



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: FEB 01 2013

OFFICE: VERMONT SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a home health services company established in 2001. In order to employ the beneficiary in what it designates as a facility rehabilitation coordinator position,¹ the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of his determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

At the outset of this decision, and beyond the decision of the director, the AAO finds that the petitioner provided as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that: (1) the LCA was certified for a wage level below that which is compatible with the level of responsibility the petitioner claimed for the proffered position through its descriptions of its constituent duties; and (2) the occupational category for which the LCA was certified (Rehabilitation Counselors) does not correspond to the proffered position and its constituent duties as described in the record of proceeding.² This aspect of the petition undermines the credibility of the petition as a whole and any claim as to the proffered position or the duties comprising it as being particularly complex, unique, and/or specialized. For this reason also, the petition must be denied.

In its December 14, 2010 letter of support, the petitioner described the proffered position as follows:

Manage, review and analyze casework techniques for compliance with federal and state regulations including care planning, progress notes, physician orders, discharge planning[,] and follow-ups. Review rehabilitation plans and procedures together with

¹ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 21-1015.00, the associated Occupational Classification of "Rehabilitation Counselors," and a Level I (entry-level) prevailing wage rate.

² The AAO conducts appellate review on a *de novo* basis (See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this aspect of the petition.

the rehabilitation production and efficiency [sic], to validate [the] facility's financial performance. Ensure that professional licenses and/or certifications of therapists and assistants are current. Participate in the formulation of agency policies, devising procedures essential to the achievement of the goals and objectives of the agency, and in developing and evaluating programs and services.

The beneficiary will supervise and coordinate the personnel involved in the facility's rehabilitative services. He is not licensed to give direct care but he must have the same educational qualifications in order to gain their respect. The beneficiary will be a resource person to the therapy assistants, in some cases. The position also requires strong oral and communications skills, [and will require the beneficiary to] evaluate [the] significance of issues and assign priorities, as well as prioritize projects and workflow. The alien is expected to work independently and in a team environment and must have the ability to manage several projects concurrently.

The record contains several claims regarding the complexity and specialization of the duties of the proffered position, as well as the position that the beneficiary will occupy within the petitioner's organizational hierarchy. For example, in addition to the assertions quoted above, the petitioner made the following, additional statements in its December 14, 2010 letter:

The position of Facility Rehabilitation Coordinator is so complex and unique because this medical field is so highly specialized and the exposure to malpractice so great that we require no less than a baccalaureate degree. . . .³ [(emphasis in original)].

The position also requires a high level of decision making, planning, directing[,] and organizing. . . .

³ This statement conflicts with the statement made by the petitioner in its undated attachment to counsel's May 18, 2011 letter, in which the petitioner stated the following:

A Baccalaureate Degree in any of the medical sciences, preferably in the field of Physical Therapy. *One year of experience in the health care industry may be substituted for each year of deficiency in the education requirement.*

(Emphasis added.)

By making this statement, the petitioner stated explicitly that it would accept a candidate with less than a bachelor's degree, or the equivalent, in a specific specialty. For example, if the petitioner would be willing to accept a candidate who lacked a degree, but had four years of experience in an undefined role "in the health care industry," then its claim that "we require no less than a baccalaureate degree" is not true. 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).

In similar fashion, counsel argued as follows in his May 18, 2011 letter:

The position of a Facility Rehabilitation Coordinator is so complex and unique because it entails a high level of decision-making, planning[,] directing[,] and coordinating the efficiency and quality of healthcare services. It entails a lot of preparation, analysis, negotiation, and review of plans and projects directly related to the delivery of quality healthcare services as well as supervision and coordination of healthcare services to be performed by the personnel. The position likewise requires leadership, strong communication and negotiation skills[,] and good judgment.

* * *

The position is [an] upper-level, supervisory[,] and administrative position. . . .

In his February 10, 2012 appellate brief, counsel made the following assertions:

The beneficiary will supervise and coordinate the personnel involved in the facility's rehabilitative services . . . The alien is expected to work independently and in a team environment and must have the ability to manage several projects concurrently.

The position of a Facility Rehabilitation Coordinator is so complex and unique because it entails a high level of decision making, planning, directing[,] and coordinating the efficiency and quality of healthcare services. It entails a lot of preparation, analysis, negotiation, review of plans and projects directly related to the delivery of quality healthcare educational services[,] as well as supervision and coordination of healthcare services to be performed by the personnel. The Facility Rehabilitation Coordinator is a resource person on health topics, and this would include performing duties such as locating services, reference material[,] and other resources[,] and referring clients to organizations or medical professional[s]. The position likewise requires leadership, strong communication and negotiation skills[,] and good judgment.

(Emphasis in original.)

However, as will now be discussed, these assertions materially conflict with the wage level designated in the LCA that the petitioner submitted with the petition. As noted above, the LCA submitted by the petitioner in support of the instant position specifies the occupational classification for the position as "Rehabilitation Counselors," SOC (O*NET/OES) Code 21-1015.00, at a Level I (entry level) wage. The *Prevailing Wage Determination Policy Guidance*⁴ issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

⁴ Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed January 17, 2013).

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

These assertions regarding the proposed duties' level of complexity and specialization, as well as the level of independent judgment and responsibility and the occupational understanding required to perform them, are materially inconsistent with the petitioner's submission of an LCA certified for a Level I, entry-level position. The LCA's wage level (Level I, the lowest of the four that can be designated) is only appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels quoted above, this wage rate is appropriate for positions in which that the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and his work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the proffered position's educational demands and level of responsibilities. 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. 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).

It should be noted that, for efficiency's sake, the AAO's discussion and findings regarding the material conflict between assertions in the petition and the LCA wage-level are hereby incorporated as part of this decision's later analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Aside from the adverse impact of the LCA wage-level against the overall credibility of the petition, the AAO will now discuss that additional issue raised by the LCA which was noted at the outset of this decision, namely, the fact that the LCA does not appear to correspond to the instant petition. This factor precludes approval of the petition.

The U.S. Department of Labor (DOL) has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that “[i]t is the employer’s responsibility to ensure that ETA [(the DOL’s Employment and Training Administration)] receives a complete and accurate LCA.”

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While the DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer’s petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

As previously noted, the conflict between the LCA and the petition adversely affects the merits of the petition, because it materially undermines the credibility of the petition’s statements with regard to the nature and level of work that the beneficiary would perform.

Moreover, the petitioner’s certification of the LCA under the O*NET occupational code classification of “Rehabilitation Counselors” constitutes a second reason why the submitted LCA does not correspond to the petition, as the proposed duties as described in the record of proceeding do not comprise the type of position (Rehabilitation Counselors) designated in the LCA.

The appropriate wage level is determined only after selecting the most relevant O*NET occupational code classification. The aforementioned *Prevailing Wage Determination Policy Guidance* issued by the DOL states that “[t]he O*NET description that corresponds to the

employer's job offer shall be used to identify the appropriate occupational classification" for determining the prevailing wage for the LCA.

The O*NET Summary Report for the occupational category "Rehabilitation Counselors" summarizes that occupation as follows:

Counsel individuals to maximize the independence and employability of persons coping with personal, social, and vocational difficulties that result from birth defects, illness, disease, accidents, or the stress of daily life. Coordinate activities for residents of care and treatment facilities. Assess client needs and design and implement rehabilitation programs that may include personal and vocational counseling, training, and job placement.

See Employment & Training Administration, U.S. Dep't of Labor, O*Net OnLine, Summary Report for Rehabilitation Counselors, available at <http://www.onetonline.org/link/details/21-1015> (accessed January 17, 2013).

The O*NET Details Report for this occupation lists the following "core tasks" that are performed by rehabilitation counselors:

- Prepare and maintain records and case files, including documentation such as clients' personal and eligibility information, services provided, narratives of client contacts, and relevant correspondence;
- Develop rehabilitation plans that fit clients' aptitudes, education levels, physical abilities, and career goals;
- Monitor and record clients' progress to ensure that goals and objectives are met;
- Confer with clients to discuss their options and goals so that rehabilitation programs and plans for accessing needed services can be developed;
- Maintain close contact with clients during job training and placements to resolve problems and evaluate placement adequacy;
- Confer with physicians, psychologists, occupational therapists, and other professionals to develop and implement client rehabilitation programs;
- Arrange for physical, mental, academic, vocational, and other evaluations to obtain information for assessing clients' needs and developing rehabilitation plans;
- Analyze information from interviews, educational and medical records, consultation with other professionals, and diagnostic evaluations to assess clients' abilities, needs, and eligibility for services;

- Develop and maintain relationships with community referral sources, such as schools and community groups;
- Locate barriers to client employment, such as inaccessible work sites, inflexible schedules, and transportation problems, and work with clients to develop strategies for overcoming these barriers;
- Develop diagnostic procedures to determine clients' needs; and
- Collaborate with clients' families to implement rehabilitation plans such as behavioral, residential, social, and employment goals.

Id. at <http://www.onetonline.org/link/details/21-1015.00>.

These duties do not correspond to the duties of the proffered position, as the overwhelming majority of the tasks constituting "core" ones by DOL do not fall within those proposed for the beneficiary. In short, and as noted by DOL, a rehabilitation counselor provides direct care to his or her clients, which the petitioner specifically states the beneficiary would not do.

DOL guidance specifies that when ascertaining the proper occupational classification, a determination should be made by "consider[ing] the particulars of the employer's job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected." *See Prevailing Wage Determination Policy Guidance*. In this case, the petitioner has provided no explanation of its apparently erroneous claim that the position's primary and essential tasks, knowledge, and work activities are those generally associated with the occupational category of "Rehabilitation Counselors" as depicted by O*Net. As such, it has not established that this LCA actually corresponds to this petition for this additional reason.

As reflected in this decision's earlier discussion regarding the fact that the LCA does not correspond to the petition, that conflict between the petition and the LCA adversely affects the merits of the petition, because it materially undermines the credibility of the petition's statements therein with regard to the nature and level of work that the beneficiary would perform. That being said, the AAO will now continue to address the evidence in the record of proceeding.

The AAO will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one 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 term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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 stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

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 it addresses.⁵ As noted, the petitioner claims that the duties of the proffered position align with those of rehabilitation counselors. The *Handbook* describes the duties of rehabilitation counselors as follows:

Rehabilitation counselors help people with emotional and physical disabilities live independently. They work with clients to overcome personal, social, and professional effects of disabilities as they relate to employment or independent living. . . .

* * *

Rehabilitation counselors help people with physical, mental, emotional, or social disabilities at various stages in their lives. Some work with students to develop strategies to live with their disability and to move from school to work. Others help veterans cope with the mental or physical effects of their military service. Still others help elderly people adapt to disabilities developed later in life due to illness or injury. Because rehabilitation counselors deal with employment issues, they typically work with older students and adults rather than young children.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Rehabilitation Counselors," <http://www.bls.gov/ooh/community-and-social-service/rehabilitation-counselors.htm#tab-2> (accessed January 17, 2013).

As discussed above, these are not the types of duties that have been proposed for the beneficiary, and consequently the AAO does not agree with the petitioner that the duties of the proffered position align with those of rehabilitation counselors as described in the *Handbook*. As indicated, all of the duties described in the passage quoted above involve direct care. However, as noted above the petitioner specifically stated that the beneficiary would not be providing direct care.

Instead, the AAO finds that the duties of the proffered position are generally similar to those normally performed by medical and health services managers, as that occupation is described in the *Handbook*. The *Handbook* states the following with regard to the duties of medical and health services managers:

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. . . .

Medical and health services managers typically do the following:

⁵ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.



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- 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

* * *

Medical and health services managers' titles depend on the facility or area of expertise in which they work. . . .

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Medical and Health Services Managers," <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-2> (accessed January 17, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

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. . . .

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.

* * *

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.

Id. at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-4>.

The information from the *Handbook* does not support a finding that a bachelor's degree or the equivalent, in a specific specialty, is the normal minimum entry requirement for this occupation. The *Handbook* states that "most" medical and health services managers possess at minimum a bachelor's degree before entering the field,⁶ that requirements vary by facility, and that some facilities hire those who have on-the-job experience instead of formal education. However, the *Handbook* does not report that a bachelor's degree *in a specific specialty*, or the equivalent, is normally required for entry into the occupational category. Accordingly, inclusion of the proffered position within this occupational category is not in itself sufficient to establish the position as one for which the normal minimum entry requirement is at least a bachelor's or higher degree, or the equivalent, in a specific specialty.

Finally, as discussed in footnote 3 the petitioner stated that although it requires a bachelor's degree in a medical science field, "[o]ne year of experience in the health care industry may be substituted for each year of deficiency in the education requirement." By making this statement, the petitioner was stating explicitly that it would accept a candidate with less than a bachelor's degree, or the equivalent, in a specific specialty, as it would apparently also find acceptable a candidate with, alternatively: (1) three years of academic coursework in a medical science field and one year of work experience; (2) two years of academic coursework in a medical science field and two years of work experience; (3) one year of academic coursework in a medical science field and three years of work experience; or (4) no academic coursework in a medical science field and four years of work experience. None of these combinations of academic coursework and work experience are equivalent to a bachelor's degree, or the equivalent, in a specific specialty.

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not established the criterion at 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 prong alternatively calls for a petitioner to establish that a

⁶ "Most" does not indicate that a medical and health services manager position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty. The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of medical and health services managers positions require at least a bachelor's degree in a specific specialty, it could be said that "most" medical and health services managers positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions 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.

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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and 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.

Nor do the five job vacancy announcements contained in the record of proceeding satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, the petitioner has not submitted any evidence to demonstrate that the positions being advertised in these vacancy announcements are "parallel" to the one being proffered here.⁷ Second, the petitioner has not submitted any evidence to demonstrate that any of these advertisements is from a company "similar" to the petitioner.⁸ The petitioner has submitted no evidence to establish that any of these advertisers are similar to the petitioner in size, scope, scale of operations, business efforts, expenditures, or other fundamental dimensions. Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the position

⁷ [REDACTED] and the unnamed facilities located in Weyauwega, Wisconsin and Gainesville, Florida all require work experience. However, as noted above, the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

Furthermore, although all five of the advertised positions involve at least some direct patient care, the petitioner specifically stated that the beneficiary would provide no direct patient care.

The petitioner has not explained how these positions are "parallel" to the proffered position.

⁸ The petitioner claimed to be a home health services company on the Form I-129. However, the [REDACTED] is a government entity, [REDACTED] is apparently a hospital, and the unnamed facilities located in Weyauwega, Wisconsin and Gainesville, Florida do not appear to be home health services companies.

The petitioner has not explained how it is similar to these companies.

advertised. Again, simply 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 165.⁹

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The duties proposed for the beneficiary are similar to those outlined in the *Handbook* as normally performed by medical and health services managers, and the petitioner's description of the duties which collectively constitute the proffered position lacks the detail and specificity required to establish that they surpass or exceed in terms of complexity or uniqueness the duties performed by medical and health services manager positions that can be performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty. As noted above, the *Handbook* indicates that the performance of such generic duties does not normally require a bachelor's degree, or the equivalent, in a specific specialty. The AAO finds further that, even outside the context of the *Handbook*, the petitioner has simply not established relative complexity or uniqueness as

⁹ Furthermore, according to the *Handbook* there were approximately 303,000 persons employed as medical and health services managers in 2010. *Handbook* at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-6> (last accessed January 17, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the five submitted vacancy announcements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if these five job-vacancy announcements established that the employers that issued them routinely recruited and hired for the advertised positions only persons with at least a bachelor's degree in a specific specialty closely related to the positions, it cannot be found that these five job-vacancy announcements that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

attributes of the proffered position, let alone as attributes with such an elevated level as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Also, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the proffered position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate is indicative of a position where the beneficiary would perform routine tasks that require limited, if any, exercise of independent judgment; would be closely supervised and monitored; would receive specific instructions on required tasks and expected results; and would have her work reviewed for accuracy.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties constitute a position so complex or unique it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it did not show that the particular position for which it filed this petition 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 AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position. The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and with regard to employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 proffered position.¹⁰ In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the actual performance requirements of the position necessitate a petitioner's history of requiring a particular degree in its recruiting and hiring for the position. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element

¹⁰ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that it would be paying the beneficiary a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation.

is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Counsel conceded in his May 18, 2011 letter that this is a newly-created position. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only “moderately complex tasks that require limited judgment.” The fact that this higher-than-here-assigned, Level II wage rate itself indicates performance of only “moderately complex tasks that require limited judgment,” is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer’s job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment’s

procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II). The AAO also finds that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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. Here, that burden has not been met.

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