U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25234174

Date: FEB. 16, 2023

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (H-1B)

The Petitioner seeks to temporarily employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(B), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the Petitioner's proffered position was not a specialty occupation under section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)-(*4*) and that the Beneficiary was unqualified to perform the duties of the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(C). The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. SPECIALTY OCCUPATION

The Petitioner filed its petition to seek to employ the Beneficiary as a Data Analyst and it submitted a labor condition application (LCA) certified for a position in the Business Intelligence Analyst occupational category.[1] The Director may request additional evidence when determining eligibility for the requested benefit. 8 C.F.R. § 103.2(b)(8). In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1).

[1] After the filing of the petition, the Department of Labor's Bureau of Labor Statistics (BLS) advised that the Business Intelligence Analyst entry contained at Standard Occupational Code (SOC) 15-1199.08 had been discontinued. BLS replaced the Business Intelligence Analyst entry with the Data Scientist entry described at SOC 15-2051.01.

Upon review of the record in its totality, we conclude that the Petitioner has not established that the proffered position qualifies as a specialty occupation. The record does not sufficiently establish the substantive nature of the proffered position, which precludes us from determining that the proffered position qualifies as a specialty occupation under sections 101(a)(15)(H)(i)(b), 214(i)(1) of the Act, 8 C.F.R. § 214.2(h)(4)(i)(A)(1), 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A). The record contains material inconsistencies in documents and materials submitted with the petition, RFE, and appeal that do not describe the position's duties with sufficient and consistent detail. Inconsistently stated degree requirements and supporting documentation likewise do not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.[2]

A. Legal Framework

The Act at Section 214(i)(1), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires: (A) the 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) adds a non-exhaustive list of fields of endeavor to the statutory definition. And the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the proffered position must also meet one of the following criteria to qualify as a specialty occupation:

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.

The statute and regulations must be read together to make sure the proffered position meets the definition of a specialty occupation. *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 statue 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). Considering the statute and the regulations separately could lead to scenarios where a petitioner satisfies a regulatory factor but not the definition of specialty occupation contained in the statute. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). The regulatory criteria read together with the statute gives effect to the statutory intent. *See* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991).

So we construe the term "degree" in 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 supporting the statutory definition of specialty occupation. *See Royal Siam Corp. v. Chertoff*,

[2] Although we may not discuss every document submitted, we have reviewed and considered each one.

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"). USCIS' application of this standard has resulted in the orderly approval of H-1B petitions for engineers, certified public accountants, information technology professionals, and other occupations commensurate with what Congress intended when it created the H-1B category.

And job title or broad occupational category alone does not determine whether a particular job is a specialty occupation under the regulations and statute. The nature of a petitioner's business operations along with the specific duties of the proffered job are also considered. We must evaluate the employment of the individual and determine whether the position qualifies as a specialty occupation. *See Defensor*, 201 F.3d 384. So a petitioner's self-imposed requirements are not as critical as whether the nature of the position the petitioner offers requires the application of a theoretical and practical body of knowledge gained after earning the required baccalaureate or higher degree in the specific specialty required to accomplish the duties of the job.

B. Analysis

The vague and inconsistent manner in which the Petitioner has described the proffered position and its job duties, combined with the evolving nature of the position's minimum stated entry requirements, render us unable to ascertain the position's substantive nature. And if we cannot ascertain the position's actual, substantive nature, then we cannot determine whether it satisfies at least one of the specialty-occupation criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)-(*4*). We therefore agree with the Director that the Petitioner has not established that the position is a specialty occupation.

1. Vague and Inconsistent Job Duties

The Petitioner, founded in 2018, describes itself as a three-employee provider of services for client information technology (IT) organizations. This description does not shed any meaningful light on the Petitioner's business and whether it requires the services of an individual performing the duties of a specialty occupation. The Petitioner emphasizes evidence of its tax documents, invoices for services, state registration, and corporate governance documents. The Petitioner also submits six pictures of its principal place of business. The tax documents and invoices indicate a nominal level of income which tends to reflect that the Petitioner may be conducting some minimal business. However, it is not clear what the nature of the business operations is. The Petitioner's state registration and corporate governance documents are similarly unable to illuminate what specific business the Petitioner operates and the services it offers. We note that the Petitioner's principal place of business is a residential address in Northern Virginia. The submitted pictures appear to reflect a temporary workplace with easily removable signage and furniture. Whilst it can be inferred from the record and other materials that the Petitioner's business may have some connection to information technology and staff augmentation, it is wholly unclear what the nature of the service provided by the Petitioner to its clients is. When it is unclear as to what exactly the Petitioner does, it is equally unclear whether work of a specialty nature is required to accomplish the Petitioner's services for client IT organizations.

If we are unable to assess, categorize, and comprehend the Petitioner's business, we cannot conclusively determine the type and complexity of the work described in the proffered job duties. And this is made especially more difficult when the job duties provided are vague, as is the case here. This

vagueness obscures whether the proffered job is a specialty occupation. The Director requested additional evidence because the Petitioner's duties were generalized and did not provide sufficient information to assess what the actual occupation is. In response to the RFE, the Petitioner provided substantially the same job description but removed three points and added the following:

- Channels such as email, push message, direct mail communication for each treatment segment of the campaign.
- Building data visualizations using SQL and Tableau for business KPIs that can reduce manual reporting.
- Receiving, cleaning and prepping data from clients using Python, SQL, Excel to help data scientists build marketing mix models that lifted ROI by 4 basis points.

These additions do not add the specificity we require to evaluate whether the proffered job's duties describe the work of a specialty occupation nature.

In an attempt to establish that the proffered position falls within the Data Scientist category of the Occupational Information Network (O*NET), the Petitioner submits a chart on appeal attempting to favorably compare an expanded version of the Petitioner's original duties with the Data Scientist O*NET category.[3] Simply completing a table and expanding the original job description with buzz words and technical jargon from the O*NET, which the Petitioner does liberally throughout the job description provided on appeal, does not explain how the job relates to or comprises duties that fall within the selected O*NET category. In one specific example, the Petitioner's original job description as listed in the initial petition and RFE described a duty wherein the Data Analyst would "[p]erform segmentation analytics for each campaign using database technologies present both on premise (such as SQL, Teradata, Unix) and on Cloud platform using AWS (Amazon Web Services) technologies and Big Data Technologies, such as Spark, Cassandra, Python and Redshift." This duty morphed at appeal to require the Data Analyst to "[p]rovide technical support and perform segmentation analytics for each campaign using database technologies present both on premise (such as SQL, Teradata, UNIX) and on Cloud Platform using AWS (Amazon Web Services) technologies and Big Data Technologies, such as Spark, Cassandra and Redshift" so that a correlation could be drawn between the expanded job duties and the O*NET job description. The O*NET job description states in pertinent part "[p]rovide technical support for existing reports, dashboards or other tools." Adding "provide technical support" into the original job duty does not convincingly correlate the duty to the occupational classification contained in O*NET. The inconsistent characterization of the proffered job's duties raises questions about the substantive nature of the proffered job and therefore whether it is a specialty occupation that satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Our doubts about the accuracy of the job duties go directly to the heart of whether the proffered job is a specialty occupation. And any evidence rooted in the job duties is considerably weaker as a result. The Petitioner provided a position evaluation from [redacted] concluding that the proffered Data Analyst position is a specialty occupation requiring the application of a body of theoretical knowledge in the computer field. On appeal, the Petitioner provides a position evaluation from [redacted] Professor in the Department of Data Analytics and Information Systems at [redacted] University's

[3] *See* O*NET Summary Report for "Data Scientist," SOC 15-2051.01 at https://www.onetonline.org/link/summary/15-2051.00.

[redacted] School of Business which also concludes that the Petitioner's proffered position is a specialty occupation.[4] Both writers' opinions are based on the nonspecific job duties provided by the Petitioner. In the case of [redacted] opinion, new job duties not mentioned or contained anywhere else in the record are introduced. [redacted] opinion is based on revised job duties first introduced to the record by the Petitioner in the appeal. the Petitioner's inconsistent job descriptions scattered throughout the record do not provide an accurate description of the proffered job. Opinion statements based on these various job descriptions are therefore unreliable. We may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). But an opinion statement is afforded less weight by us where there is cause to question or doubt the opinion, or if it is not in accord with other information in the record as is the case here.

The Petitioner also submits evidence of work product in the appeal to support their description of the proffered job and their claim it comprises a specialty occupation. The examples appear to be screen shots of "dashboards" and "scripts." The screenshots without more are not instructive to us. The Petitioner has not explained how specialized knowledge is used when working with "dashboards" and "scripts." And the screenshots raise questions about the true nature of the job. The term "scripts" for example can relate to other jobs that are in the computer and software sphere, not necessarily just Data Scientists as selected by the Petitioner.[5]

2. Inconsistent Degree Requirements and Supporting Documentation

The Petitioner's inconsistent expression of the proffered position's minimum educational requirements raises yet more questions as to the position's substantive nature. In the initial petition, the sole indication of the educational requirements for the proffered position is a letter from a midvendor for the engagement the Petitioner seeks to fill with the proffered position. The midvendor states that the requirements of the position are a "Bachelor's degree, or higher, in Computer Science, Computer Engineering, Computer Information Systems, Computer Application, Data Science, or a related field of study in Engineering or Science." In its RFE response, the Petitioner supplements the midvendor letter with a notarized statement within which they describe the minimum educational requirements to be "a Bachelor's in Computer Science or Information Science or Civil Engineering or any related Engineering." Later in the same document the Petitioner omits the acceptability of the "Civil Engineering" field and the qualifier of a "related Engineering" field and states the minimum requirements are at least a "Bachelors in Computer Science or Information Science or Engineering." On appeal, the Petitioner asks us to ignore the record of proceedings that came before and states that they have "always required that applicants have at a minimum a Bachelor's degree in Computer Science or a related field."

In lockstep with their evolving requirements, the Petitioner's supporting documents and their contents meld and change. The educational requirements for the position contained at the midvendor letter submitted initially and with the RFE change in the midvendor letter submitted at appeal without any explanation other than the vague reference to the mistakes of prior counsel contained in the Petitioner's

[4] [redacted] also shared their opinion about the Beneficiary's qualification in their respective opinions, as discussed below.

[5] *See, e.g.*, Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Programmers (Sept. 8, 2022), https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm.

and Beneficiary's statements. The Petitioner seeks to replace a brief letter submitted before the appeal from the end client describing the end client's use of contractors for services with a printout of an email from an individual purporting to be an employee of the end client to the Beneficiary describing duties and requirements at appeal.

None of this is material, relevant, or probative evidence of the Petitioner's provision of a specialty occupation. Both the statutory and regulatory definitions of specialty occupation should be read in context to require attainment of a bachelor's degree or higher in a specific specialty. *See Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). A position is a "specialty occupation" under the statute and regulations if it involves a "body of highly specialized knowledge" attained after completing a bachelor's degree or higher in a "specific specialty." *Sagarwala v. Cissna*, 387 F.Supp.3d 56, 65 (D.D.C. 2019). The everchanging degree requirements as expressed by the Petitioner in the record of proceedings before us cannot comprise a specialty because their fluid nature leads us to question what the true requirements are. The varied expressions of what fields of study the Petitioner would accept to comprise a body of specialized knowledge to perform the duties of the position introduce a doubt as to whether the Petitioner would accept a bachelor's degree in any generalized field of study to perform the duties of the position. And if we do not know what the specialty is, we cannot conclude that the educational requirements would provide an individual with the "body of highly specialized knowledge" required to perform the duties of a specialty occupation. So this excludes the Petitioner's proffered position from consideration as a specialty occupation. The Petitioner's exercise of flexibility in its minimum educational requirements and preparation of supporting documentation does not convincingly demonstrate that their proffered job is a specialty occupation.

In summary, we are unable to ascertain the proffered position's substantive nature due to the deficiencies outlined above. And since we cannot determine its substantive nature, we cannot conclude whether the position qualifies as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)-(*4*). The Petitioner has therefore not overcome this ground of the Director's decision.

II. BENEFICIARY QUALIFICATIONS

On appeal, the Petitioner asserts that the Beneficiary is qualified to perform the duties of the position. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. *Cf. Matter of Michael Herts Assocs.,* 19 I&N Dec. 558, 56 (Comm'r 1988). As discussed above, the Petitioner has not established that the proffered job's duties are of the substantive nature of a specialty occupation requiring the application of a theoretical and practical body of highly specialized knowledge attained after earning a bachelor's degree or higher or its equivalent in the specific specialty minimally mandated for entry into position. *See* section 291 of the Act, 8 U.S.C. § 1361. So, we do not have to address the Beneficiary's qualifications further.

But even if the Petitioner had established that its proffered job is a specialty occupation, we would nonetheless likely conclude it had not provided material, relevant, or probative evidence of the Beneficiary's qualifications to perform the duties of a specialty occupation.

A. Legal Framework

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an individual applying for classification as an H-1B nonimmigrant worker must possess a license if it is required for the occupation, have earned a bachelor's or higher degree in a specific specialty related to the job duties, or have earned the equivalent of a bachelor's or higher degree in a specific specialty related to the job duties based on having experiences in the specialty equivalent to the completion of the degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The supplementing regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C) restate the statute and require meeting one of four criteria to qualify to perform services in a specialty occupation:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
(3) Hold an unrestricted state license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
(4) have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) provides five methods by which a petitioner can satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*):

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
(2) The result of recognized college-level equivalency examinations or special credit programs such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training and/or work experiences in areas related to the specialty and that the noncitizen has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

B. Unqualified Beneficiary

The Beneficiary earned a U.S. master of engineering degree in engineering management from [redacted] Institute of Technology in [redacted] NJ. They also earned a bachelor of technology in civil engineering from [redacted] University of Information Technology in [redacted] India. We agree with the Director that the Petitioner has not established the Beneficiary's qualifications for the proffered specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*)-(*3*). The Beneficiary does not hold a United States bachelor's or higher degree required by the specialty occupation from an accredited college or university. They likewise do not hold a foreign degree determined to be equivalent to a United States bachelor's or higher degree required for the specialty occupation from an accredited college or university. The Petitioner has also not demonstrated that the Beneficiary holds an unrestricted State license, registration, or certification which authorizes them to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

When the occupation does not require a license and the Beneficiary does not have the required U.S. degree or its foreign degree equivalent in the field required for entry to the specialty occupation, our analysis revolves around whether the Petitioner established that the Beneficiary possesses the education, specialized training and/or progressively responsible experience in the specialty equivalent to the completion of the required U.S. degree or its foreign degree equivalent and has progressively responsible experience in job position in the specialty constituting a recognition of expertise as required by 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*).

The Director based their decision on the insufficiency of the evaluations of the Beneficiary's education and work experience provided by the Petitioner. As we have stated before, we may exercise our discretion and consider opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l*, 19 I&N Dec. at 795. Most relevantly, the record of proceeding contains:

- A credential evaluation report submitted with the RFE response from [redacted] Professor at the Universidad [redacted] concluding that the Beneficiary's education and work experience is equivalent to a U.S. bachelor of science with a concentration in data analysis;
- An expert opinion and educational evaluation submitted with the RFE response from [redacted] Professor at the Universidad [redacted] concluding that the Beneficiary's education and work experience is equivalent to a U.S. bachelor of science with a concentration in data analysis;
- An evaluation submitted with the RFE response by [redacted] a self-identified "consultant and subject matter expert." [redacted] justifies their capacity to render their opinion based on their "extensive and varied past positions," none of which is specified in their biography nor is evidenced in the record. They conclude that the Beneficiary has the qualifications to perform the duties of a specialty occupation, but do not identify what the field of specialty required is.
- An evaluation submitted with the appeal by [redacted] a college professor at [redacted] University, concluding that the Beneficiary's education, training and/or experience was equivalent to a United States baccalaureate degree in computer information systems; and
- Letters from the Beneficiary's former employers.

The evaluations submitted by the Petitioner are also accompanied by either the writer's curriculum vitae; a self-authored statement of "expertise," letter(s) from their employing institutions attesting to their authorization to grant college-level credit or training and/or work experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training/work experience, and/or documentation either from an internal policy document or printed from publicly available internet sources describing the institution's policy for granting academic credit.

Each evaluation submitted by the Petitioner at each stage of this case introduces questions and doubts about the Beneficiary's qualifications and does not fit into the requirements of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*) requires that an evaluation to document eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) be issued by an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit. Both Professor and Professor are authorized to provide credit only at the Universidad This is not an accredited U.S. institution of higher education. As the credits that Professor and/or Professor are authorized to provide would be applied towards a degree from a non-U.S. institution of higher education unaccredited in the United States, it follows that they cannot evaluate the Beneficiary's education and work experience to equate to a bachelor's or higher degree from an accredited U.S. institution of higher education.

Nor is evaluation probative to the question of the Beneficiary's qualifications. They refer to "extensive and varied past positions" to justify their opinion. However, there is no evidence in the record that they are currently an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited U.S. college or university which has a program for granting such credit based on an individual's training and/or work experience.

opinion is accompanied by two letters from officials at the writer's employer, University, attesting to authority to issue credit for relevant work experience where appropriate. The letters are identical in every way other than the date, letterhead, and signature block. Most specifically, the content of the submitted letters conflicts with public information from University which makes no provision for credit to be authorized based on work experience. Per their published policy University only awards credit for academic work completed at other academic institutions and not for work experience or training. Examples of sources listed in the policy from which University may accept credit are accredited institutions, foreign universities, U.S. military credit for approved job and educational experience, and miscellaneous sources such as internships and nontraditional learning experiences. Work experience is not mentioned or provided for. Moreover, the policy states that the credit may or may not apply for the purposes of graduation from University, regardless of the number of credits transferred. This conflict raises doubt about whether the writer is authorized to grant credit based on training and/or work experience. The record of proceeding does not contain material, relevant, or probative evidence addressing this discrepancy. opinion, like those of and Professors does not satisfy the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*) to establish the Beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). Opinion statements have less weight where there is cause to question or doubt the opinion, or if it is not in accord with other information in the record as is the case here.

And there is insufficient evidence in the record to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*), (*3*), or (*4*). So we will turn to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) which grants USCIS the authority to make our own determination on the Beneficiary's qualifications. Specifically, we can evaluate that an individual has earned the equivalent of the degree required by the specialty occupation through a combination of education, specialized training and/or work experiences in areas related to the specialty and that the noncitizen has achieved recognition of expertise in the specialty occupation as a result of such training and experience. We may determine equivalency by accepting three years of specialized training and or work experience demonstrated by the individual for each year of college level training the noncitizen lacks. Additionally, the noncitizen must demonstrate recognition of expertise by one of the following:

> (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
>
> (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
>
> (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
>
> (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
>
> (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record is not sufficient to satisfy 8 C.F.R. § 214.2(h)(4))(iii)(D)(*5*) either. The record of proceedings provides insufficient work-experience evidence for us to reasonably conclude that the Petitioner has satisfied any one of the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*)(*i*)-(*v*).[6] So we cannot conclude that the evidence of the Beneficiary's work experience qualifies for recognition of any years of college-level credit by correct application of the H-1B beneficiary-qualification regulations' "three-for-one" standard. Based upon the findings articulated above, we conclude that the totality of the evidence regarding the Beneficiary's foreign education and work experience does not satisfy any criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (h)(4)(iii)(D).

[6] Though acknowledged, the letters regarding the Beneficiary's work experience lack the detail necessary to meet these requirements.

III. INEFFECTIVE ASSISTANCE OF PRIOR COUNSEL[7]

The Petitioner claims that the prior proceedings in this matter were negatively influenced by the ineffective assistance of their previous counsel. In support of their claim of ineffective assistance, the Petitioner provides us with sworn statements from the Petitioner's managing partner and the Beneficiary. Both make nonspecific allegations regarding mistakes of inconsistency and accuracy by their previous counsel.

We are not convinced by these claims of ineffective assistance of counsel. We examine claims of ineffective assistance of counsel under the three prong procedural requirements set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). To demonstrate a claim of ineffective assistance of counsel, a petitioner or applicant must typically demonstrate:

- That the claim is supported by an affidavit of the allegedly aggrieved party setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;
- That prior counsel was informed of the allegations against them and be given an opportunity to respond to the questions of their integrity and competence; and
- That the appeal or motion reflects whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities and, if not, why not.

The above are simply minimum evidentiary requirements designed to provide a basis for us to evaluate whether the alleged ineffective assistance rendered the proceeding "fundamentally unfair" and whether the parties were "prejudiced by [the former] representative's performance." *Id.* at 638.

The Petitioner does not demonstrate compliance with these minimal evidentiary requirements under the *Lozada* framework. The record does not contain evidence of notice and opportunity to respond to the prior counsel who allegedly provided ineffective assistance. The record does not reflect whether the Petitioner filed a complaint with appropriate disciplinary authorities with respect to the prior counsel's ineffective assistance. The sole allegations of ineffective assistance present in the record

[7] On appeal, the Petitioner provides new information, documentation, and explanation as part of an expanded set of the proffered job's duties. The Petitioner also provides new educational requirements minimally required for entry into the proffered job, revised supporting documents regarding the proffered job opportunity at the third-party worksite, and a new evaluation of the Beneficiary's education and work experience at appeal. The Petitioner attempts to justify the submission of new information and explanation by claiming that the prior proceedings in this matter were negatively influenced by the ineffective assistance of their previous counsel, discussed above. Multiple precedent decisions address whether newly submitted evidence on appeal will be considered. *See Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996). We note that the Director requested evidence to evaluate whether the nature of the proffered job was a specialty occupation and whether the Beneficiary had the qualifications to perform proffered job duties comprising a specialty occupation. But the Petitioner did not submit at that time what they provided with the appeal. A petitioner may not make material changes to a petition, to its claims, or to the evidence in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 2I&N Dec. 169, 175 (Assoc. Comm'r 1998). We have chosen to exercise our discretion in this matter and evaluate the new information, documentation, and explanation provided by the Petitioner for the first time on appeal. But we have concluded that it is not material, relevant, or probative to the threshold questions of whether the Petitioner's proffered job is a specialty occupation and whether the Beneficiary has the minimum qualifications to function in a specialty occupation for the reasons specified in this decision.

are contained in the Petitioner and Beneficiary's respective sworn statements. Neither statement provides any detail to support the claim of ineffective assistance of counsel other than an allegation of mistakes and inconsistencies without any specificity.

As such, the Petitioner has not satisfied the procedural requirements of *Matter of Lozada* and the claim of ineffective assistance of counsel is insufficient.

IV. CONCLUSION

It is the Petitioner's burden to provide competent and credible evidence of the nature of its proffered specialty occupation and the Beneficiary's qualification for the proffered position. The Petitioner has not met their burden for the reasons set forth above.

ORDER: The appeal is dismissed.