a business entity majority owned by Mr. [REDACTED] a U.S. Citizen and national. I also own a stake in the U.S. Company as minority member of the corporation. I am considered a silent partner *i.e.* a financial investor, who takes no part in management, and is often unknown to third parties.

Ms. [REDACTED] noted that on rare occasions she is asked to step in and manage the business and that on the day of the site visit, she had been requested to step in and manage the business operations. Ms. [REDACTED] also noted that she had met the beneficiary "maybe once or twice" between his employment with the petitioner in July 2011 and the date of the onsite visit in November 2011. Ms. [REDACTED] noted further that she had "guessed at [the beneficiary's] functions and job duties" when providing responses to the USCIS officer.

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and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner also submitted the beneficiary's quarterly and yearly performance reviews for 2011 and 2012. The petitioner's initial reviews referenced the beneficiary's supervision of subordinates and the need to improve in the area of supervision.

The petitioner also included a number of graphs comparing the petitioner's financial operations by month for the years 2011 and 2012, beginning June 2011 through June 2012, and some graphs continuing by quarter through May 2013. The graphs do not include information regarding the date they were prepared and do not identify who prepared the graphs or how they were prepared. The record also included photocopies of a ledger showing the number of checks cashed by date from July 2011 to June 2013. The record further included a one page five-year plan and two graphs related to a budget for the next five years. The petitioner provided a partial copy of its 2011 and 2012 IRS Form 1120S showing [REDACTED] as the petitioner's president, as well as some of its bank statements.

The director found the petitioner's explanations insufficient and revoked the petition's approval.

On appeal, counsel for the petitioner asserts that the petitioner has more than established eligibility using the preponderance of evidence standard. Counsel re-submits Ms. [REDACTED] statement.

### III. STANDARD OF REVIEW

In light of counsel's references to the requirement that USCIS apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within 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.

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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.*

As noted above, 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*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our 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.

#### IV. BASIS OF REVOCATION

As observed above, the director revoked approval of the petition based on an onsite visit of the petitioner's tobacco and check cashing shop and the interview of Ms. [REDACTED]. In this matter we note that Ms. [REDACTED] is the president of the company and apparently signed the petitioner's tax returns as such in 2011 and 2012. In addition, the 2008 and 2009 tax returns provided show that Ms. [REDACTED] owned 100 percent of the petitioner. Further, State of Florida corporate records submitted by the petitioner show that Ms. [REDACTED] is the president of and registered agent for the company. Ms. [REDACTED] also noted in her affidavit that she is asked to step in and manage the business in rare instances and was doing so on the day of the site visit. We further observe that the petitioner stated that it only had three employees when the petition was filed.

Upon review of the above information, we find that it is more likely than not that Ms. [REDACTED] participates in the management and operations of the petitioner's business and that she is more than a silent, minority partner and a financial investor in the petitioner. We find that it is more likely than not, based on the above information, that Ms. [REDACTED] was aware of the beneficiary's daily duties in the petitioner's shop, and that the beneficiary performs the duties she claimed he performs during the site visit.

Moreover, the graphs submitted as evidence of the beneficiary's work product do not include evidence corroborating the petitioner's claim that the beneficiary prepared the graphs. Notably, the graphs and business plans do not contain sufficient information to ascertain the level of analysis used when inputting data into the program used to generate the graphs. Nor do the graphs include

evidence that the beneficiary worked on the graphs from the beginning of his employment with the petitioner. We note that the petitioner's comments relating to the beneficiary's performance on his quarterly and annual reviews do not discuss the beneficiary's performance as a financial analyst, but rather pertain to the beneficiary's supervisory skills. The petitioner failed to submit documentary evidence to establish the actual day-to-day duties performed by the beneficiary. Upon review of the totality of the record, it is insufficient to establish that the beneficiary was primarily performing the duties of a financial analyst.

There is a lack of documentation to corroborate the assertion that the beneficiary is performing the duties as described in the initial petition. For example, the petitioner did not provide any evidence that the beneficiary recommends actions to ensure compliance with laws and regulations and to protect the company from penalties during state and federal audits. Additionally, the record of proceeding does not include evidence that the beneficiary reviews audit reports from external auditors, or that he maintains, modifies, documents and coordinates the implementation of accounting information systems and internal controls or that he has developed and executed a marketing plan or otherwise evaluated the financial aspects of product developments. Moreover, although not specifically a duty of a financial analyst, the record does not include evidence that the beneficiary recruited staff members, oversaw training programs performed evaluations or terminated staff. Upon review of the record of proceeding, the petitioner has failed to substantiate that the beneficiary performed the duties as described in the approved petition.

For these reasons, the record is insufficient to establish that the petitioner employed the beneficiary as a financial analyst by a preponderance of the evidence. The petitioner has failed to overcome the revocation ground specified in the NOIR and the subsequent revocation decision. The petitioner has not established that it would employ the beneficiary in the capacity specified in the approved petition.

## V. SPECIALTY OCCUPATION

Upon conducting our *de novo* review of the totality of the record, we also find that the approval of the petition was in gross error. The petitioner has not established that the proffered position as described by the petitioner comprises a specialty occupation. Thus, even if the beneficiary had been performing the duties as set out in the petition, which has not been established, the position does not meet the criteria of a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

### A. The Law

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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

#### B. Position Requirements

First, we observe that the petitioner in its January 20, 2011 support letter indicated that it "require[s] a Bachelor's degree in Business Administration, Accounting, Finance or a related field" to perform the duties of the position. The claimed requirement of a degree in a major such as "Business Administration" for the proffered position, without specialization, is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree,

without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1<sup>st</sup> Cir. 2007).

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. As such, the instant petition could not be approved for this additional reason.

### C. Application of Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed 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. The petitioner has not done so here.<sup>3</sup>

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. We recognize the DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup>

<sup>3</sup> For example, the petitioner states on the Form I-129 that it employs three individuals. The petitioner, however, in its initial reviews of the beneficiary's performance references the beneficiary's supervision of subordinates and the need to improve in the area of supervision. It is not clear who the beneficiary is supervising or whether this is a primary function of his position. When a petitioner employs relatively few people, it may be necessary for it to establish how the beneficiary will be relieved from performing non-qualifying duties. The petitioner in this matter did not provide information regarding the duties and responsibilities of the other employee(s). Thus, without additional information, it cannot be ascertained how the beneficiary would be relieved from performing non-qualifying duties such that the performance of non-qualifying duties would not affect the primary duties of the occupational classification of the position.

<sup>4</sup> Our references to the *Handbook*, are references to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

As noted above, the petitioner claims in the LCA that the proffered position falls under the occupational category "Financial Analysts." Regarding the education and training for financial analysts, the *Handbook* states:

Most positions require a bachelor's degree. A number of fields of study provide appropriate preparation, including accounting, economics, finance, statistics, mathematics, and engineering. For advanced positions, employers often require a master's in business administration (MBA) or a master's degree in finance. Knowledge of options pricing, bond valuation, and risk management are important.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Financial Analysts," <http://www.bls.gov/ooh/business-and-financial/financial-analysts.htm#tab-4> (last visited December 24, 2014).

Here, although the *Handbook* indicates that most financial analyst positions require a bachelor's or higher degree, it also indicates that degrees in various fields are acceptable for entry into the occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, for example, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.<sup>5</sup> Section 214(i)(1)(B) of the Act (emphasis added).

The *Handbook* does not limit the academic disciplines suitable to perform the duties of a financial analyst to finance but rather indicates that a disparate group of disciplines, varying from an accounting degree to a degree in engineering, are acceptable for employment as a financial analyst. Accordingly, as the *Handbook* indicates that working as a financial analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the particular position proffered here as being a specialty occupation.

As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or the equivalent, to satisfy this

<sup>5</sup> Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

first alternative criterion at 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 qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. The petitioner has not provided such evidence. Thus, as the evidence in the record of proceeding does not establish 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 this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102). 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. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In the Form I-129, the petitioner stated that it is a three-employee check cashing and tobacco shop established in 2003. The petitioner stated its gross annual income as approximately \$500,000+. The petitioner did not provide its net annual income.

In response to the director's RFE, the petitioner provided printouts of eight online job announcements. However, this documentation does not establish that the proffered position qualifies as specialty occupation. As a preliminary matter, we note that the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

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

that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

None of the advertisements provide sufficient information regarding the advertising organizations to establish that the advertising organizations are similar to the petitioner. Further, the advertisements provided state the duties of the advertised positions in terms that do not allow a comparison to the duties of the proffered position. Thus, we are unable to ascertain if the duties are parallel to the proffered position. While we are unable to determine the duties of the advertised positions, they all appear to be more senior than the proffered position. Seven of the eight advertisements list two or more years of required experience in addition to a degree. As previously noted, the petitioner has characterized the proffered position as a Level I (entry-level) position on the LCA. DOL guidance states that Level I positions are appropriate for a worker-in-training or an individual performing an internship.<sup>6</sup>

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a *specific specialty*, or its equivalent, is required for the positions. The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>7</sup>

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<sup>6</sup> For additional information regarding wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>7</sup> The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position (for organizations similar to the petitioner) required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Accordingly, the petitioner failed to establish that a bachelor's degree, in a specific specialty, 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 petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence of its incorporation, various graphs, and ledgers, bank statements, and copies of its federal tax returns.

However, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The evidence of record does not establish that this position is significantly different from other financial analyst positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for these positions, including 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 positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.<sup>8</sup>

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<sup>8</sup> This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Upon review of DOL's instructive comments, we observe that the petitioner did not designate the proffered position as involving even "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*

The petitioner has indicated that the beneficiary's education 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 qualifies as a specialty occupation. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to 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. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. 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 as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In support of the petitioner's assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulation, the petitioner provided documentation regarding the education and past H-1B approval of one of its employees. The petitioner noted that when this individual left the company, it had withdrawn the petition for this individual, and hired the beneficiary to take his place.

However, the petitioner does not set out the duties this individual performed for the petitioner. As

such, we are unable to ascertain if the position performed is actually comparable to the position proffered here. Moreover, if the approval of the nonimmigrant petition for the previous employee was based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). 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).

Upon review of the record, the petitioner has not submitted sufficient probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than positions within the same occupational category that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

In addition to the lack of sufficient specificity to distinguish the proffered position from other positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. Therefore, it is not credible that the position is one with specialized and complex duties, as such a higher-level position would likely be classified as a Level IV position, requiring a significantly higher prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Upon review of the totality of the record, 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.

For these material deficiencies in the record, the director's approval of the petition was in gross error.

## VI. CONCLUSION

Based upon a complete review of the appeal and the record of proceeding, the petitioner has failed to overcome the revocation ground specified in the NOIR and the subsequent revocation decision. The petitioner has not established that it would employ the beneficiary in the capacity specified in the approved petition. Accordingly, the appeal is dismissed. The approval of the petition remains revoked.

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

**ORDER:** The appeal is dismissed. The approval of the petition remains revoked.