



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF H-, INC.

DATE: FEB. 17, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a deli and butcher shop, seeks to temporarily employ the Beneficiary as a “food service manager” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition, and the matter is now before us on appeal. Upon *de novo* review, we will dismiss the appeal.

I. ISSUE

The issue before us is whether the Petitioner has established that the proffered position qualifies as a specialty occupation under the applicable statutory and regulatory provisions.

II. SPECIALTY OCCUPATION

A. Legal Framework

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 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. Fed. 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 individuals 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 individual, 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 or 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. The Proffered Position

The Petitioner seeks to employ the Beneficiary in a part-time "food service manager" position. In the initial petition, the Petitioner stated the following about the proffered position:

We would like to employ [the Beneficiary] once again as Food Service Manager. In this position, [the Beneficiary] manages the front-end operations of our business. [The Beneficiary] is responsible for training new employees, coordinating schedules with other departments, overseeing food service staff, scheduling, and ensuring that all government health and safety regulations are complied with regarding perishable food products.

....

[The Petitioner] requires a bachelor degree in business, hospitality, or a related field for the position. For our business, a Food Service Manager must have professional training in business and hospitality theory along with finance/accounting and business operations. Our manager must possess a foundation of strong business theory that he/she can apply to our operations in order to perform effectively, to achieve and maintain an acceptable profit margin and to manage food service staff.

In a letter submitted in response to the Director's request for evidence, the Petitioner provided the following duties for the proffered duties:

- Inventory control (10%) – manage inventory of meats and perishables daily to comply with government and health and safety regulations, new product orders
- Merchandise presentation (15%) – direct staff in presentation of large showcases of fresh meats, deli, and grocery products

- Customer Service (20%) – address customer concerns regarding requests, product inquiries, complaints and personnel issues
- Overseeing Food Service Staff (30%) – manage staff efficiently and politely during the day and particularly during the busy lunch hours of 11:00 am to 2:00 pm
- Health and Safety Regulations (5%) – appropriate hot/cold temperature requirements, restocking schedules, proper packaging and maintaining a scrupulously clean food presentation
- Training employees (15%) – training of new and existing employees to familiarize them with Petitioner’s products and processes, to explain individual product characteristics and production methods
- Coordinating schedules (5%) – responsible for scheduling sufficient staffing and timing for the different departments including food production, meat butchering, deli sales, lunch services and general retail grocery products

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner stated that the proffered position falls under the occupational category “Food Service Managers.” The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels).<sup>1</sup>

### C. Analysis

On appeal, the Petitioner asserts that the Director erred in concluding that the proffered position did not qualify as a specialty occupation. We reviewed the record in its totality and determined that the Petitioner provided an insufficient explanation of why the duties require an educational background commensurate with a specialty occupation.<sup>2</sup>

---

<sup>1</sup> The “Prevailing Wage Determination Policy Guidance” issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results. 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). 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. *Id.*

<sup>2</sup> The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

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

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 normally the minimum requirement for entry into the particular position.

We recognize 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.<sup>3</sup> We reviewed the subchapter of the *Handbook* entitled "How to Become a Food Service Manager" which states the following:<sup>4</sup>

Most applicants qualify with a high school diploma and several years of work experience in the food service industry as a cook, waiter or waitress, or counter attendant. Some applicants have received additional training at a community college, technical or vocational school, culinary school, or 4-year college.

....

Although a bachelor's degree is not required, some postsecondary education is increasingly preferred for many manager positions, especially at upscale restaurants and hotels. . . .

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Food Service Managers," <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-4> (last visited Feb. 16, 2016).

According to the *Handbook*, a bachelor's degree is not required for positions in this occupational category. It reports that most applicants qualify for these positions with a high school diploma and work experience. The *Handbook* continues by stating that some employers prefer employees to have some postsecondary education, but it does not state that there are any degree requirements for food service manager jobs. The *Handbook's* narrative does not support the Petitioner's assertion that a degree is required for entry into this occupation.

When the *Handbook* does not support a petitioner's assertion that a position meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the Petitioner to provide

---

<sup>3</sup> All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

<sup>4</sup> The occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. However, to satisfy the first criterion, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

(b)(6)

*Matter of H-, Inc.*

persuasive evidence (e.g., documentation from other objective, authoritative sources) that the proffered position qualifies, notwithstanding the absence of the *Handbook's* support on the issue. Whenever more than one authoritative source exists, we will consider and weigh all of the evidence presented. Here the Petitioner has not provided documentation from an authoritative source that supports its assertion that this particular position qualifies as a specialty occupation. 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: (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)).

The Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

In support of this criterion of the regulations, the Petitioner submitted a letter from [REDACTED]. In her letter, [REDACTED] (1) describes the credentials that she asserts qualify her to opine upon the nature of the proffered position and claims that she has "expertise in the analysis of modern business operations"; (2) lists the duties proposed for the Beneficiary; (3) states that the duties she lists require at least a bachelor's degree in business administration, hospitality management, or the equivalent; and (4) claims that these qualifications represent a common standard for parallel positions among similar organizations.

Upon review, we note that [REDACTED] has not provided sufficient information regarding the basis of her claimed expertise on this particular issue, that is, the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how her education, training, skills or experience would translate to expertise regarding the current recruiting and hiring practices of deli/butcher shops with catering

(b)(6)

*Matter of H-, Inc.*

services (as designated by the Petitioner in the Form I-129) or similar organizations for food service managers (or parallel positions). [REDACTED] opinion letter does not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that she has conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the Petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements. Her curriculum vitae does not reflect that she has published any works on the academic/experience requirements for food service managers (or related issues).

Further, while [REDACTED] provides a brief, general description of the Petitioner's business activities, she does not demonstrate in-depth knowledge of its business operations or how the duties of the position would actually be performed in the context of its business enterprise. For instance, there is no evidence that [REDACTED] was in contact with the Petitioner's owner or managers, visited the business, observed the employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job.

With regard to the opinion letter itself, [REDACTED] does not reference or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which she may have consulted in the course of whatever evaluative process she may have followed. Furthermore, she did not support her conclusions by providing copies or citations of any research material used.

Moreover, [REDACTED] does not discuss the duties of the proffered position in any substantive detail. To the contrary, she simply listed the tasks in bullet-point fashion without discussion. Accordingly, the fact that she attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of her opinion.

Importantly, there is also no indication that the Petitioner advised [REDACTED] that it characterized the proffered position as a low, entry-level food services manager position for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). It appears that [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the Petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the position and appropriately determine parallel positions based upon the job duties and responsibilities.

As such, [REDACTED] opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988).

The Petitioner also submitted printouts of several online job announcements. Its reliance on the job announcements, however, is misplaced. More specifically, the primary tasks and responsibilities of

the some of the advertised positions do not appear to be parallel to those of the proffered position. Therefore, these job postings do not appear to be relevant here.

Moreover, contrary to the purpose for which the advertisements were submitted, many of the job postings do not indicate that a bachelor's degree is required. For example, the Petitioner provided advertisements that do not specify any particular academic requirements or that indicate a bachelor's degree is preferred. A "preference" does not indicate that a bachelor's degree is required for the advertised positions.

Notably, some of the job postings do not indicate that a bachelor's degree in a directly related specific specialty (or its equivalent) is required. 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 one in a specific specialty that is directly related to the specialty occupation claimed in the petition.

Further, many of the job postings do not appear to be for similar organizations. 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, the submitted documentation is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the Petitioner.<sup>5</sup> 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.

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.<sup>6</sup> That is, not every deficit of every job posting has been addressed.

For the reasons discussed, 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

---

<sup>5</sup> 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).

<sup>6</sup> 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.

performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

To establish eligibility, the Petitioner must describe the specific duties and responsibilities to be performed by the Beneficiary in the context of its business operations, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner submitted a description of the proffered position, along with information regarding its business operations. The Petitioner designated the proffered position as an entry-level position within the occupational category (by selecting a Level I wage). This designation, when read in combination with the Petitioner's job description and the *Handbook's* account of the requirements for this occupation, further suggests that the particular position is not so complex or unique that the duties can only be performed an individual with bachelor's degree or higher in a specific specialty, or its equivalent. While related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of 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 Petitioner claims that the Beneficiary is well-qualified for the position, and references her qualifications. 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 did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. 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 merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not 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 the 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 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.

Here, the Petitioner did not provide documentation regarding its past recruiting and hiring practices, or information regarding employees who previously held the position. It has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Therefore, it has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(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. In support of this criterion, the Petitioner provided a description of the duties of the proffered position and information regarding its business operations.

While the Petitioner provided a description of the Beneficiary's duties, the description does not establish that the duties 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 also 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 (of the lowest of four assignable wage-levels) relative to others within the occupational category.<sup>7</sup> Without further evidence, the Petitioner has not demonstrated that its proffered position is one with specialized and complex duties as such a position within 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.<sup>8</sup>

---

<sup>7</sup> 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, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, 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 relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

<sup>8</sup> 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 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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 submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

### III. PRIOR PETITIONS

On appeal, the Petitioner references prior petitions that it filed on behalf of the Beneficiary and cites to a 2004 memorandum authored by William R. Yates (Yates memo). Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (Apr. 23, 2004).

It must be noted that the Yates memo specifically states that adjudicators are not bound to approve subsequent petitions seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d). It would be “absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent.” *Sussex Eng’g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). 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. Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214).

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 *Tex. A&M Univ. v. Upchurch*, 99 F. App’x. 556 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. See *La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

The Petitioner suggests that USCIS was required to look at the prior records of proceeding dealing with the separate adjudications of the H-1B petitions filed on behalf of the Beneficiary and provide a reason why deference is not warranted. Copies of these petitions, however, were not included in the record and, therefore, this claim is without merit. If a petitioner wishes to have prior decisions considered by USCIS in its adjudication of a petition, it is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with the applicable regulations. Otherwise, “[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility.” 8 C.F.R. § 103.2(b)(2)(i).

When “any person makes application for a visa or any other document required for entry, or makes application for admission, . . . the burden of proof shall be upon such person to establish that he is

eligible” for such benefit. Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof. Each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of proceeding.<sup>9</sup> Accordingly, the Director was not required to request and obtain a copy of the prior H-1B petitions.

As set forth above, we agree with the Director's conclusion that the evidence of record does not demonstrate that the proffered position qualifies as a specialty occupation. Accordingly, the Director's decision will not be disturbed.

#### IV. CONCLUSION

The Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, has not demonstrated that the proffered position qualifies as a specialty occupation.

The burden is on the Petitioner to show 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.

Cite as *Matter of H-, Inc.*, ID# 15287 (AAO Feb. 17, 2016)

---

<sup>9</sup> USCIS is not required to review previous nonimmigrant petitions when adjudicating extension petitions. Given the various and changing jurisdiction over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, while being impractical and inefficient, would also be a shift in the evidentiary burden in this proceeding from the Petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.