U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 2 6 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 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 company providing long-term care that was established in 1975. In order to employ the beneficiary in a position to which it assigned the job title "patient safety officer," the petitioner seeks to classify the beneficiary 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 her 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, 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.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely, providing as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the LCA was certified for a wage level below that which is compatible with the levels of responsibility, judgment, and independence the petitioner claimed for the proffered position through its descriptions of its constituent duties.[1] For efficiency's sake, the AAO will now address the conflict between the wage-level of the prospective position for which the LCA was certified (that is Level I, the lowest of the four assignable) and what the petition asserted about the scope and relative levels the proffered position's duties, independent responsibilities, and required occupational knowledge.

This is an appropriate juncture because some of the related analysis also will apply to the AAO's discussion of the specialty occupation issue, which is the focus of the appeal.

That the petitioner claimed the proffered position would require the exercise of high levels of independent responsibility, judgment, and occupational knowledge, above that of the LCA's Level I wage level, is clearly evident in the record of proceeding.

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[1] 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 additional ground for denial.

In its June 14, 2010 letter of support, the petitioner stated that the beneficiary would be responsible for planning, organizing, and directing all administrative and functional activities related to patient safety, quality, and regulatory compliance at the petitioner's facility. The petitioner also claimed that the beneficiary would provide administrative leadership for risk management, performance improvement, and case management, and that she would also provide such leadership to the petitioner's education department.

In an attachment to counsel's November 2, 2010 letter, the petitioner stated that the beneficiary would assume responsibility for the following specific tasks:

- Designing and implementing a comprehensive program intended to promote safety and reduce the risk of injuries, infections, and liability exposure of patients, employees, and guests;
- Maintaining an in-depth knowledge of health care delivery requirements, applicable laws and standards, accepted professional safety practices, and effective communications and interpersonal skills;
- Ensuring proper maintenance of records required for safety and hazard control by all authorities having jurisdiction over such matters;
- Ensuring compliance with all federal, state, and local laws;
- Managing staff activities in order to reduce the risk of injuries;
- Performing periodic and random security inspections;
- Assisting with aggressive patients;
- Leading the development and implementation of risk management programs;
- Identifying patient safety and risk exposure in various healthcare settings;
- Leading team efforts to develop solutions for difficult or complex patient situations in order to ensure that goals and objectives are met;
- Advising senior management of deficiencies and of remedial or disciplinary actions to decrease deficiencies; and
- Interfacing with various external and internal individuals and groups.

Also, the record of proceeding contains several claims regarding the uniqueness, complexity, and specialization of the duties of the proffered position. For example, in his November 2, 2010 letter,

counsel argued that the duties of the proffered position are "specialized and complex," and he makes similar assertions on appeal:

> [O]nly a highly educated and trained professional . . . has the technical skills and scholastic competency to do the highly specialized and complex duties. . . .
>
> * * *
>
> Because of the diversity of duties and the complexity of the levels of responsibility, the Patient Safety Officer should also manage time effectively, remain on task despite interruptions, and work independently with minimal supervision. . . .
>
> * * *
>
> This is a supervisory position . . . [t]he position requires a flexible, organized person with supervisory skills who is capable of multi-tasking. . . .
>
> * * *
>
> [A] closer and more circumspect reading and understanding of the job description of the proffered position shows the judicious application of technical and specialized knowledge and experience [required for] the performance of the enumerated duties. . . .

Finally, the AAO refers to the proposed duties of planning, planning, organizing, and directing all administrative and functional activities related to patient safety, quality, and regulatory compliance at the petitioner's facility; as well as the beneficiary's proposed duties of providing administrative leadership.

However, the AAO finds that the above-referenced assertions by the petitioner and its counsel are materially inconsistent with the LCA's Level I wage-level designation.

The LCA submitted in support of the instant position had been certified for a job opportunity within the Medical and Health Services Managers occupational group (SOC (O*NET/OES) Code 11-9111.00) at a Level I (entry level) wage. The *Prevailing Wage Determination Policy Guidance*[2] 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].

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[2] Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed Jun. 13, 2013).

The elevated levels of complexity and specialization that the petitioner claims for the proffered position, as well as the levels of independent judgment and independent responsibility that the petitioner claims for the proffered position, as reflected in this decision's earlier references to the record of proceeding, are questionable not only because of the lack of substantive supportive evidence, but also because they are materially inconsistent with the petitioner's submission of an LCA certified for a Level I, entry-level position. The AAO finds that such a wage-level designation is indicative of a position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the holder of the position would be required to have only a basic understanding of the occupation; would be expected to perform routine tasks requiring limited, if any, exercise of judgment; would be closely supervised; would have his or her work closely monitored and reviewed for accuracy; and would receive specific instructions on required tasks and expected results. Thus, the LCA materially conflicts with the petitioner's claims with regard to the nature and performance demands of the proffered position.

With regard to its impact upon the merits of the petition, the AAO finds that this materially conflicting aspect of the LCA undermines the credibility of the petitioner's assertions regarding the proffered position's performance demands and level of responsibilities and also undermines the credibility of the overall petition. 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).

Now, as already noted, aside from this LCA/petition conflict's adverse impact upon the credibility of the petition, the AAO also finds that this conflict precludes approval of this petition because the conflict indicates that the LCA submitted to support this petition does not correspond to it.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) 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 [(DOL)] 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 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.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit an LCA that corresponds to the petition. Specifically, it has failed to submit an LCA that corresponds to the level of work and responsibilities that the petitioner claims for the proffered position and, likewise, to the wage-level appropriate to that claimed level of work.

As already noted, the statements of record regarding the claimed level of complexity, independent judgment and understanding required for the proposed position are materially inconsistent with the certification of the LCA for a Level I entry-level position, and this conflict undermines the overall credibility of the petition. The record contains no explanation for this inconsistency regarding the proposed position's wage level. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA certified for the proper wage classification.

Thus, even if the petitioner were to otherwise prevail in this appeal – which is not the case – the petition still could not be approved, because of the above-discussed material inconsistency between the LCA's wage-level and the claims of the petitioner and counsel regarding the demands of the proffered position.

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely 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 alien, 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. (It should be noted that the AAO hereby incorporates by reference into its forthcoming analyses of each criterion this decision's earlier comments and findings regarding the conflict between the petitioner's assertions and the submission of an LCA certified for a Level I wage-rate.)

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), 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.[3]

As noted above, the petitioner submitted an LCA certified under the occupational classification of "Medical and Health Services Managers." The AAO agrees that the duties of the proffered position align with those of medical and health services managers as their typical duties are described in the

[3] 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.

Handbook. In relevant part, the *Handbook* describes the duties typically performed by medical and health services managers as follows:

> 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:
>
> - 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 Jun. 10, 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.
>
> **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.

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,[4] that requirements vary by facility, and that some

[4] "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

facilities hire those who have on-the-job experience instead of formal education. It does not state that a bachelor's degree *in a specific specialty* is normally required. Additionally, the information reported in the *Handbook* about the Medical and Health Services Managers occupational classification does not support a finding that a particular position's inclusion within that occupational classification is, in itself, sufficient to establish that position as one that requires at least a bachelor's degree, or the equivalent, in a specific specialty.

Next, the materials from the DOL's Occupational Information Network (O*NET OnLine) do not establish that the proposed position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O*NET OnLine's Job Zone assignments make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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 proposed position. The Specialized Vocational Preparation rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O*NET OnLine excerpt submitted by counsel is of little evidentiary value to the issue presented on appeal.

Nor does the record of proceeding contain any persuasive[5] documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in the Medical and Health Services Mangers occupational classification would be sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, as previously discussed, the petitioner submitted an LCA with a wage-level designation that is appropriate for a comparatively low, entry-level position relative to others within the occupation.

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 satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

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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.

[5] The information that counsel submits from the Illinois Department of Employment Security (IDES) regarding general and operations managers, administrative services managers, and human resources managers is not persuasive. Although the IDES chart indicates that a bachelor's degree is required for entry into each of these fields, it does not state that the requisite degree must be in a specific specialty.

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 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 job vacancy announcements submitted by counsel satisfy the first alternative prong described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

First, counsel has not submitted any evidence to demonstrate that these advertisements are from organizations "similar" to the petitioner. At page 5 of the brief on appeal, counsel describes the petitioner as "a 298-bed skilled nursing and rehabilitation facility," and counsel in effect asserts - without supportive documentation – that the petitioner's bed-capacity translates into a need for the same patient safety services as hospitals – and, by extension, the same educational requirements of hospitals. While the AAO will not dispute that patient safety is a major concern and responsibility of all medical care facilities, whether a school nurse's office or a major medical center, the AAO does not accept counsel's unsubstantiated suggestion to the effect that the petitioner's safety concerns require a patient safety officer performing duties substantially the same – and requiring the same educational attainments – as such officials at hospitals. For this reason, and the corollary reasons to follow, the AAO finds that the submitted advertisements from hospitals have not been established as relevant to the proffered position. The first additional reason is that comparison of the duties of the proffered position as described in the record with the job and duty descriptions in the advertisements do not establish the advertised positions as parallel to the proffered position. The petitioner has not established that the duties and performance requirements of the proffered position are substantially the same. The second additional reason is that the petitioner has submitted no evidence to establish that these advertisers are similar to the petitioner in scope and scale of operations. 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)). 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 Obaigbena*, 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)..[6]

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 will 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 AAO also here incorporates by reference its earlier discussion regarding the LCA and the implications of the Level I wage level, which is appropriate only for a low-level, entry position relative to others within the Medical and Health Services Managers occupational group. In accordance with the relevant DOL explanatory information on wage levels, the Level I wage rate for which the LCA was certified is indicative of a position for which only a basic understanding of the occupation is required; the expected performance would consist of routine tasks requiring limited, if any, exercise of judgment; the job holder would be closely supervised; the work would be closely monitored and reviewed for accuracy; and the job holder would receive specific instructions on required tasks and expected results.

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[6] 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 June 21, 2012). 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 ten 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 ten job vacancy announcements supported the finding that the job of a medical and health services manager for a company providing long-term care required a bachelor's or higher degree *in a specific specialty* or its equivalent, it cannot be found that ten job postings 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.

In any event, the AAO finds that, as evident in the duty descriptions that this decision quoted earlier from the record, to the extent that they are presented in the record, neither the duties comprising the proffered position nor the position itself convey the relative complexity or uniqueness required to satisfy the present criterion. The record of proceeding simply has not developed relative complexity or uniqueness as factors that distinguish the proffered position as more complex or unique than positions within that spectrum of positions, within the Medical and Health Services Managers occupational group, which the *Handbook's* information reflects as being held by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as the petitioner 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.

To merit approval of a 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 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 proposed position.[7]

The evidence in this record of proceeding does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. In fact, the petitioner acknowledges that this is a newly-created position, and, as naturally follows, the petitioner has provided no evidence no evidence regarding its previous recruiting and hiring practices for the position. Accordingly, the record lacks evidence for consideration under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).[8]

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 the specialty.

The AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, specialization and complexity have not been developed by the petitioner as aspects that would distinguish the nature of the duties of the proffered position from

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[7] Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proposed position is a comparatively low, entry-level position relative to others within the occupation.

[8] On appeal counsel concedes that the proffered position does not qualify for classification as a specialty occupation under this criterion.

the nature of the duties of medical and health services manager positions not requiring the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. The AAO observes, in particular, that, as illustrated by the array of duties quoted, on the third page of this decision, from the attachment to counsel's letter of November 2, 2010, the proposed duties are presented in terms of generalized functions that are not illuminated by any substantive information about what specific types of activities and associated theoretical and practical applications of specialized knowledge their actual performance would involve that would distinguish them from those of other medical and health services manager positions' duties whose performance does not require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

As the petitioner has not provided sufficiently detailed evidence with regard to the substantive nature of the duties that would be performed if this petition were approved, the petitioner has not established the nature of those duties as 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.

Also, 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 that is indicative of duties of relatively low complexity.

The AAO also incorporates herein its earlier comments and findings regarding the petitioner's attributing to the proffered position an LCA wage-level I which, as already noted, amounts to an assertion that the proffered position is an entry-level position that requires only a basic understanding of the occupation and that basically involves routine tasks requiring limited exercise of judgment and that are performed under close supervision and specific instructions. Such a designation, the AAO finds, is not indicative of duties with the level of complexity and specialization required to satisfy this criterion.

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 (Revised November 2009)* 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.

The AAO also incorporates its earlier findings regarding the petitioner's submitting in support of this petition an LCA that had been certified for only a Level I wage-level position, that is, a position that would be a low-level, entry position relative to others within the occupation.

Accordingly, the evidence in the record of proceeding fails to establish that the nature of 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.