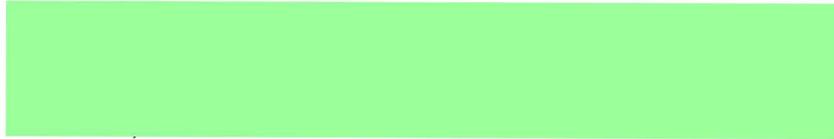




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 30 2013** Office: VERMONT SERVICE CENTER File:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner, through counsel, submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on November 2, 2011. On the Form I-129 visa petition, the petitioner describes itself as a home health care service with eight employees, established in 2010. In order to employ the beneficiary in a position to which it assigned the job title, "Home Care Clinical Manager," the petitioner seeks to classify her 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 on October 19, 2012, on two separate and independent grounds, namely, that the petitioner failed to establish (1) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) that the beneficiary would be qualified to perform the services of a position in the Medical and Health Services occupational group if such position qualified as a specialty occupation.

The petitioner, through counsel, submitted an appeal of the decision on November 20, 2012. On appeal, counsel for the petitioner contends that the director's bases for denial of the petition were erroneous. In support of this contention, counsel for the petitioner submits a brief and additional evidence.

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

For the reasons that will be discussed below, the AAO agrees with the director's decision that the petitioner has not established that the proffered position qualifies as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

However, the AAO hereby withdraws the beneficiary-qualification issue that the director's decision specified as an additional basis for the dismissal. This is because a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.¹

¹ The petitioner should, however, note the AAO's comments, near the end of this decision, with regard to the evidentiary deficiencies in the record with regard to establishing the beneficiary's credentials. As the AAO there states, the evidence in the record of proceeding fails to establish that the beneficiary would qualify to serve in any H-B specialty occupation position in accordance with the H-1B beneficiary qualification regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The AAO also there notes an issue with regard to the beneficiary's licensure status.

(b)(6)

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

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position to which it assigned the job title "Home Care Clinical Manager," to work on a full-time basis at a salary of \$48,693 per year. In the Form I-129, the petitioner described the proposed duties of the proffered position, as follows:

Clinical Manager manages, supervises, coordinates, evaluates, and develops client care teams to ensure quality care delivery and appropriate case management. Please see enclosed employment letter for detail.

The AAO notes that the Labor Condition Application (LCA) which the petitioner submitted in support of this H-1B petition had been certified for a job opportunity which would fall within the occupational classification of Medical and Health Services Managers – SOC (ONET/OES Code) 11-9111.00 – and for which the appropriate prevailing-wage level would be Level I (which is the lowest of the four wage-levels assignable to a position.)

In its support letter, dated October 21, 2011, the petitioner provided the following descriptions of the proffered position:

In this position, [the beneficiary] will manage, supervise, coordinate, evaluate, and develop client care teams to ensure quality care delivery and appropriate case management within the home health scope of services and policies; State, federal, and local laws.

The Clinical Manager reports to the Director and/or Department Head and is in charge of coordinating both complex home health services and clinical services as required to meet the particularized needs of the client. The position is responsible for working with other medical disciplines (i.e., PT, OT, ST, Dictation) to ensure synchronized services and that the client's needs are identified through the assessment process and addressed through the implementation of the Plan of Care and reevaluation and supervisory process.

The Clinical Manager's responsibilities include contributing to [the petitioner's] strategic planning activities; playing a role in the planning and development of the overall agency structure; developing and enforcing clinical and administrative policies and procedures; and generating the annual operating and capital budgets. This position also reviews agency policies and procedures and revises as needed. In this capacity, the nurse identifies and participates in agency performance improvement activities and stays informed about changes in the field of nursing and home health care, sharing information with appropriate organization personnel. Additional responsibilities include, but are not limited to, assisting with marketing, public relations, and discharge planning by participating in departmental meetings, assisting quality improvement teams with data collection for the Quality Improvement Plan established by the agency and serves on the Professional Advisory Board.

In addition, the Clinical Manager assists in the development of organization goals, administers agency policies and procedures and provides information to be used for statistics, reports and records for purposes of evaluation and reporting of organization activities. In addition, she will assist the Director with assessing the competency of clinical staff to promote quality, continuity and safety of a client's care while providing leadership to the clinical management staff. Additional responsibilities include ensuring accuracy, completeness, and timeliness of clinical documentation in accordance with [the petitioner's] policies and procedures, regulatory requirements, and industry standards, providing educational programs and information regarding appropriate documentation practices.

The Clinical Manager must be able to utilize the theoretical foundation she received through her Bachelor of Nursing studies so that she can be in a position to educate and coach nursing personnel to include CNA, LVN, and RN's, as directed by the Director of Nursing and/or Department Head. She will provide

leadership to her teams and support staff in identifying agency/client needs and opportunities for quality improvement and onsite supervision per agency policy and as needed to determine staff competency and respond to educational and developmental needs.

Due to the highly specialized professional nature of the Clinical Manager, the minimum education required for this position with our institution is a Bachelor of Science Degree in Nursing. The Clinical Manager position requires the theoretical and practical application specialized, bachelor's level coursework, covering scientific and behavioral practices necessary to provide stable care throughout a patient's period of treatment. This includes the higher level administrative aspects required in coordinating patient care, as well as a comprehensive ability to assess patient health care problems and needs on a case-by-case basis so that the Clinical Manager can accurately direct teams of nurses. A Bachelor's in Nursing provides broad competence as a provider of care, coordinator of care, and manager of personnel through relevant coursework including the study of research methods, leadership, and nursing informatics in the specific clinical area of nursing. This position requires an individual with an advanced background and solid foundation in all of those areas. The Clinical Manager is in a position to educate and coach nursing personnel to include CNA, LVN, and RN's, and therefore in addition to the strict educational requirements, she must be currently licensed in the State of Texas, or part of a compact state license, or have a valid temporary RN license for the State of Texas while waiting to receive the permanent license.

The petitioner stated that "the minimum education required for [the proffered] position with our institution is a Bachelor of Science Degree in Nursing."

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on March 9, 2012. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary and that the beneficiary qualified for a specialty occupation position. The director outlined the specific evidence to be submitted.

On May 25, 2012, counsel for the petitioner responded to the RFE and submitted a response letter and additional evidence.

In its response to the RFE, the petitioner provided, *inter alia*, a more detailed job description and a chart entitled, "Clinical Manager Special Occupation Chart." The copy of that chart which follows is complete except for the contents of one column. That column's contents will however be discussed.

Here follows that copy of that "Clinical Manager Special Occupation Chart."

<u>Job Duty requiring Bachelor of Science in Nursing (BSN)</u>	<u>How is a Baccalaureate degree essential for the satisfactory execution of this proffered duty.²</u>	<u>Why an RN without a BSN could not do this duty.</u>	<u>Approximate % of time</u>
Participates in the organization's strategic planning activities.		Statistics is not a course of study engaged in at the RN level. RN's without a BSN lack this analytical skill set.	2%
Assists in the planning and development of agency structure, clinical and administrative policies and procedures, and the annual operating and capital budgets. Identifies and participates in agency performance improvement activities.		<i>Statistics</i> is not a course of study engaged in at the RN level. RN's without a BSN lack this analytical skill set. <i>Composition II, Health Promotion in Professional Nursing, Professional Nursing in the Community, Contemporary Issues in Professional Nursing, and Leadership in Nursing</i> are not required courses for RN and therefore RN's without BSN lack the leadership and analytical skills.	2%
Stays informed about changes in the field of nursing and home health care. Shares information with appropriate organization personnel.		These courses of study are not engaged in at the RN level. RN's without a BSN lack the needed management, leadership and analytical skills for this duty.	2%

² The AAO reviewed the information contained in this column but, for the sake of adjudicative economy, will not restate it here. As will be seen, however, the AAO will address the evidentiary value of those comments.

<p>Participates in/on a variety of meetings, committees, and/or other related groups in order to receive and convey information. Assists with marketing, public relations, and discharge planning by participating in departmental meetings.</p>			
<p>Assists quality improvement teams with data collection for the Quality Improvement Plan established by the agency.</p>		<p>Bachelor's level coursework includes courses in Statistics, which is the study of the collection, organization, and interpretation of data. Being able to understand and use statistical data is necessary to long and short term strategic planning.</p>	<p>2%</p>
<p>Serves on the Professional Advisory Board.</p>		<p>These courses of study are not engaged in at the RN level. RN's without a BSN lack the needed management, leadership and analytical skills for this duty.</p>	<p>2%</p>
<p>Provides human resource management to achieve quality services and positive employee relations.</p> <p>Interprets and enforces human resource policies and procedures in a fair and consistent manner.</p>		<p>These courses of study are not engaged in at the RN level. RN's without a BSN lack the needed management, leadership and analytical skills for this duty.</p>	<p>15%</p>

Assists in the development of organizational goals. Administers agency policies and procedures.		These courses of study are not engaged in at the RN level. RN's without a BSN lack the needed management, leadership and analytical skills for this duty.	2%
Provide[s] information to be used for statistics, reports and records for purposes of evaluation and reporting of organization activities.		Statistics is not a course of study engaged in at the RN level. RN's without a BSN lack this analytical skill set.	2%
Assists the Director of Nursing and/or Department Head with assessing the competency of clinical staff to promote quality, continuity and safety of a client's care.		Associate level coursework does not require this during it's [sic] coursework.	5%
Ensure proper maintenance of clinical records in compliance with local, state and federal laws and in accordance with agency policies and procedures, regulatory requirements, and industry standards.		Associate degree nurses do not have the core foundation on this matter because it is not included in the Associate level RN coursework.	3%
Provides education and training related to clinical practice issues [and] appropriate documentation practices[.]		Principles of Education is not on the curriculum on the associate level. Therefore[,] RN on this program lacks the necessary skills.	2%

<p>Supervises, educates and coaches other nursing personnel to include CNA, LVN, and other RN's, as directed by the Director of Nursing and/or Department Head. Assigns and directs employees to completion of duties.</p>		<p>Delegation and supervision is not part of the program on an Associate level.</p>	<p>15%</p>
<p>Provides staff direction through general meetings, timely personnel evaluations, and identified performance expectations.</p>		<p>Communication and directions are both part of the BSN and Associate degree. But however, [sic] BSN level have the capacity to lead and possess the drive people [sic] to organization as they are being trained in 4 years in directing and supervision[.]</p>	<p>10%</p>
<p>Reviews monthly productivity information of team members.</p>		<p>Statistics is not a course of study engaged in at the RN level. RN's without a BSN lack this analytical skill set.</p>	<p>5%</p>
<p>Provides leadership to team and support staff in identifying agency/client needs and opportunities for quality improvement. Provides onsite supervision per agency policy and as needed to determine staff competency and respond to educational and developmental</p>		<p>RN level coursework does not include courses on the clinical staff appraisal on [sic] their course[.]</p>	<p>15%</p>

needs.			
Documents all disciplinary actions in accordance with human resource policies and legal guidelines.		Associate degree nurses do not have the core foundation on this matter because this is not included [in] coursework.	2%
Monitors employee turnover, overtime, and absenteeism. Takes appropriate actions to address problems/issues.		Statistics is not a course of study engaged in at the RN level. RN's without a BSN lack this analytical skill set.	10%
Provide[s] back-up assistance to other staff and supervisors.		Taken [sic] into consideration on [sic] .the length of the course, Associate degree RN lack this program to experience the rotation that would allow them to be assigned at all position[s] of the nursing profession.	1%
Participates in orientation of personnel as needed.		RN on associate degree is not engaged into the program curriculum.	1%
Promotes personal safety and a safe environment for clients and coworkers.		Quality assurance in healthcare is not part of the training and curriculum on [sic] amongst associate degree RN's.	1%
Assesses safety of environment and takes the initiative to help prevent accidents and promote safety.		Considering the length of time of study, the training is not rigid compared to that of BSN RN holders.	1%

At this juncture, the AAO will state what it regards as a critical and decisive finding with regard to the weight of the petitioner's submissions with regard to the nature of the proposed duties and the educational requirements of the proffered position that those duties comprise. The AAO's review of all of the descriptive statements and documents submitted into this record leads the AAO to conclude that, while the petitioner has ascribed a variety of generalized functions to the

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proffered position, the petitioner has failed to provide specific and substantial evidence establishing that actual performance of the proffered position would require the beneficiary to employ particular theoretical and practical applications of highly specialized knowledge in nursing (or any other specialty, for that matter) that would require at least a bachelor's degree, or the equivalent, in a specific specialty.

The AAO finds, for instance, that the entries in the "Job Duty [R]equiring Bachelor of Science in Nursing" column of the above-excerpted chart identify only generalized functions that the petitioner does not illuminate by specific examples of associated concrete, substantive work that would support the petitioner's claims that attainment of a Bachelor's Degree in Nursing is "essential" for the proffered position. As representative examples, the AAO points to the following duty descriptions that illustrate the relatively abstract and generalized level of the claims that the petitioner asserts for the need for a BSN: "Participates in the organization's strategic planning activities" (which activities the petitioner does not delineate); "Assists in planning and development of agency structure, clinical and administrative policies and procedures, and the annual operating and capital budgets" (regarding which activities the petitioner provides no substantive evidence, either about their scope and range, or about the role that its Home Health Care Clinical Manager would play in them, or about any aspect of them that would elevate them to a level that would require the beneficiary to have attained at least a BSN); "Serves on the Professional Advisory Board" (a function about which the petitioner provides no substantive information); and "Reviews monthly productivity information of team members" (regarding which function the petitioner also provides no substantive information).

The AAO acknowledges the petitioner's contentions that performance of the proffered position requires certain coursework and knowledge attainable only by achieving a Bachelor's Degree in Nursing (BSN). However, the AAO finds that the record of proceeding provides neither substantial, concrete, and specific instances of work to be performed nor documentary evidence substantiating such instances as requiring an education above that required for licensure to work as a Registered Nurse. The AAO further finds that neither the aforementioned chart nor any other evidence in the record of proceeding substantiates that such generalized and relatively abstract duty descriptions confirm the need for at least a BSN. 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)).

Further, the AAO observes that the most critical element for establishing the level of whatever nursing education would be required for the proffered position is the extent, if any, to which the descriptions of the proposed duties, and any supportive evidence, establish both the substantive nature of the actual work that would be performed and the accuracy of the petitioner's assertions as to the educational credentials that such work would require. Here, however, the AAO finds that, to the extent that they are described, the proposed duties do not relate sufficiently specific and substantive information to establish that their performance exceeds the capabilities of a Registered Nurse whose license was granted on the basis of an Associate's Degree in Nursing rather than a BSN.

Additionally, as the AAO will now explain, it finds that neither the assertions in the second column of the above-copied chart (under the heading "How is a Baccalaureate degree essential

for the satisfactory execution of this proffered duty”) nor in the third column (under the heading “Why an RN without a BSN could not do this duty”) merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Each item in the chart’s second column merely consists of a rendition, without any attributed source, of asserted aspects of BSN studies that the column contends is necessary for the performance of the related duty stated in the related row of the first column. However, as already discussed, the first column entries only amount to generalized functions that the petitioner attributes to the proffered position. As generalized and lacking in substantive specifics as these first-column entries are, they do not provide a sufficient factual and analytical foundation for the petitioner to establish that the asserted BSN coursework descriptions entered in the second column are, in fact, required for the performance of the generalized functions of the first column. Also, then, the third column’s assertions that a registered nurse without a BSN would not be equipped to perform the associated duty specified in column one carry no weight, because the two preceding columns do not in fact establish that any aspect of the proffered position actually requires particular coursework that could only be gained in a BSN curriculum. Further, the AAO finds that the record of proceeding lacks any independent, objective evidence from any authoritative source that generated or supports, adopts, or endorses the chart entries or, more importantly, the ultimate claim of the chart as read as a united document, namely, that the proffered position cannot be performed without the attainment of at least a BSN. No matter the form in which a petitioner may couch its assertions, they merit weight only to the extent that they are supported by documentary evidence. *Cf. Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

On October 19, 2012, the director denied the petition. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish (1) how the beneficiary’s immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty; and (2) that the beneficiary qualifies for a specialty occupation. Counsel for the petitioner submitted a timely appeal of the denial of the H-1B petition.

The issue remaining before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO finds that the director’s decision to deny the petition for its failure to establish the proffered position as a specialty occupation was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding 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 that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a home care clinical manager position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO 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.³

As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Medical and Health Services Managers." The director, however, found that the duties described in the record are comparable to the duties of a nurse supervisor in the "Registered Nurse" chapter.⁴

The AAO reviewed the chapters in the *Handbook* on both "Registered Nurses" and "Medical and Health Services Managers," in the light of the extent, depth, and quality of the evidence of record about what the beneficiary would actually do in the proffered position if this petition were approved.

Based upon its review of the totality of the evidence bearing upon the nature and educational requirements of the proffered position, the AAO finds that the director's determination that the proffered position appears to fall within the "Registered Nurse" occupational category is supported by the evidence of record. Accordingly, the AAO shall not disturb that decision.

It bears emphasis that both the Form I-129 and the LCA submitted with it identified a position – Home Care Clinical Manager – whose focus is upon a relatively limited range of nursing and client-care activities, namely, those that can be provided in a client's private residence – as opposed to the spectrum of care available at a hospital. The AAO again notes that the petitioner fails to document the specific nature of the actual work in which the beneficiary would engage in performing the generally-described management-type functions that the petitioner ascribes to the proffered position. The AAO finds that this aspect of the record of proceeding weighs against the petitioner establishing that the beneficiary would perform the work of a position in the Health

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

⁴ The AAO notes that the director found the duties of the proffered position to be comparable to the duties of a nurse supervisor. Nurse supervisors fall within the description of registered nurses that oversee licensed practical nurses, nursing aides, and home care aides.

Services Managers occupational group.

The AAO will now note some aspects of the petition that negatively impact upon the credibility of its claiming that the proffered position exceeds that of a Registered Nurse.

According to the Form I-129, the petitioner employed only eight persons at the time the petition was filed; yet the line-and-box organizational chart submitted by the petitioner includes 18 position boxes, some of which are for multiple employees (such as, Home Care Clinical Managers, Field Nurses, Licensed Vocational Nurses, Certified Nurse Aids, Therapists, Therapist Assistants, and Case Managers.)

It bears emphasis that the AAO finds that, considering the limited extent of the information that the petitioner provided about its particular business operations – such as, by way of some illustrative examples, information about scope and severity of the medical conditions to which its homecare staff attends; the nature and demands of the asserted “strategic planning” in which the beneficiary would participate; the make-up, specific activities, and role of the beneficiary in the “Professional Advisory Board”; and the nature and level of supervision that, according to the petitioner, elevates the proffered position above the capabilities of Registered Nurses who have less than a bachelor’s degree in nursing – the petitioner has failed to substantiate that the actual performance of the beneficiary’s duties would require the coursework claimed by the petitioner, let alone the theoretical and practical application of more than an Associate’s Degree level of highly specialized knowledge in nursing. As stated earlier, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

According to the *Handbook*, the “Registered Nurse” occupational category is described as follows:

Registered nurses (RNs) provide and coordinate patient care, educate patients and the public about various health conditions, and provide advice and emotional support to patients and their family members.

Duties

Registered nurses typically do the following:

- Record patients' medical histories and symptoms
- Give patients medicines and treatments
- Set up plans for patients' care or contribute to existing plans
- Observe patients and record the observations
- Consult with doctors and other healthcare professionals
- Operate and monitor medical equipment
- Help perform diagnostic tests and analyze results
- Teach patients and their families how to manage their illnesses or injuries
- Explain what to do at home after treatment

Some registered nurses oversee licensed practical nurses, nursing aides, and home care aides. For more information, see the profiles on licensed practical and

licensed vocational nurses; nursing aides, orderlies, and attendants; and home health and personal care aides.

Registered nurses sometimes work to promote general health by educating the public on warning signs and symptoms of disease. They might also run general health screenings or immunization clinics, blood drives, or other outreach programs.

Most registered nurses work as part of a team with physicians and other healthcare specialists.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

Registered nurses' duties and titles often depend on where they work and the patients they work with. They can focus on the following specialties:

- A specific health condition, such as a diabetes management nurse who helps patients with diabetes or an oncology nurse who helps cancer patients
- A specific part of the body, such as a dermatology nurse working with patients who have skin problems
- A specific group of people, such as a geriatric nurse who works with the elderly or a pediatric nurse who works with children and teens
- A specific workplace, such as an emergency or trauma nurse who works in a hospital or stand-alone emergency department or a school nurse working in an elementary, middle, or high school rather than in a hospital or doctor's office.

Some registered nurses combine one or more of these specialties. For example, a pediatric oncology nurse works with children and teens who have cancer.

Many possibilities for specializing exist. The following list includes just a few other examples of ways that some registered nurses specialize:

Addiction nurses care for patients who need help to overcome addictions to alcohol, drugs, tobacco, and other substances.

Cardiovascular nurses treat patients with heart disease and people who have had heart surgery.

Critical care nurses work in intensive care units in hospitals, providing care to patients with serious, complex, and acute illnesses and injuries that need very close monitoring and treatment.

(b)(6)

Genetics nurses provide screening, counseling, and treatment of patients with genetic disorders, such as cystic fibrosis and Huntington's disease.

Neonatology nurses take care of newborn babies.

Nephrology nurses treat patients who have kidney-related health issues that are attributable to diabetes, high blood pressure, substance abuse, or other causes.

Rehabilitation nurses care for patients with temporary or permanent disabilities.

Advanced practice registered nurses may provide primary and specialty care, and, in most states, they may prescribe medicines. All states specifically define requirements for registered nurses in these four advanced practice roles:

- **Clinical nurse specialists** provide direct patient care and expert consultations in one of many nursing specialties, such as psychiatric-mental health.
- **Nurse anesthetists** provide anesthesia and related care before and after surgical, therapeutic, diagnostic, and obstetrical procedures. They also provide pain management and emergency services.
- **Nurse-midwives** provide care to women, including gynecological exams, family planning advice, prenatal care, assistance in labor and delivery, and care of newborns.
- **Nurse practitioners** serve as primary and specialty care providers, providing a blend of nursing and primary care services to patients and families.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Registered Nurses," available on the Internet at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-2> (last visited August 14, 2013).

As noted above, the *Handbook* states that "some registered nurses oversee licensed practical nurses, nursing aides, and home care aides." *Id.*

The AAO finds that the *Handbook* indicates that the duties attributed to the proffered position are within the ambit of the duties of some registered nurses, some of whom serve in a supervisory capacity. Also, AAO finds that the duties described by the petitioner appear to comport closest with the duties of a "Registered Nurse," as described in the *Handbook*.

The *Handbook* states the following regarding the educational requirements and advancement prospects of registered nurse positions:

Registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. Registered nurses must also be licensed.

Education

In all nursing education programs, students take courses in nursing, anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take four years to complete; ADN and diploma programs usually take two to three years to complete.

All programs also include supervised clinical experience in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in extended and long-term care facilities, public health departments, home health agencies, or ambulatory (walk-in) clinics.

Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse.

Many registered nurses with an ADN or diploma find an entry-level position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

* * *

Advancement

Most registered nurses begin as staff nurses in hospitals or community health settings. With experience, good performance, and continuous education they can move to other settings or be promoted to positions with more responsibility.

In management, nurses can advance from assistant unit manager or head nurse to more senior-level administrative roles, such as assistant director, director, vice president, or chief of nursing. Increasingly, management-level nursing positions require a graduate degree in nursing or health services administration. Administrative positions require leadership, communication and negotiation skills, and good judgment.

Some RNs choose to become advanced practice registered nurses (APRNs). APRNs work independently or in collaboration with physicians. They may provide primary care, and, in most states, they may prescribe medications.

APRNs require at least a master's degree. Each state's board of nursing can provide the specific regulations regarding APRNs.

Some nurses move into the business side of healthcare. Their nursing expertise and experience on a healthcare team equip them to manage ambulatory, acute, home-based, and chronic care businesses.

Employers—including hospitals, insurance companies, pharmaceutical manufacturers, and managed care organizations, among others—need registered nurses for jobs in health planning and development, marketing, consulting, policy development, and quality assurance.

Other nurses work as postsecondary teachers in colleges and universities. For more information, see the profile on postsecondary teachers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Registered Nurses," available on the Internet at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4> (last visited August 14, 2013).

Review of the *Handbook's* education and training requirements for this occupational category indicates that it does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry. As noted above, this sub-chapter of the *Handbook* states that "[r]egistered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program." However, to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), the petitioner must establish that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. Accordingly, the AAO finds, that the petitioner has not satisfied this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

However, to fully address the petitioner's claims, the AAO will now, for the sake of argument, address the proffered position as if it fell within the Medical and Health Services Managers occupational group, as the petitioner asserts.

The *Handbook's* "Medical and Health Services Managers" chapter includes the following information about this occupational category:

Medical and health services managers, also called healthcare executives or healthcare administrators, plan, direct, and coordinate medical and health services. They might manage an entire facility or specialize in managing a specific clinical area or department, or manage a medical practice for a group of physicians. As healthcare changes, medical and health services managers must be able to adapt to changes in laws, regulations, and technology.

Duties

Medical and health services managers typically do the following:

- Work to improve efficiency and quality in delivering healthcare services

- Keep up to date on new laws and regulations so the facility complies with them
- Supervise assistant administrators in facilities that are large enough to need them
- Manage finances of the facility, such as patient fees and billing
- Create work schedules
- Represent the facility at investor meetings or on governing boards
- Keep and organize records of the facility's services, such as the number of inpatient beds used
- Communicate with members of the medical staff and department heads

In group medical practices, managers work closely with physicians, nurses, laboratory technicians, and other healthcare employees. For more information, see the profiles on physicians and surgeons, registered nurses, and medical and clinical laboratory technologists and technicians.

Medical and health services managers' titles depend on the facility or area of expertise in which they work. The following are some examples of types of medical and health services managers:

Nursing home administrators manage staff, admissions, finances, and care of the building, as well as care of the residents in nursing homes. All states require them to be licensed; licensing requirements vary by state.

Clinical managers manage a specific department, such as nursing, surgery, or physical therapy and have responsibilities based on that specialty. Clinical managers set and carry out policies, goals, and procedures for their departments; evaluate the quality of the staff's work; and develop reports and budgets.

Health information managers are responsible for the maintenance and security of all patient records. They must stay up to date with evolving information technology and current or proposed laws about health information systems. Health information managers must ensure that databases are complete, accurate, and accessible only to authorized personnel.

Assistant administrators work under the top administrator in larger facilities and often handle daily decisions. Assistants might direct activities in clinical areas, such as nursing, surgery, therapy, medical records, or health information.

U.S. Dep't. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Medical and Health Services Managers," available on the Internet at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-2> (last visited August 14, 2013).

It did not escape the AAO's notice that the *Handbook* references "Clinical Managers" as one of the examples of types of medical and health services managers. However, the AAO finds that the Clinical Managers occupation group as described above is distinctly different from the proffered position. The tenor of the paragraph on Clinical Managers is that they serve within facilities that have major clinical departments, "such as nursing, surgery, or physical therapy." In the petitioner's case, there is no medical facility and no separate department within a facility for the beneficiary to manage, as she would be involved exclusively with home care nursing.

The *Handbook* includes the following information regarding entry requirements for and advancement within the Medical and Health Services Managers occupational group:

Most medical and health services managers have at least a bachelor's degree before entering the field; however, master's degrees also are common. Requirements vary by facility.

Education

Medical and health services managers typically need at least a bachelor's degree to enter the occupation. However, master's degrees in health services, long-term care administration, public health, public administration, or business administration also are common.

Prospective medical and health services managers have a bachelor's degree in health administration. These programs prepare students for higher level management jobs than programs that graduate students with other degrees. Courses needed for a degree in health administration often include hospital organization and management, accounting and budgeting, human resources administration, strategic planning, law and ethics, health economics, and health information systems. Some programs allow students to specialize in a particular type of facility, such as a hospital, a nursing care home, a mental health facility, or a group medical practice. Graduate programs often last between 2 and 3 years and may include up to 1 year of supervised administrative experience.

Work Experience

Although bachelor's and master's degrees are the most common educational pathways to work in this field, some facilities may hire those with on-the-job experience instead of formal education. For example, managers of physical therapy may be experienced physical therapists who have administrative experience. For more information, see the profile on physical therapists.

* * *

Advancement

Medical and health services managers advance by moving into more responsible and higher paying positions. In large hospitals, graduates of health administration

programs usually begin as administrative assistants or assistant department heads. In small hospitals or nursing care facilities, they may begin as department heads or assistant administrators. Some experienced managers also may become consultants or professors of healthcare management. The level of the starting position varies with the experience of the applicant and the size of the organization.

For those already in a different healthcare occupation, a master's degree in health services administration or a related field might be required to advance. For example, nursing service administrators usually are supervisory registered nurses with administrative experience and graduate degrees in nursing or health administration. For more information, see the profile on registered nurses.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Medical and Health Services Managers," available on the Internet at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-4> (last visited August 14, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.⁵ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁶ That is, in accordance with the relevant DOL explanatory

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

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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

information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

While the *Handbook* reports that “most” medical and health services managers have at least a bachelor's degree before entering the field, the *Handbook* does not indicate that even the proportion identifiable as “most” consists only of persons holding one of a definitive group of closely related degrees.⁷ Also, the *Handbook's* statement that medical and health services managers “typically” need “at least a bachelor's degree to enter the occupation” does not limit membership in this occupational group to persons holding only a degree in a specific specialty, or a degree within a limited group of closely related specialties. In the same vein, the AAO notes that the *Handbook* states that education “[r]equirements vary by facility.”

Further, the *Handbook* indicates that a master's degree in business administration, without further specification, may be an adequate educational credential for entry in this occupational

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.

Id.

⁷ The statement that “most medical and health services managers have at least a bachelor's degree” does not support the view that all medical and health services managers positions qualify as a specialty occupation. The statement does not indicate that most employees in this occupation have a bachelor's degree *in a specific specialty*, or its equivalent, that is directly related to the duties and responsibilities of the position. Although a general-purpose bachelor's degree 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 at 147.

Furthermore, the term “most” is not indicative that a particular position within the wide spectrum of medical and health services managers jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent. For instance, the first definition of “most” in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is “[g]reatest in number, quantity, size, or degree.” As such, if merely 51% of employees in this occupation have a bachelor's degree, it could be said that “most” of the individuals have such a degree. It cannot be found, therefore, that a statement that “most” employees possessing such a degree in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part “attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” Section 214(i)(1) of the Act.

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

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).⁸

The *Handbook* indication that a degree in business administration without further specification has been sufficient for entry into the Medical and Health Services Managers occupational group is yet another reason why the *Handbook* does not support the proffered position as one for which a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The AAO also directs the petitioner to the *Handbook's* stating, in the above-quoted Work Experience section of the Medical and Health Services Managers chapter:

Although bachelor's and master's degrees are the most common educational pathways to work in this field, some facilities hire those with on-the-job experience instead of formal education.

For all of the reasons discussed above, the AAO finds that a position's inclusion within the Medical and Health Services Manager's occupational group is not in itself sufficient to establish

⁸ 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.

that position as one for which, in the words of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), "a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

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

It is noted that on appeal the petitioner submits a copy of information from the Illinois Department of Employment Security regarding the "Illinois Occupations with the Most Openings Each Year," indicating that "Medical and Health Services Managers" are among the occupations listed under the heading "Work Experience + 4 years of College (Bachelor's Degree) or More." However, the AAO finds that this submission does not state that a bachelor's degree *in a specific specialty* is a normal, minimum entry requirement for this occupation. Further, although not an issue, the record of proceeding provides no basis as to why the AAO should accord the submission more weight than the *Handbook*.

In summary then, upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry. The AAO further concludes that the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

This first alternative prong 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 to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely

employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided several job postings. Upon review of the documentation, the AAO finds that the petitioner's reliance on the job postings is misplaced.

In the Form I-129 petition, the petitioner describes itself as a home health care service, established in 2010, with eight employees. The petitioner claims that it has a projected gross annual income of \$1.5 million and a net annual income of approximately \$230,000.

In order for the petitioner to establish that another organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Here, the petitioner submits no evidence demonstrating that any of the advertising companies are similar in size and scope of operations to the petitioner, an eight-employee home health care service. Without such evidence, advertisements submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and another organization share the same general characteristics, 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) may be considered. It is not sufficient for the petitioner to claim that the organizations are 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

For instance, the advertisements include positions with Northwestern Lake Forest Hospital (Grayslake Ambulatory Surgical Center), Good Shepherd Hospital (Labor/Delivery Room Dept.), Rush University Medical Center (Geriatric Clinic), ePartners (the Electronic Intensive Care Unit/eICU at Indiana University Health – Methodist Hospital), Advocate Health Care

(Christ Medical Center), and Diversified Clinical Services (Wound Care Center). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner, which is self-described as a Home Health Care Service (on page 5 of the Form I-129, at Part 5, item 11), and the petitioner has not provided any probative evidence to suggest otherwise. Furthermore, the petitioner submitted job postings for which little or no information regarding the employers is provided. For example, the petitioner submitted job postings for OSF Healthcare, ICCU, Artha Professional Services, and an undisclosed hospital with a homecare and hospice division. The postings lack information regarding the actual employers. Consequently, the record is devoid of sufficient information regarding the advertising organizations to conduct a meaningful comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, some of the advertisements appear to be for more senior positions and/or do not appear to be for parallel positions. For instance, the position advertised by Northwestern Lake Forest Hospital (Grayslake Ambulatory Surgical Center) requires a bachelor's degree in nursing and five to eight years of nursing experience with demonstrated progressive responsibilities and the position advertised by Artha Professional Services states that a MSN is preferred, but will consider a BSN that is very close to completing the Master's degree and must have 3+ years of clinical experience in labor/delivery and maternal child. As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I low, entry-level position. Furthermore, some of the positions do not appear to have similar duties to the proffered position. Moreover, the petitioner also submitted postings which do not contain a job description. For example, the posting for an undisclosed hospital with a homecare and hospice division does not contain a job description. For these postings, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which they were submitted, the advertisements are not even evidence that the organizations that issued them compose a group that requires at least a bachelor's degree in a specific specialty for the positions represented in the advertisements. Some of the advertisements state that less than a bachelor's degree is acceptable. The advertisement for Good Shepherd Hospital (Labor/Delivery Room Dept.) states that a "bachelor[']s degree in [a] related area or enrolled and progressing" is needed for the position. Several of the postings state that a bachelor's degree is required, but they do not state that a bachelor's degree in a *specific specialty*, or its equivalent, is required for the advertised positions. As previously 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 such a degree in a *specific specialty* that is directly related to the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the position. Moreover, the job posting for Rush University Medical Center (Geriatric Clinic) states that a bachelor's degree is preferred and the job posting for ICCU states that a BSN is desired. Obviously, a *preference* or a *desire* for a degree is not indicative of a degree *requirement*. Thus, the advertisement does not indicate that at least a bachelor's degree, in a specific specialty, or the equivalent is required for the advertised position.

In any event, the petitioner provides no authoritative documentation that addresses how representative the submitted advertisements are of the recruiting and hiring practices of organizations similar to the petitioner, and in its particular industry, for positions that are parallel to the one that is the subject of this petition.⁹

Thus, for the reasons discussed above, the petitioner's reliance on the job vacancy advertisements is misplaced.

In sum, as the evidence in the record of proceeding does not establish that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common in the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. While in response to the RFE, the petitioner submitted a chart entitled, "Clinical Manager Special Occupation Chart," the petitioner failed to demonstrate how the home care clinical manager duties as so generally described in the record of proceeding comprise a position that can be performed only by a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent.

While some of the courses listed on the copy of the beneficiary's transcript for the Bachelor of Science Degree in Nursing from the [REDACTED] may be beneficial in performing the proffered position, the petitioner has failed to demonstrate that completion-to-degree of any BSN curriculum is required for a person to be able to perform the duties of the particular position here proffered.

This aspect of the petition is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates a wage level based upon the occupational classification "Medical and Health Services Managers" at a Level I (entry level) wage. This wage level

⁹ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just ten job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

Most critically, and as reflected in this decision's earlier comments and findings regarding the generalized and relatively abstract level of the information provided about the duties that the petitioner presents in the record of proceeding, the evidence of record simply does not develop relative complexity or uniqueness as aspects of the proffered position, let alone as aspects so material to the position as to distinguish it from others in the occupational classification that are not so complex or unique as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

As the evidence in this record of proceeding does not show the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past.

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

While a petitioner may assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then

any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree-requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In the RFE-response letter, dated May 21, 2012, counsel for the petitioner stated that “[d]ue to the unavailability of qualified applicants, to date, only one individual has been hired into this desperately needed role. Accordingly, attached as EXHIBIT 9, please find the Bachelor of Science degree in Nursing and recent paystubs of the current Clinical Manager.” A review of the evidence submitted in response to the RFE indicates that the petitioner and counsel provided a copy of [REDACTED] Bachelor of Science in Nursing degree from [REDACTED]. However, it does not appear that any paystubs for [REDACTED] were submitted into the record of proceeding. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Also, in response to the RFE, the petitioner submitted a letter dated February 9, 2012, which states the following:

This is to confirm that the employees listed below have held the proffered position of Clinical Manager at [the petitioner], and that both individuals hold a Bachelor of Science Degree in the field of Nursing.

Due to the highly professional nature of the Clinical Manager, the minimum education required for this position with our institution is a Bachelor of Science in Nursing Degree.

Employee Name	Degree	Hire Date
[REDACTED]	BSN	9/16/2011

However, the petitioner did not provide a copy of this individual's degree and evidence that she has worked for the petitioner, such as paystubs, W-2 forms, or other evidence of employment with the petitioner.

Moreover, the AAO notes that the petitioner's statement contains internal inconsistencies, in that it indicates that two individuals have held the proffered position, yet only names one person. In contrast, counsel stated that “only one individual has been hired into this . . . role.” Also, the name of the individual cited by counsel differs from the name cited by the petitioner. 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.* at 591.

In any event, the AAO finds that even if substantiated – which is not the case – the claimed number of hires for the proffered position would not be sufficient to establish a sufficient employment history to satisfy this criterion.

As the evidence of record does not establish that the proffered position is one for which the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO also finds that the petitioner has not satisfied the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which requires a petitioner to establish that 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.

As reflected in this decision's earlier comments and findings with regard to the generalized and relatively abstract descriptions of the proposed duties, the petitioner has not provided sufficiently detailed information to develop relative specialization and complexity as an aspect of the nature of the proposed duties, let alone as an aspect that establishes their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

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

As the evidence in the record of proceeding has not established that the nature of the duties of the proffered position 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 petitioner has not to satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that in its response to the RFE, counsel refers to an unpublished 2006 decision in which the AAO determined that the position of coordinator of rehabilitation services proffered in that matter qualified as a specialty occupation. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg.

Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to 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. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the unpublished decision cited by counsel.

If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. 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). In the instant case, the petitioner failed to submit a copy of the unpublished decision. As the record of proceeding does not contain any evidence of the unpublished decision, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to establish that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. However, the AAO will nonetheless identify some issues that militate against a finding that the beneficiary would be qualified to serve in the proffered position if the evidence had established it as a specialty occupation – which, again, is not the case.

The petitioner stated that "[the beneficiary] received a Bachelor of Science Degree in Nursing from [the] ██████████" In addition, the petitioner stated that "[the beneficiary] has met the requirements of CGFNS¹⁰ and has a valid nursing license from the State of Texas.¹¹ She is Basic and Advance Cardiac Life Support and Neonatal Resuscitation certified."

¹⁰ The acronym CGFNS stands for the Commission on Graduates of Foreign Nursing Schools.

¹¹ The AAO reviewed the Texas Board of Nursing's Internet site, available online at <https://www.bon.state.tx.us/index.html>, to verify the beneficiary's Registered Nurse license online. The Registered Nurse Online Verification search result indicates that the beneficiary's nursing license number ██████████ issued on April 21, 2011 has been "delinquent" since March 31, 2013. See <https://www.bon.state.tx.us/olv/rnrslt.asp>.

Thus, the AAO notes that, to establish the beneficiary's qualifications, the petitioner relies upon evidence that the beneficiary has attained a foreign degree in nursing. However, the AAO observes that the record of proceeding lacks an evaluation of U.S. degree-equivalency that was provided by an agency engaged in the business of providing foreign-degree evaluations. Further, the AAO observes that the CGFNS certificate submitted into the record does not attest that the beneficiary's foreign degree is equivalent to at least a bachelor's degree, or the equivalent, attained from an accredited college or university in the United States. Accordingly, even if the petitioner had established the proffered position as requiring at least a U.S. bachelor's degree or the equivalent - which is not the case - the evidence of record does not establish the beneficiary as qualified to serve therein in accordance with the controlling regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

Beyond the decision of the director, the AAO found public information on a Texas Board of Nursing Internet site (<https://www.bon.state.tx.us/olv/rnrslt.asp>) (visited on August 14, 2013) which indicates that the beneficiary's Registered Nurse licensure status in the State of Texas (as a Compact License) is "Delinquent" as of "3/31/2013". As the petitioner expressly acknowledged within the documentation accompanying the Form I-129, Registered Nurse licensure was required if the beneficiary were to perform the proffered position. Consequently, even if the petition were approvable - which the AAO obviously finds not to be the case - it could not be approved for any part of the requested employment period beyond March 31, 2013, unless, of course, the petitioner were to overcome this licensure issue.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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