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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



U.S. Citizenship  
and Immigration  
Services

DATE: **AUG 28 2014** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

## I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a 274-employee nursing home facility<sup>1</sup> established in [REDACTED]. In order to employ the beneficiary in what it designates as a full-time "Registered Nurse – Specialty Care" position at a salary of \$32 per hour,<sup>2</sup> the petitioner seeks to extend her classification 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 found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 11, 2013. Within the RFE, the director outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation. The director denied the petition, concluding that the evidence of record failed to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before us 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.

Beyond the decision of the director, we find that the petitioner provided as the supporting 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 level of responsibility the petitioner claimed for the proffered position through its descriptions of its constituent duties. This aspect of the petition undermines the credibility of the petition as a whole and any claim as to the proffered position or the duties comprising it as being particularly complex, unique, and/or specialized.<sup>3</sup>

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 623110, "Nursing Care Facilities (Skilled Nursing Facilities)." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "623110 Nursing Care Facilities (Skilled Nursing Facilities)," <http://www.naics.com/naics-code-description/?code=623110> (last visited August 8, 2014).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Registered Nurses" occupational classification, SOC (O\*NET/OES) Code 29-1141, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

<sup>3</sup> The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and we identified this issue in the course of that review.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's basis for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

## II. LAW

To meet the petitioner's burden of proof in establishing the proffered position as a specialty occupation, the evidence of record must establish that the employment the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or



- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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



### III. ANALYSIS

Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

#### A. The Proffered Position and its Constituent Duties

In a September 27, 2013 letter submitted in support of the petition, the petitioner stated:

[I]n the specialized nursing position of Registered Nurse – Specialty Care, [the beneficiary] would perform the following duties: (i) supervise the clinical practice of Licensed Practical Nurses and Certified Nursing Assistants; (ii) assign shift staff members so that adequate coverage is maintained as per Facility policy and plans for optimal utilization of staff; (iii) manage patient's complex conditions including central lines, would [sic] care/dressings and chest tube management; (iv) coordinate patient's plan of care among interdisciplinary teams including Physician services, Respiratory Therapy, Social Work, Dietary, Recreation and Rehabilitation; (v) review patient care plans and [redacted] and assure that a current plan is maintained for each resident in connection with other disciplines required to provide total care; (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; (vii) coordinate nursing rounds with physicians as needed; (viii) perform written performance evaluation of staff under supervision; and (ix) examine and assess all patients encountering an accident/incident.

The director determined that the duties as listed did not constitute a specialty occupation position and could be performed by a registered nurse who had gained a certain level of experience. The director further noted that the position of a registered nurse is not normally considered a specialty occupation because nursing applicants may qualify for a licensure through attainment of an associate degree. In an RFE, the director requested a detailed statement of the beneficiary's duties and an explanation regarding how a bachelor's degree is essential for each of the duties of the proffered position.

In response to the director's RFE, the petitioner submitted a letter, dated January 6, 2013, signed by its counsel. In the letter, counsel stated that in the proffered position, the beneficiary would be "assigned exclusively to ventilator and step down units and will assume full responsibility for the continuity and supervision of the specialized nursing care for patients admitted to these units." Counsel listed the same duties stated in the petitioner's support letter and broke down the time spent on specific duties in percentages as follows:

%	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

	<p>policy and plans for optimal utilization of staff[;]</p> <p>Manage patient's complex conditions including central lines, would [sic] care/dressings and chest tube management[;]</p> <p>Coordinate patient's plan of care among interdisciplinary teams including Physicians services, Respiratory Therapy, Social Work, Dietary, Recreation and Rehabilitation[;]</p> <p>Review patient care plans and [REDACTED] and assure that a current plan is maintained for each resident in connection with other disciplines required to provide total care[;]</p> <p>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[.]</p>
30	<p>Coordinate nursing rounds with physicians as needed[;]</p> <p>Perform written performance evaluation of staff under supervision[;]</p> <p>Examine and assess all patients encountering an accident/incident[.]</p>

In addition, the petitioner submitted a letter, dated November 25, 2013, from [REDACTED] Ph.D., a professor at the [REDACTED] in which Dr. [REDACTED] stated that she reviewed the duties of the proffered position and concluded that the proffered position "satisfies two of the criteria which are generally recognized as distinguishing specialty-level positions in the nursing field from standard, RN [Registered Nurse] positions: (1) the individual operates in a senior/supervisory capacity (with responsibility for supervising direct reports and coordinating plans of care; and (2) the position operates in an advanced-practice capacity, relative to the requirements of specialty care services."

#### B. The Letter Submitted as Expert Testimony

We will first address the letter from Dr. [REDACTED]. At the outset, we note that Dr. [REDACTED] stated she was basing her opinion on "copies of the original documents provided by the candidate"<sup>4</sup> and specifically mentioned the petitioner's support letter dated September 27, 2013. However, Dr. [REDACTED] did not expressly state whether she had reviewed any other documentation regarding the petitioner or the position, whether she had made any personal observations of her own, or whether there had been any oral transmissions with the petitioner upon which she based her opinion beyond this single letter. Dr. [REDACTED] did not indicate whether she visited the petitioner's business premises or spoke with anyone affiliated with the petitioner, so as to ascertain and base her opinion upon, the substantive nature and educational requirements of the proposed duties as they would be actually performed. Nor did she specify and discuss any studies, treatises, surveys, authoritative industry sources or relevant other authoritative publications, and, significantly, she did not discuss the pertinent occupational information provided in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). It appears as though Dr. [REDACTED] did not base her opinion on any objective evidence, but instead simply reviewed the duties of the registered nurse – specialty care position as set forth by the petitioner in that letter.

<sup>4</sup> Dr. [REDACTED] did not indicate to whom she was referring when she stated "candidate."



However, even if these foundational deficiencies were not present, Dr. [REDACTED] letter would still not satisfy any of the criteria described at 8 C.F.R. § 214.2(h)(4)(iii)(A). Dr. [REDACTED] did not indicate whether she considered, or was even aware of, the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for the author's ultimate conclusion regarding the educational requirements of the positions upon which she opines.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Registered Nurses" occupational category, SOC (O\*NET/OES) Code 29-1141, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. 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.<sup>5</sup>

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring 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. The author's omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of her assertions. Therefore, Dr. Ivanov's conclusion that the individual in the proffered position operates in a senior/supervisory capacity and that the position operates in an advanced-practice capacity, relative to the requirements of specialty care services contradicts the

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<sup>5</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited August 8, 2014).



petitioner's LCA wage-level designation of the proffered position as Level-I. The petitioner's LCA wage-level designation does not support Dr. [REDACTED] conclusion that the proffered position is an advanced-practice occupation.

For all of these reasons, we find that the letter from Dr. [REDACTED] is not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

### C. The LCA Submitted by the Petitioner in Support of the Petition

We will next address the supplemental finding we have made on appeal, which independently precludes approval of this petition: our finding that the LCA submitted by the petitioner in support of this petition does not correspond to the petition and does not establish that the petitioner will pay the beneficiary an adequate salary.

As noted, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Registered Nurses" occupational classification, SOC (O\*NET/OES) Code 29-1141, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Wage levels should be determined only after selecting the most relevant O\*NET code classification. A prevailing wage determination is then made by selecting one of four wage levels for an occupation based upon 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.<sup>6</sup>

Prevailing wage determinations start at Level I (entry) and progress to a wage that is commensurate with that of 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.<sup>7</sup> DOL emphasizes

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<sup>6</sup> For additional information on wage levels, 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited August 9, 2014).

<sup>7</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4

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 as indicated by the job description.

The petitioner has classified the proffered position at a Level I wage. Pursuant to the *Prevailing Wage Determination Policy Guidance* set forth previously, a Level I wage is only appropriate for a position requiring only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." That designation indicates further that the beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment." However, we find that many of the duties and job requirements described by counsel and the petitioner exceed this threshold.

For example, in its September 27, 2013 letter, the petitioner stated its "Registered Nurses – Specialty Care, are assigned exclusively to our ventilator and step down units and will assume full responsibility for the continuity and supervision of the specialized nursing care for patients admitted to these units. These nurses do not have a Unit Manager and their services are focused on patients whose conditions necessitate a higher level of medical attention and care." The petitioner also stated that the "[p]atients admitted to this unit require constant monitoring around the clock as their acuity level is higher than [sic] the patients admitted in other units." On appeal, the petitioner asserts that the proffered position would require the beneficiary "to exercise independent clinical judgment related to the residents under their care." Furthermore, the petitioner states that the beneficiary would "manage and oversee the work of five (5) Professional Registered Nurses (RNs), eight (8) Licensed Practical Nurses (LPNs) and twenty-three (23) Certified Nursing Assistants (CNAs)."

In similar fashion, in the RFE response letter, counsel stated that the beneficiary "would use advanced therapeutic intervention skills based on [her] knowledge and experience of health disorders, human growth and development and principles of rehabilitation." Counsel further stated that the beneficiary "must be deeply familiar with advanced rehabilitation techniques." Finally, counsel quoted Dr. [REDACTED] assertion that the beneficiary would occupy "an advanced high level position within the facility's treatment environment."

These stated duties and related claims indicate that the beneficiary will be required to exercise extensive independent judgment in the proffered position, which conflicts with the Level I wage-rate designation.

We therefore question the level of complexity, independent judgment and understanding actually required for the proffered position, as the LCA was certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the

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accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.



petitioner conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7<sup>th</sup> Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. Again, the petitioner has offered the beneficiary a wage of \$32 per hour, which satisfied the Level I (entry level) prevailing wage in the [REDACTED] Statistical Area at the time the LCA was certified.<sup>8</sup> However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise her salary to at least \$35.29 per hour. The Level III (experienced) prevailing wage was \$39.63 per hour, and the Level IV (fully competent) prevailing wage was \$43.98 per hour.<sup>9</sup>

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required

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<sup>8</sup> U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Registered Nurses," [http://www.flcdatcenter.com/OesQuickResults.aspx?code=29-1141&area=\[REDACTED\]&year=14&source=1](http://www.flcdatcenter.com/OesQuickResults.aspx?code=29-1141&area=[REDACTED]&year=14&source=1) (last visited August 9, 2014).

<sup>9</sup> *Id.*



under the Act, if the petition were granted for a higher-level and more complex position as claimed elsewhere in the petition.

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

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

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is 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.<sup>10</sup>

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 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):

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<sup>10</sup> See also 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) ("An approved labor condition application is not a factor in determining whether a position is a specialty occupation").

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, provided the proffered position was in fact found to be a higher-level and more complex position as claimed elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position; that is, specifically, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I, entry-level position. This conflict undermines the overall credibility of the petition. We find that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the LCA submitted by the petitioner indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such higher level work and responsibilities, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. 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.<sup>11</sup>

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<sup>11</sup> Fundamentally, it appears (1) that the petitioner claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) that the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position is a specialty occupation. The petitioner cannot have it both ways. Either the position is a more senior and complex position (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.



#### D. Review of the Director's June 25, 2013 Decision Denying the Petition

We 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.

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

We recognize DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>12</sup> As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Registered Nurses" occupational category.

The *Handbook* states the following with regard to the duties of positions falling within the "Registered Nurses" occupational category:

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

#### **Duties**

Registered nurses typically do the following:

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

Most registered nurses work as part of a team with physicians and other healthcare specialists. Some registered nurses oversee licensed practical nurses, nursing assistants, and home health aides.

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<sup>12</sup> 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 2014-15 edition available online.



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

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

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

Many possibilities for working with specific patient groups exist. The following list includes just a few other examples:

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

**Cardiovascular nurses** care for patients with heart disease and people who have had heart surgery.

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

**Genetics nurses** provide screening, counseling, and treatment of patients with genetic disorders, such as cystic fibrosis.

**Neonatology nurses** take care of newborn babies.

**Nephrology nurses** care for patients who have kidney-related health issues stemming from diabetes, high blood pressure, substance abuse, or other causes.

**Rehabilitation nurses** care for patients with temporary or permanent disabilities.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital

administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

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

**Clinical nurse specialists (CNSs)** are a type of advanced practice registered nurse (APRN). They provide direct patient care in one of many nursing specialties, such as psychiatric-mental health or pediatrics. CNSs also provide indirect care, by working with other nurses and various other staff to improve the quality of care that patients receive. They often serve in leadership roles and may advise other nursing staff. CNSs also may conduct research and may advocate for certain policies.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Registered Nurses," <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-2> (last visited August 9, 2014).

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

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.

### **Licenses, Certifications, and Registrations**

In all states, the District of Columbia, and U.S. territories, registered nurses must have a nursing license.

To become licensed, nurses must graduate from an approved nursing program and pass the National Council Licensure Examination, or NCLEX-RN.

Other requirements for licensing vary by state. Each state's board of nursing can give details. For more on the NCLEX-RN examination and a list of state boards of nursing visit the National Council of State Boards of Nursing.

Nurses may become certified through professional associations in specific areas, such as ambulatory care, gerontology, and pediatrics, among others. Although certification is usually voluntary, it demonstrates adherence to a higher standard, and some employers may require it.

CNSs must satisfy additional state licensing requirements. They may choose to earn certification in a specialty.

### **Important Qualities**

***Critical-thinking skills.*** Registered nurses must be able to assess changes in the health state of patients, including when to take corrective action and when to make referrals.

***Compassion.*** Registered nurses should be caring and sympathetic, characteristics that are valuable when caring for patients.

***Detail oriented.*** Registered nurses must be responsible and detail oriented because they must make sure that patients get the correct treatments and medicines at the right time.

***Emotional stability.*** Registered nurses need emotional stability to cope with human suffering, emergencies, and other stresses.



**Organizational skills.** Nurses often work with multiple patients with various health needs. Organizational skills are critical to ensure that each patient is given proper care.

**Physical stamina.** Nurses should be comfortable performing physical tasks, such as helping to lift and to move patients. They may be on their feet for most of their shift.

**Speaking skills.** Registered nurses must be able to talk effectively with patients to assess their health conditions. Nurses need to explain how to take medication or to give other instructions. They must be able to work in teams with other health professionals and communicate the patients' needs.

### **Advancement**

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

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

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

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

Some RNs choose to become nurse anesthetists, nurse midwives, or nurse practitioners, which, along with certified nurse specialists, are types of advanced practice registered nurses (APRNs). APRNs may provide primary and specialty care, and, in most states, they may prescribe medicines. For example, clinical nurse specialists provide direct patient care and expert consultations in one of many nursing specialties, such as psychiatric-mental health.

Other nurses work as postsecondary teachers in colleges and universities.

*Id.* at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4> (last visited August 9, 2014).

At the outset of its analysis under this criterion, we note again that the petitioner designated the proffered position as a Level I position on 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 beneficiary is only expected to possess a basic understanding of the occupation.

Moreover, 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.

Turning to the *Handbook* entry quoted above, we note that it does not report that a baccalaureate degree in nursing is normally the minimum requirement for entry into positions within this occupational category. On the contrary, this passage of the *Handbook* reports that a BSN, an ADN, or a diploma from an approved nursing program qualifies individuals to take the licensing exam.



The *Handbook* states that there are three general paths for becoming a registered nurse, i.e., a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program. The *Handbook* states that associate's degrees and diploma programs for this occupation usually take two to three years to complete. The narrative of the *Handbook* indicates that generally, licensed graduates of any of the three types of educational programs (bachelor's, associate's, or diploma) qualify for entry-level positions. Nor does the *Handbook* state a minimum requirement for at least a bachelor's degree in nursing, or its equivalent for management positions; instead, it indicates only that graduate degrees are "increasingly required." An increasing preference for a graduate degree does not equate to a normal minimum hiring requirement for a graduate degree, or even a bachelor's degree, in a specific specialty or the equivalent. For all of these reasons, the *Handbook* does not indicate that the proffered position falls under an occupational group which normally constitutes a specialty occupation.

Next, we turn to the Williams Memo cited by the petitioner on appeal. Section C of the Williams Memo states, in pertinent part, the following:

Certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree. (See Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook at 269.) Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (See Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook at 75.)

Memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002). The Williams Memo does not support a finding that the proffered position is a specialty occupation under this, or any other, criterion.

First, the Williams Memo only indicates that certain upper-level nurse manager positions "may" qualify, not that such positions categorically qualify as specialty occupations. Even if it did, as indicated above, the petitioner classified the proffered position as an entry-level registered nurse on the submitted LCA, and not as an upper-level registered nurse position. Second, we note that the Williams Memo misrepresents the findings of the *Handbook*. The *Handbook* did not state that administrative positions typically require a bachelor's degree. Instead, the *Handbook* stated that "[a] bachelor's degree is often necessary for administrative positions . . ." See *Handbook*, 2002-03 edition, "Registered Nurses," at 269. In any event, the *Handbook* did not state that such a degree is a prerequisite for entry into the position. Moreover, we find that the nursing services administrators portion of the Williams Memo refers to medical and health services manager positions, and the proffered position and the duties comprising it do not fit within that occupational category. Rather, as indicated above, the proffered position is a registered nurse position, and the *Handbook* indicates that registered nurses, including those with associate degrees or diplomas, oversee other healthcare workers, such as licensed practical nurses, nursing aides, and home care aides. Thus, the Williams

Memo is not evidence that the particular position that is the subject of this petition is a specialty occupation.

We turn next to DOL's Occupational Information Network (O\*NET OnLine), an alternative authoritative source cited by the petitioner. We find that O\*NET OnLine does not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. In general, O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a standard entry requirement for a given position, as O\*NET OnLine's Job Zone designations 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. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Furthermore, the Specialized Vocational Preparation (SVP) ratings, which are cited within O\*Net OnLine's Job Zone designations, are meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP ratings do 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 cited by the petitioner is of little evidentiary value to the issue presented on appeal.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is 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."

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, 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 described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find 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 (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)).



Here and as already discussed, the evidence of record does not establish that the petitioner's 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, as we discussed earlier, the letter from Dr. [REDACTED] is not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). While the assertions of the petitioner, counsel, and Dr. [REDACTED] with regard to an industry-wide recruiting and hiring standard are acknowledged, the record contains no evidence to support those assertions. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

We also find that the petitioner's reliance upon the job vacancy advertisements is misplaced. In support of its assertion that the BSN requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of 18 advertisements. The advertisements provided, however, establish at best that a bachelor's degree may be generally preferred. However, hiring "preferences" do not necessarily equate to minimum hiring "requirements." Furthermore, ten of these job announcements were for RN Manager/Unit Managers, two were for nursing supervisors, and two for case manager positions. Therefore, these announcements are not sufficient to demonstrate that a bachelor's degree is a common degree for the proffered position as they are not for parallel positions. In addition, the other four positions that are listed as RN positions either state that a BSN is preferred or list "Graduate of a State approved and accredited school of nursing" without specifying a degree level. Specifically, an announcement by [REDACTED] in New York for an RN position in a ventilator unit, while indicating an experience with ventilators was preferred, did not mention any degree level requirement. This undermines the petitioner's contention that a BSN degree is an industry standard for the proffered position which, as indicated by the wage-level designation on the LCA, is an entry-level position.

In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. The postings lack sufficient information regarding the actual employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Without such evidence, job advertisements submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Furthermore, 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. Moreover, as they are only solicitations for hire, they are not evidence of the

employers' actual hiring practices. Finally, we note that majority of these positions, if not all, require work experience. The proffered position, however, is a Level I, entry-level position.

As such, even if the job announcements supported the finding that the position of "Registered Nurse – Specialty Care" 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.<sup>13</sup>

As a result, the petitioner has not established that similar companies in its industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.

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 or its equivalent that is common (1) to the petitioner's industry and (2) for positions in that industry that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

Next, we find that the evidence of record does 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 the instant case, the evidence of record does not credibly demonstrate relative complexity or uniqueness as aspects of the proffered position. Specifically, it is unclear how the registered nurse – specialty care position, as described, necessitates the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in nursing or its equivalent is required to perform them. Rather, we find that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions falling within the "Registered Nurses" occupational category, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

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<sup>13</sup> Also, although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from less than a dozen 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 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").



We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

Accordingly, given the *Handbook's* indication that typical positions located within the "Registered Nurses" occupational category do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.

Finally, we observe that the petitioner has indicated that the beneficiary's course work, degrees, and certifications make her qualified for 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 requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the proposed duties, if any, would render the proffered position so complex or unique as to be distinguishable from those of similar RN positions held by nurses who have associate's degree or a diploma in nursing. Again, the petitioner did not 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.

For all of these reasons, it cannot be concluded that the evidence of record satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn 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 in a specific specialty or its equivalent for the position.

Our review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's

imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>14</sup>

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 employer 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 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

On the Form I-129, the petitioner stated that it was established in 1975 and employs 274 workers. On appeal, the petitioner submitted an organizational chart of the [REDACTED] which indicates ten<sup>15</sup> "RN-Specialty Care" positions. The petitioner also indicated on the chart that the nurses who occupy these ten RN-Specialty Care positions all hold a "BSN." The chart further indicates that these units have additional five additional RN (three with BSN and two with ADN), eight LPN<sup>16</sup>, and 23 CNA<sup>17</sup> positions. In efforts to demonstrate its prior hiring history, the petitioner also submits copies of 14 bachelor's degrees and a master's degree of individuals it claims are currently working or have worked for the petitioner.<sup>18</sup> Out of these 15 individuals with

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<sup>14</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the same occupation.

<sup>15</sup> One of these positions is identified as the proffered position hold by the beneficiary.

<sup>16</sup> LPN – Licensed Practical Nurse. According to the *Handbook*, LPN "programs award a certificate or diploma and typically take about 1 year to complete, but may take longer. They are commonly found in technical schools and community colleges, though some programs may be available in high schools and hospitals." *See* <http://www.bls.gov/ooh/healthcare/licensed-practical-and-licensed-vocational-nurses.htm#tab-4>.

<sup>17</sup> CNA – Certified Nursing Assistant. The *Handbook* states, "[n]ursing assistants must complete a state-approved education program in which they learn the basic principles of nursing and complete supervised clinical work. These programs are found in high schools, community colleges, vocational and technical schools, hospitals, and nursing homes. . . . After completing a state-approved education program, nursing assistants take a competency exam. Passing this exam allows them to use state-specific titles. In some states, a nursing assistant or aide is called a Certified Nursing Assistant (CNA), but titles vary from state to state." *See* <http://www.bls.gov/ooh/healthcare/nursing-assistants.htm#tab-4>.

<sup>18</sup> Some of these degrees are foreign degrees and the petitioner did not submit academic evaluations for these foreign degrees or otherwise explain by what objective means it determined their equivalency to U.S. degrees.



bachelor's degrees, the petitioner identified only seven of them working in the positions designated as "Specialty Care." The petitioner did not submit copies of degrees for the other two individuals<sup>19</sup> who are identified on the organizational chart as currently being employed in the specialty care positions. The record is devoid of information regarding the employment status of the other individuals whose degrees were submitted. Moreover, the petitioner submitted timesheets for only four of the employees who are indicated as employed in the specialty care positions. Therefore, we find that the evidence submitted is insufficient to prove that the petitioner has historically hired individuals with bachelor's degree in nursing for the proffered position. Even if the petitioner were able to demonstrate that every nurse, who are currently employed in the specialty care position, holds a bachelor's degree in nursing, which it has not, submitting a little more than a dozen degrees is not sufficient to establish a hiring history since its establishment in [REDACTED]. Furthermore, the timesheets, when verified against the organizational chart, reflect that one of the RNs holds an ADN and 18 individuals are hired in CNA positions.<sup>20</sup> Accordingly, these timesheets have little probative value as they are not for the individuals who were hired for positions similar to the proffered position.<sup>21</sup>

For all these reasons, we find that the record of proceeding does not establish the prior history of recruiting and hiring required to satisfy this particular criterion. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, we find that the evidence of record does not satisfy 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 specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position's duties. In other words, the proposed duties have not been described with sufficient specificity to show that their nature is more specialized and complex than registered nurse positions whose duties are not of a nature so specialized and complex that their

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<sup>19</sup> Excluding the beneficiary.

<sup>20</sup> The petitioner also submitted timesheets for individuals who were not identified on the organizational chart; therefore, we are not able to ascertain what position these individuals hold.

<sup>21</sup> Even if these factors were not present, the evidence of record would still not satisfy the third criterion. Again, in order to satisfy this criterion, the evidence of record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position. As discussed above, by submitting an LCA certified for an entry-level, Level I position, the petitioner effectively attested that the proffered position requires only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." That attestation does not lead us to believe that even if established by the current record, such a degree requirement would in this case actually be "necessitated by the performance requirements of the petition."

performance requires knowledge usually associated with a bachelor's degree in nursing. In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Registered Nurses" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in nursing, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite), and the record indicates no factors that would credibly elevate the duties proposed for the beneficiary above those discussed for similar positions in the *Handbook*. With regard to the specific duties of the position proffered here, we find that the record of proceeding lacks sufficient, credible evidence establishing that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's of science degree in nursing, or the equivalent.

Moreover, we incorporate our earlier discussion regarding the wage-level designation on the LCA, which is appropriate for duties whose nature is less complex and specialized than required to satisfy this criterion. We find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by 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].

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited August 9, 2014).

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

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment.



An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

*Id.*

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 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 the petitioner's Level I wage-rate designation.

Further, we note 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. . . .

*Id.*

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.

*Id.*

As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

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

As the evidence of record does not satisfy 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.

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Therefore, we need not and will not address the beneficiary's qualifications further.

#### E. Prior Approval

The petitioner submitted evidence that USCIS approved another petition that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).



#### IV. CONCLUSION AND ORDER

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).

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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. The petition is denied.