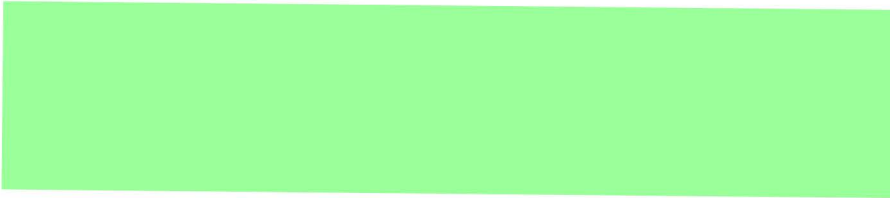




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 18 2014**

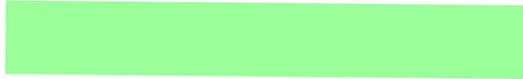
OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

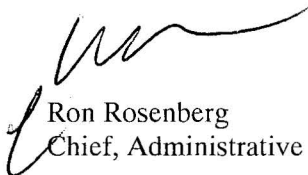


INSTRUCTIONS:

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

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

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on October 2, 2014. In the Form I-129 visa petition, the petitioner describes itself as a nursing home facility established in 1975. In order to employ the beneficiary in what it designates as a registered nurse-unit manager position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on January 27, 2014, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B (Notice of Appeal or Motion), and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed, we agree with the director's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed.

I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time registered nurse-unit manager. In a letter dated September 27, 2013, the petitioner articulated the following duties and requirements for the proffered position:

Reporting directly to the facility's Director of Nursing and Assistant Direct[or] of Nursing, [the beneficiary] would assume full responsibility for the continuity and supervision of the specialized nursing care and would assure that work responsibilities are coordinated, problems are effectively handled, and emergency situations are handled promptly, in accordance with the Facility's policies and procedures. [The beneficiary] would oversee the clinical practice of the charge nurse, supervise and train 1 Registered Nurse and 5 Licensed Practicing Nurses, and schedule 17 staff members so that adequate coverage is maintained as per facility policy and plans for optimal utilization of staff. [The beneficiary] would also review

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

patient care plans and assure that a current plan of care is maintained for each resident in conjunction with other disciplines required to provide total care. More specifically, in this specialized nursing position of Registered Nurse-Unit Manager, [the beneficiary] would perform the following duties: (i) manage patient's complex conditions including central lines, wound care/dressings and chest tube management; (ii) coordinate patient's plan of care among interdisciplinary teams including Physician services, Respiratory Therapy, Social Work, Dietary, Recreation and Rehabilitation; (iii) coordinate nursing rounds with physicians as needed; (v) [sic] perform written performance evaluation of staff under supervision; (vi) [sic] examine and assess all patients encountering an accident/incident; and (vi) assure that all documentation sheets for nursing practice such as Decubitus sheets, Care plans and Nursing summaries have data that is current and consistent with the PRI instrument.

* * *

Due to the advanced and specialized nature of the aforementioned duties, the position of Registered Nurse-Unit Manager requires a level of education and training commensurate with the attainment of a bachelor's-level degree in nursing.

The petitioner stated that the beneficiary is qualified to perform services in the proffered position by virtue of her foreign education and registered nurse license from the state of New York. In support of this assertion, the petitioner provided copies of the beneficiary's foreign diploma and transcripts, and a copy of her New York Registered Professional Nurse license. An evaluation of the beneficiary's foreign education was not provided.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicates on the LCA that the proffered position corresponds to the occupational category "Registered Nurses" – SOC (ONET/OES Code) 29-1141, at a Level I (entry level) wage. The petitioner submitted an excerpt of U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding "Registered Nurses" and a printout of the Occupational Information Network (O*NET) OnLine Details Report for the occupation "Registered Nurses."

In regard to its business operations, the petitioner submitted financial statements for 2012, a copy of a brochure regarding its services, printouts from its website, and an organizational chart.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 16, 2013. The director outlined the evidence to be submitted.

The petitioner responded to the RFE by submitting a letter and additional evidence in support of the H-1B petition. In its letter, dated January 9, 2014, the petitioner provided a "summary" table of the duties of the proffered position. The additional evidence submitted includes an opinion letter from [redacted] printouts of New York regulations governing the staffing of nursing facilities; several job advertisements; a copy of a U.S. Citizenship & Immigration Services (USCIS) memorandum dated May 20, 2009, and a copy of an Immigration

& Naturalization Service (INS) memo dated November 27, 2002.²

The director reviewed the record of proceeding, and determined that the petitioner did not establish eligibility for the benefit sought. The director denied the petition on January 27, 2014. Thereafter, counsel submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel provided an additional job description for the proffered position, additional job advertisements, documentation regarding some of the petitioner's other employees, and copies of previously submitted documents.

The issue before us is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

II. SPECIALTY OCCUPATION

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

A. The Law

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

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

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

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

² The petitioner also provided additional copies of its organizational chart and the beneficiary's nursing license.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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 on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. Material Findings

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately and consistently described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed 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 petitioner has not done so here.

In the instant case, the petitioner has placed varying emphases on different aspects of the proffered position. The petitioner submitted job descriptions for the proffered position with conflicting breakdowns on the time to be spent on the various duties. As previously described, in support of the initial Form I-129 submission, the petitioner indicated that the following duties correspond to the proffered position:

[The beneficiary] would assume full responsibility for the continuity and supervision of the specialized nursing care and would assure that work responsibilities are

coordinated, problems are effectively handled, and emergency situations are handled promptly, in accordance with the Facility's policies and procedures. [The beneficiary] would oversee the clinical practice of the charge nurse, supervise and train 1 Registered Nurse and 5 Licensed Practicing Nurses, and schedule 17 staff members so that adequate coverage is maintained as per facility policy and plans for optimal utilization of staff. [The beneficiary] would also review patient care plans and assure that a current plan of care is maintained for each resident in conjunction with other disciplines required to provide total care. More specifically, in this specialized nursing position of Registered Nurse-Unit Manager, [the beneficiary] would perform the following duties: (i) manage patient's complex conditions including central lines, wound care/dressings and chest tube management; (ii) coordinate patient's plan of care among interdisciplinary teams including Physician services, Respiratory Therapy, Social Work, Dietary, Recreation and Rehabilitation; (iii) coordinate nursing rounds with physicians as needed; (v) [sic] perform written performance evaluation of staff under supervision; (vi) [sic] examine and assess all patients encountering an accident/incident; and (vi) assure that all documentation sheets for nursing practice such as Decubitus sheets, Care plans and Nursing summaries have data that is current and consistent with the PRI instrument.

In its letter submitted in response to the RFE, dated January 9, 2014, the petitioner provided the following "summary" table of the duties of the proffered position:

%	JOB DUTIES
70	Supervise the clinical practice of Licensed Practical Nurses and Certified Nursing Assistants
	Assign shift staff members so that adequate coverage is maintained as per Facility policy and plans for optimal utilization of staff
	Manage patient's complex conditions including central lines, wound care/dressings and chest tube management
	Coordinate patient's plan of care among interdisciplinary teams including Physician services, Respiratory Therapy, Social Work, Dietary, Recreation and Rehabilitation
	Review patient care plans and Medex and assure that a current plan is maintained for each resident in conjunction with other disciplines required to provide total care;
	Assure that all documentation sheets for nursing practice such as Decubitus sheets, Care plans and Nursing summaries have data that is current and consistent with the PRI instrument
30	Coordinate nursing rounds with physicians as needed
	Perform written performance evaluation of staff under supervision
	Examine and assess all patients encountering an accident/incident

On appeal, counsel provided a document bearing the petitioner's logo entitled, "Job Description," for the position of "RN Supervisor/Nurse Manager." This document contains numerous duties,

some of which have been highlighted and annotated by the petitioner. The document appears to indicate that the beneficiary will spend 70% of her time performing the following duties:

- Supervise the clinical practice of the charge nurse.
- Apply basic, sound nursing skills in ascertaining appropriate levels of care for each resident.
- Review patient care plans and medex. Assure that a current plan of care is maintained for each resident in conjunction with other disciplines required to provide total care.
- Evaluate the nursing care and assure that its administration is in accordance with the Facility's policies and procedures.
- Coordinate nursing services with other services, such as medical services, physical and occupational therapy, social services, dietary services, activities, etc.
- Assist in the completion of Long Term Care and Medicare forms.
- Assure that all documentation sheets for nursing practice such as, Decubiti Sheets, Care Plans and Nursing Summaries have data that is current and consistent with the PRI instrument.

In addition to these duties, the job description indicates that on a daily basis, the beneficiary will spend 1 hour "[making] rounds to see residents and allow them to verbalize problems and/or concerns," and 2 hours "[making] patient rounds at least twice on the shift, and more often if needed" and "[supervising] meals in the dining room." The beneficiary will spend 2 hours per week to "[scheduling] shift staff member so that adequate coverage is maintained as per Facility policies and procedures"; 1 hour per week "[performing] written evaluations of staff in coordination with Charge Nurse"; and 2 hours per week "[participating] in the Facility's Quality Assurance Program."

We first observe that within the "70%" of duties to be performed by the beneficiary, there is a substantial range of activities. Notably, the percentage of time that the beneficiary will spend on administrative activities compared to direct patient care has not been established. The petitioner has not provided an estimate as to the portion of the beneficiary's time that will be dedicated to typical registered nurse duties. On appeal, the petitioner included the duty of application of basic nursing skills as an additional portion of the 70% of the beneficiary's time. The petitioner also indicated that, in addition to the 70% of duties, an unknown portion of which is direct patient care, the beneficiary will spend three hours daily making patient rounds.

Further, we note that the petitioner has made various claims regarding the supervisory responsibilities involved in the proffered position. In its initial description, the petitioner stated that the beneficiary would "oversee the clinical practice of the charge nurse, [and] supervise and train 1 Registered Nurse and 5 Licensed Practicing Nurses, and schedule 17 staff members." In the summary chart provided in response to the RFE, the petitioner indicated that the beneficiary will "[s]upervise the clinical practice of Licensed Practical Nurses and Certified Nursing Assistants." On appeal, the job description provided by the petitioner indicates that the beneficiary will "[s]upervise the clinical practice of the charge nurse." With the initial submission, in response to the RFE, and again on appeal, the petitioner and counsel provided an organizational chart that

appears to suggest that one registered nurse, five licensed practical nurses, and eleven certified nursing assistants are employed the beneficiary's unit; however, from this chart the reporting responsibilities cannot be ascertained. In addition, we note that the position of "charge nurse" does not appear on the organizational chart. In its letter in response to the RFE, the petitioner indicated that the beneficiary will manage a charge nurse *as well as* a registered nurse and five licensed practical nurses.³ Thus, even if the petitioner had established the percentage of the beneficiary's time to be dedicated to administrative duties (which it did not), the discrepancies in the petitioner's representations regarding the supervisory duties of the proffered position call into question the actual tasks the beneficiary is expected to perform.

Thus, upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. Thus, the petitioner has failed to demonstrate how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

C. Analysis

We now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). As explained above, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed within the petitioner's business operations. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

³ We note that in the RFE, the director specifically requested clarification regarding the individuals to be supervised by the beneficiary. The director requested that the petitioner provide the names, position titles, and highest level of education for individuals to be supervised by the beneficiary. In response, the petitioner submitted the same ambiguous organizational chart that was previously provided. The specific individuals to be supervised by the beneficiary, including their names, titles, and education, have not been established.

Nevertheless, assuming, *arguendo*, that the petitioner had adequately and consistently described the duties of the proffered position, we will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

As previously referenced, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Registered Nurses." We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ The subchapter of the *Handbook* entitled "How to Become a Registered Nurse" states, in pertinent part, the following about this occupational category:

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

Education

In all nursing education programs, students take courses in anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take 4 years to complete; ADN and diploma programs usually take 2 to 3 years to complete. All programs also include supervised clinical experience.

Bachelor's degree programs usually include additional education in the physical and social sciences, communication, leadership, and critical thinking. These programs also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

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

Many registered nurses with an ADN or diploma choose to go back to school to earn a bachelor's degree through an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field. Some employers offer tuition reimbursement.

Certified nurse specialists (CNSs) must earn a master's degree in nursing. CNSs who conduct research typically need a doctoral degree.

⁴ All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Registered Nurses, on the Internet at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4> (last visited August 15, 2014).

The *Handbook* does not report that the occupational category of "Registered Nurses" requires at least a bachelor's degree in a specific specialty, or its equivalent for entry into the occupation. Rather, the *Handbook* states that registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. In addition, there are programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field. While the *Handbook* states that a bachelor's degree or higher is often necessary for administrative positions, as discussed above, the petitioner has not established administrative duties as a substantial aspect of the proffered position.

Further, when reviewing the *Handbook* we must consider the petitioner's designation of the proffered position as a Level I (entry level) position on the LCA.⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."⁶ A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees 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.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at

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

⁶ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. Based upon the petitioner's designation of the proffered position as a Level I (entry) position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner cites New York state regulatory requirements for nursing facilities. We reviewed title 10, section 415.13 of the New York Health Code, and we find that it is not probative as to the petitioner's claim that the proffered position is a specialty occupation. New York state staffing requirements indicate that a registered nurse or a licensed practical nurse must serve as a charge nurse for each tour of duty. N.Y. Comp. Codes R. & Regs. tit. 10, § 415.13(a)(2). State regulations further require a nursing facility to utilize the services of a registered professional nurse for at least eight consecutive hours a day, seven days a week. N.Y. Comp. Codes R. & Regs. tit. 10, § 415.13(b)(1). However, these regulations do not speak to requirements for registered professional nurses in the state of New York. The Commissioner's Regulations, Part 52.12, Registration of Curricula [for Nursing Programs], states, in pertinent part, the following regarding the education requirements for licensure as a registered professional nurse in the state of New York:

- a. *Programs which prepare for admission to licensing examinations.*
 1. The curriculum for a program preparing for admission to the licensing examination for registered professional nurse shall meet the following standards:
 - i. The program leading to the diploma in nursing shall include a minimum of the equivalent of 30 semester hours in nursing and shall be at least two years in length.
 - ii. The program leading to an associate degree with a major in nursing shall include a minimum of 30 semester hours or the equivalent in nursing.
 - iii. The program leading to a baccalaureate or higher degree with a major in nursing shall include a minimum of 40 semester hours or the equivalent in nursing.

Thus, it is apparent that the minimum education required for licensure as a registered professional nurse in the state of New York is a two-year diploma in nursing, which is less than the minimum requirements for a bachelor's degree.

In addition to the above discussed regulations, the petitioner provided an opinion letter from [REDACTED] professor of nursing at the [REDACTED] Ms. [REDACTED] bases her opinion on her "academic, professional, and research experiences," and her review of the "employer-prepared petition support letter." Ms. [REDACTED] repeatedly emphasizes the supervisory duties of the proffered position. She states that the beneficiary will provide "staff oversight," "managerial decision-making responsibility," and she will "oversee the clinical practice of licensed nurses and other such personnel." She also notes that the position entails "complex critical thinking and decision making" and asserts that the position can be distinguished from "more general entry-level nursing positions, which may be fulfilled by candidates with only an associate-level assessment in Nursing." Ms. [REDACTED] finds that the proffered position is a "senior-level post (relative to other nursing positions)." She thus concludes that the proffered position requires at least a bachelor's degree in nursing and "the appropriate and necessary nursing license."

Upon review of the opinion letter, there is no indication that Ms. [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond that which was provided in the petitioner's letter.⁷ There is no evidence that Ms. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. She does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. She bases her opinion solely on the petitioner's letter and her "familiar[ity] with such positions."

Furthermore, it does not appear that Ms. [REDACTED] is fully informed of the level of responsibility that the petitioner has attributed to the proffered position. Notably, her characterizations of the proffered position as "senior-level" and distinguishable from entry-level nursing positions directly contradict the petitioner's designation of the proffered position as a Level I (entry) position in the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the proffered position will entail limited, if any, exercise of judgment. It appears that Ms. [REDACTED] would have found this information relevant for the opinion letter. Without this information, the petitioner has not demonstrated that Ms. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position.

We may, in our discretion, use an advisory opinion or statement submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion, we decline to regard the advisory opinion letter as probative evidence of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion regarding the opinion letter into our analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

⁷ We note that the petitioner provided differing descriptions of the proffered position in its letters submitted in support of the initial Form I-129 petition, and subsequently in response to the RFE. Ms. [REDACTED] does not specify which letter she consulted, nor did she provide a copy.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, we will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In the Form I-129, the petitioner stated that it is a nursing home facility established in 1975, and has 274 employees. The petitioner stated its gross annual income as approximately \$22 million and its net annual income as approximately \$39,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 623110. According to the U.S. Census Bureau, NAICS is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited August 15, 2014). The NAICS code specified by the petitioner is designated for "Nursing Care Facilities (Skilled Nursing Facilities)," and is defined by the U.S. Department of Commerce, Census Bureau as follows:

This industry comprises establishments primarily engaged in providing inpatient nursing and rehabilitative services. The care is generally provided for an extended period of time to individuals requiring nursing care. These establishments have a permanent core staff of registered or licensed practical nurses who, along with other staff, provide nursing and continuous personal care services.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 623110 – Nursing Care Facilities (Skilled Nursing Facilities), on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 15, 2014).

In response to the RFE and on appeal, the petitioner and counsel provided printouts of several online job announcements. However, this documentation does not establish that the proffered position qualifies as specialty occupation. As a preliminary matter, we note that the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

For the petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics with the advertising organization. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. The petitioner has not supplemented the record with sufficient information to establish that the advertising organizations are similar to the petitioner.

Contrary to the purpose for which the advertisements were submitted, many of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, the job postings from [REDACTED] at [REDACTED] and unnamed hospitals in New York indicate that a BSN degree is preferred. We note that a *preference* for a particular level of education is not a *requirement* for the same. Other postings seek a "graduate of an approved RN program," a "graduate of an accredited school of nursing," or simply state a requirement for a valid RN license. These advertisements are from organizations including [REDACTED]

As previously discussed, accredited nursing programs under New York regulations include two-year diploma programs and associate's degree programs. Thus, a requirement for a licensed RN or a graduate of an accredited nursing school or program is not a requirement for at least a bachelor's degree. Finally, nearly all the postings that require bachelor's degrees appear to be for positions more senior than the proffered position. As previously discussed, the petitioner has certified the proffered position at a Level I entry-level wage, which according to DOL guidance is appropriate for an internship or a worker in training. However, many of the advertisements provided indicate that that several years of experience are required in addition to a BSN. These include the following advertisements:

- [REDACTED] Nursing Supervisor): "6+ years of experience"
- [REDACTED] (Sub-Acute RN unit manager): "5+ to 7" years of experience
- [REDACTED] (RN ICU Case Manager): "3-5 years acute case management experience in the hospital setting"

- Unnamed [REDACTED] NY (RN Manager/Nurse Manager): "Minimum of 5+ to 7 years post graduate (current) experience as Nurse Manager": "3+ to 5 years ICU experience"
- Unnamed [REDACTED] NY (Nurse Manager): "5+ years experience"
- [REDACTED] "Manager or minimum of 3-5 years experience as an RN in an acute care setting"
- Unnamed [REDACTED] NY (Nurse Supervisor-Evenings): "2+ years of Management experience in Acute Care setting"
- [REDACTED] (Assistant Director of Nursing): "6+ years of satisfactory nursing experience, including 4+ years in a supervisory or teaching capacity"
- Unnamed [REDACTED] (Pulmonary Nurse Manager): "2+ to 5 Years" of experience
- Unnamed [REDACTED] NY (Assistant Nurse Manager): "A minimum of three years' recent clinical experience within ER specialty"
- [REDACTED] (Nurse Manager (RN)- Surgical Unit): "2+ to 5 Years" of experience
- [REDACTED] (Associate Nurse Manager/L&D): "minimum of three years experience"
- [REDACTED] (Assistant Director of Nursing): "6+ years of satisfactory nursing experience, including 4+ years in a supervisory or teaching capacity"

As the petitioner has certified the proffered position at a Level I entry-level wage, positions requiring substantial experience in the industry cannot be found parallel to the proffered position, based on the petitioner's representations.

The documentation submitted does not establish that the petitioner has met this prong of the regulations, and further analysis regarding the specific information contained in each of the job postings is therefore not necessary. That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.⁸

⁸ The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to 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

Thus, based upon a complete review of the record of proceeding, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted financial documents, a brochure, printouts from its website, and an organizational chart. The petitioner also submitted an opinion letter from Ms. [REDACTED]

However, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or 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 in a specific specialty, or its equivalent. The petitioner has not established why the proffered position cannot be performed with an associate's degree or diploma in nursing and the requisite license.

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner provided a 2002 INS memo from [REDACTED] on the adjudication of H-1B petitions filed on behalf of nurses. The memo indicates that certain nursing occupations, such as an upper-level nurse manager in a hospital administration position, may qualify as a specialty occupation. However, the memo does not relieve the petitioner of its burden of proof.

In the instant matter, the petitioner has not established that the proffered position is a high-level administrative position relative to others in the field, or that the position's duties are so complex that

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 the job announcements supported the finding that the position (for organizations similar to the petitioner) required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the 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.

⁹ We here incorporate our earlier comments and findings regarding the probative value of the opinion letter.

they can only be performed by a person with at least a bachelor's degree in a specific specialty. Rather, in designating the proffered position at a Level I entry-level wage, the petitioner has indicated that the proffered position is a relatively *low-level* nursing position. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Upon review of DOL's instructive comments, we observe that the petitioner did not designate the proffered position as involving even "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II) when compared to other positions within the same occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

As previously noted, the petitioner's varying and vague descriptions of the primary duties of the position do not establish that the proffered position is substantially administrative in nature. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner has indicated that the beneficiary's educational background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In addition, the petitioner may submit any other documentation it considers relevant to this criterion of the regulations.

To merit approval of the petition under this criterion, 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 performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the

proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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 position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element 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 proffered 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.

The petitioner stated in the Form I-129 petition that it has 274 employees and was established in 1975 (approximately 38 years prior to the filing of the H-1B petition). On appeal, counsel states that "all of [the petitioner's] Registered Nurses-Unit Manager are required to have at least a Bachelor's degree in Nursing and a RN state licensure from the state of New York." In support of this assertion, counsel provided documentation "showing the credentials of other [of the petitioner's] Registered Nurses-Unit Manager." However, the documentation provided contains a copy of only one diploma for a U.S. bachelor's degree in nursing, for [REDACTED]. Counsel provided a foreign diploma for one other employee, [REDACTED] but did not provide an evaluation of this individual's foreign credentials. We note that the pay statements provided for both Ms. [REDACTED] and Ms. [REDACTED] indicate that both individuals are paid at a higher wage than the proffered position. Counsel also provided several resumes, only one of which is from an individual who claims to have

earned a BSN. However documentation of this individual's degree was not provided. The remaining resumes are for individuals who, according to the petitioner's organizational chart, are employed as CNAs (Certified Nurse Aides). As these individuals hold positions that are different than the proffered position, any evidence regarding their education is not probative with regard to the proffered position. Further, none of these individuals claims in his or her resume to have attained a bachelor's degree in nursing.

Upon review of the evidence of record, we find that the petitioner's demonstration that it has employed one individual with a bachelor's in nursing over its 38 year history is insufficient to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The petitioner and counsel claim that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We reviewed all of the evidence of record including the evidence regarding the petitioner's business operations. For example, we reviewed the petitioner's brochure, printouts from its website, its financial statements, and its organizational chart. We also reviewed the petitioner's statements, and the opinion letter from Ms. [REDACTED]. However, upon review of the entire record of proceeding we find that the submitted documentation fails to support the assertion that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." The petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

III. BENEFICIARY QUALIFICATIONS

Beyond the director's decision, and in addition to the above described deficiencies of the instant petition, we note a further issue that precludes approval of requested benefit. Although we do not need to examine the issue of the beneficiary's qualifications where the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation, we observe that the petitioner has not demonstrated that the beneficiary is qualified to perform services in a specialty occupation position.

Specifically, the petitioner relies on the beneficiary's foreign education to qualify the beneficiary to perform services in a specialty occupation position. However, the petitioner did not provide an evaluation of the beneficiary's foreign credentials as required by Federal regulation.¹⁰ In response to the RFE, the petitioner references a 2009 USCIS memo from [REDACTED] to suggest that the

¹⁰ For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

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

beneficiary's RN license is sufficient evidence of her qualifications to perform duties in a specialty occupation position. However, this memo is not applicable to the instant case. The memo refers only to "professions enumerated under 8 C.F.R. 212.15(c) **and** meet the definition of specialty occupation, as defined at 8 C.F.R. 214.2(h)(4)(ii)(4)." As discussed above, the proffered position does not meet the definition of a specialty occupation. Further, we note that evidence of a bachelor's degree in a specific specialty is not required under the Commissioner's Regulations, Part 52.12, Registration of Curricula [for Nursing Programs] to obtain a license as a registered professional nurse license in the state of New York.

Thus, as evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

IV. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.