



U.S. Citizenship
and Immigration
Services

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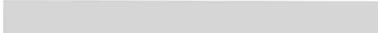


JUN 26 2015

DATE:

PETITION RECEIPT #: 

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:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a software consulting company, with 150 employees, that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a sales engineer 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 denied the petition, finding that the petitioner did not establish that the proffered position qualifies as a specialty occupation.

The record of proceeding 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 decision; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

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

II. SPECIALTY OCCUPATION

The primary issue is whether the petitioner has demonstrated by a preponderance of the evidence that it will employ the beneficiary in a specialty occupation position.²

A. Legal Framework

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.

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

² The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant's claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989)).

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 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 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 387. 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. Proffered Position

In the Form I-129, the petitioner indicated that it wishes to employ the beneficiary as a sales engineer on a full-time basis. In the support letter, the petitioner provided the following information regarding the proffered position³:

³ While the petitioner indicated in the Form I-129 and the LCA that the proffered position is a sales engineer position, the petitioner stated in its letter that it seeks to hire "the beneficiary as a sales engineer/business development manager" and refers to the proffered position as a "business development manager" when discussing duties of the proffered position. The petitioner did not explain the discrepancies. We further note that the duties of the proffered position does not correspond to the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*'s section on "What Sales Engineers Do." For example, the *Handbook* states

The beneficiarie[']s specific job duties will be to:

[S]upport our business development in the United States and in India. He will be responsible for developing business processes for our business. As a Business Development Manager, he will be responsible for identifying, negotiating and managing strategic relationships with content and technological partners. He will manage the marketing, sales and product development teams to implement business development initiatives. He will plan[,] direct[,] and coordinate activities of our Business Development Unit to ensure goals or objectives of the unit are accomplished within the prescribed time frame, funding limitations, procedures for accomplishing project, staffing requirements and allotment of available [sic] resources to various phases of project.

His job duties are as follows:

- Manage Business Development support for the company.
- Manage delivery and participation in client relationship management for corporate engagements.
- Analyze, prepare and identify quality documents of the operating systems to meet client's needs.
- Prepare statements of work and business proposals and analyze cost and man power requirements.
- Involved in the complete redesign of the site with improved usability.
- Implement web analytics and processes for behavior monitoring for web training programs.
- Analyze sales data for trends as per promotion on web and print media.
- Analyze conversion rate from impression to sales.
- Analyze online data, including click-stream behavior, path analysis & consumer profiling.

that sales engineers "sell complex scientific and technological products or services to businesses," "[p]repare and deliver technical presentations explaining products or services to customers and prospective customers," "[h]elp clients solve problems with installed equipment" or "recommend improved materials or machinery to customers, showing how changes will lower costs or increase production."

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

- Driving fiscal year planning and budgeting process and monitoring progress towards commitments
- Evaluating the P&L across regions to look for efficiencies
- Drive monthly team, and quarterly organizational business reviews
- Orchestrate communication within the Business Development team and between this group and other groups in our organization
- Collect and summarize secondary market research that pertains to the facilitated [REDACTED] business interests
- Assisting with overall business strategy, pricing analysis, vendor/partner contract reviews
- Defining and implementing best practices in business planning and management, budgeting and forecasting.

C. Analysis

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

We will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ The petitioner asserted in the LCA that the proffered position falls under the occupational category "Sales Engineer."⁵ We reviewed the section of the *Handbook* regarding this occupational category, including the section entitled "How to Become a Sales Engineer," which states the following:

A bachelor's degree is typically required to become a sales engineer. Successful sales engineers combine technical knowledge of the products or services they are selling with strong interpersonal skills.

Education

Sales engineers typically need a bachelor's degree in engineering or a related field. However, a worker without a degree, but with previous sales experience as well as

⁴ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

⁵ As noted, while there are inconsistencies in the record of proceeding regarding the proffered position, we will assume that the proffered position is a sales engineer position as the petitioner represents.

technical experience or training, sometimes holds the title of sales engineer. Workers who have a degree in a science, such as chemistry, or in business with little or no previous sales experience, also may be called sales engineers.

University engineering programs generally require 4 years of study. They vary in content, but all programs include courses in math and the physical sciences. In addition, most programs require developing strong computer skills.

Some programs offer a general engineering curriculum; students then specialize on the job or in graduate school. Most programs, however, require students to choose an area of specialization. The most common majors are electrical, mechanical, or civil engineering, but some programs offer additional majors, such as chemical, biomedical, or computer hardware engineering.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Sales Engineers, available on the Internet at <http://www.bls.gov/ooh/sales/sales-engineers.htm> (last viewed June 22, 2015).

The *Handbook* does not state that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. The *Handbook* specifically states that workers without a degree but with previous sales experience and technical experience or training serve in sales engineer positions. The *Handbook* does not indicate that such experience and/or training must be the equivalent of a bachelor's degree in a specific specialty. In addition, the *Handbook* states that employees who have a degree in a science, such as chemistry, or in business with little or no previous sales experience may be called sales engineers.

The *Handbook* states that there are several paths available for sales engineer positions. The *Handbook* indicates that work experience may be sufficient for some positions. In addition, the *Handbook* indicates that baccalaureate degrees in various fields (engineering, science or business) may be adequate for entry into this occupation. We note that, 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" 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 disparate fields, such as engineering, science, and business, would not meet the statutory requirement that the degree be "in the specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(b).

Notably, the *Handbook* also indicates that a general-purpose degree is acceptable for entry into the occupation. As previously mentioned, 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 147. Therefore, the *Handbook's* recognition that a general, non-specialty degree (i.e., a degree in science or business) is sufficient for entry into the occupation suggests that a bachelor's degree in a specific specialty is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a sales engineer 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 proffered position as being a specialty occupation.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

*The requirement of a baccalaureate or higher degree in a specific specialty,
or its equivalent, is common to the industry in parallel
positions among similar organizations*

Next, we will review the record regarding 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 for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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 independent, authoritative source) reports a standard 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. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

The petitioner submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, the petitioner's reliance on the job announcements is misplaced.

In the Form I-129, the petitioner stated that it is software consulting business with 150 employees. The petitioner also reported its gross annual income of \$41,935,439 and net annual income of \$481,364. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511.⁶ This NAICS code is designated for "Custom Computer Programming Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 541511 Custom Computer Programming Services - Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed June 22, 2015).

For the petitioner to establish that an organization is similar under this criterion of the regulations, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

We will briefly note that, without more, the job postings do not appear to be from organizations similar to the petitioner.⁷ When determining whether the petitioner and the organization share the

⁶ 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 viewed June 22, 2015).

⁷ For example, a posting from [REDACTED] indicates that it employs around 2,600 people worldwide in Europe, Asia, North America, and Russia. Some postings are from staffing companies or contain little or no information about the employers. For instance, a posting from [REDACTED] states that it is a "fast growing business within the [REDACTED]" but does not provide further information about the employer. Similarly, the posting from [REDACTED] states it is "a leading global technology services and solutions provider," but does not provide further information about scope of operations or staffing. The petitioner did not supplement the record of proceeding to establish that the advertising organizations are similar to it. Consequently, the record does not contain sufficient information regarding the advertising organizations to

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. 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In addition, some of the advertisements do not appear to be for parallel positions. For example, eight of the job postings submitted require at least 5 years of experience in addition to a degree and one posting requires eight to 12 years of experience. As mentioned, the petitioner designated its proffered position as a wage level I (entry level) on the LCA.⁸ The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Further, some postings do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.⁹ For instance, the following postings state that a degree is

conduct a legitimate comparison of the organizations to the petitioner.

⁸ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

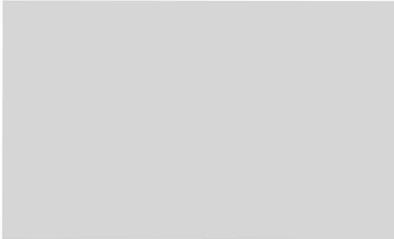
Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, 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.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁹ As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but a degree in a specific specialty that is directly related to the duties of the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

In addition, although a general-purpose bachelor's degree, such as a degree in business, 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*,

necessary, but they do not state that a specific specialty is required or they allow for a general degree, such as business:

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Additionally a posting from  state that a degree is preferred but not required. The remaining job postings submitted state that a degree in a variety of fields is acceptable. These job postings suggest, at best, that a bachelor's degree is required for sales engineer/business development manager positions, but not at in a *specific specialty* (or its equivalent).¹⁰

484 F.3d at 147. 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.

¹⁰ Even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner does not demonstrate what inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary.¹¹ That is, not every deficit of every job posting has been addressed.

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 (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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).

The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

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 did not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of sales engineer/business development manager. Specifically, the record does not demonstrate how the sales engineer/business development manager position described requires the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. The petitioner has not identified a specific specialty or field of study that it believes necessary to perform this position; and as such, the petitioner has not to demonstrate how an established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, are required to perform the duties of this particular proffered position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.¹² Without further evidence, the evidence does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category would

¹¹ The petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

¹² As previously mentioned, the wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) 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.

likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.¹³ 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."¹⁴ The evidence of record does not establish that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty, or its equivalent is not required for the proffered position.

The petitioner claims that the beneficiary is well qualified for the position, and references his qualifications.¹⁵ However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

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, we review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

¹³ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

¹⁴ 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 at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

¹⁵ We note that the petitioner has not identified the qualifications required for the position, but states that the beneficiary is qualified for the position because his education/experience has been evaluated as being equivalent to a U.S. bachelor's degree in business administration. 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 147.

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. While a petitioner may assert that a proffered position requires a specific degree, that statement 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.

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 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.

The petitioner did not address this criterion or submit evidence regarding its hiring and recruitment history for this position.¹⁶ Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

¹⁶ On appeal the petitioner noted that USCIS approved other petitions that had been previously filed by the petitioner for a sales engineer. The director's decision does not indicate whether the service center reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. We are not required to approve 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). 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

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 in a specific specialty, or its equivalent

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The petitioner has not claimed that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Nonetheless, we have reviewed and evaluated the petitioner's statements regarding the proffered position and its business operations in light of this criterion. The relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

We further incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the petitioner's has not demonstrated that its proffered position is one with specialized and complex duties as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.¹⁷

Although the petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the petitioner has not satisfied the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

service center director had approved the nonimmigrant petitions on behalf of the 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).

¹⁷ As previously discussed, 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" and requires a significantly higher wage.

For the reasons related in the preceding discussion, the petitioner has not established 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.¹⁸

III. CONCLUSION AND ORDER

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.

¹⁸ Since the identified basis for denial is dispositive of the petitioner's appeal, we will not address other grounds of ineligibility we observe in the record of proceeding.