

(b)(6)



U.S. Citizenship
and Immigration
Services

[REDACTED]

DATE: JUL 25 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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
for 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. The appeal will be dismissed. The petition will be denied.

In the Form I-129 visa petition, the petitioner describes itself as a physical and occupational therapy services clinic that was established in 2010. In order to newly employ the beneficiary in a position to which it assigned "Clinic Manager" as the job title, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on October 22, 2013, concluding 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 arbitrary and capricious, 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 response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we find that the record supports the director's denial of the petition on the basis specified in her decision. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. EVIDENTIARY STANDARD APPLIED ON APPEAL

As a preliminary matter, on appeal, counsel for the petitioner correctly asserts that the "preponderance of the evidence" standard should be applied to this matter.

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

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

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Applying the preponderance of the evidence standard, we conclude that the petitioner has not established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

II. LEGAL FRAMEWORK

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 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 evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

III. FACTUAL AND PROCEDURAL HISTORY

As already noted, the petitioner describes itself as a clinic that provides physical and occupational therapy. The petitioner also states that it was established in 2010.

The petitioner indicated on the Form I-129 that it wishes to employ the beneficiary in a position which it identifies by the job title "Clinic Manager." The Form I-129 also states that, at the time of filing, the petitioner employed five (5) persons, had a gross annual income of \$686,777 and a net annual income of "\$-78,841." The copies of the tax returns submitted into the record indicate that the petitioner there identified rehabilitation services as its principal product or service. In the Internet printouts from its Internet site, which the petitioner filed with the Form I-129, we see that the petitioner advertised services and areas of specialization consistent with such business operations,

On the Form I-129 the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 621340.² This NAICS code is designated for the industry "Offices of Physical, Occupational and Speech Therapists, and Audiologists." *See* U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 621340 - Offices of Physical, Occupational and Speech Therapists, and Audiologists, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

² According to the U.S. Census Bureau, the North American Industry Classification System (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>.

On the Form I-129, the petitioner identified the proffered position's job title as "Clinic Manager" and specified the period of intended employment as October 1, 2013 to September 20, 2016. The petitioner also stated that the beneficiary would be employed on a full-time basis, at an annual salary of \$59,446. The petitioner also submitted a Labor Condition Application (LCA) certified for a job prospect with the job title "Clinic Manager" that would fall within the "Medical and Health Services Managers" classification - SOC (ONET/OES) code 11-9111 – and would be assigned a Level I (entry level) wage.

The petitioner submitted with the Form I-129 a one-page document, entitled "Clinical Manager," which described the duties of the proffered position. (We will address this document – and compare it with statements in the RFE response – later in our decision.) This document ends with this assertion about the proffered position:

Requirements

Bachelor or Master's degree in physical or occupational therapy and 2 years therapy experience[.]

In addition to the statement of duties and the LCA, the petitioner also submitted the following documents: (1) evidence pertaining to the beneficiary's prior authorized status; (2) a copy of the beneficiary's foreign academic credentials evaluation and diploma, demonstrating that he has the equivalent of a U.S. bachelor's degree in Physical Therapy and two years of undergraduate study in pharmaceutical sciences; (3) evidence demonstrating that the petitioner is currently doing business, including copies of its federal tax returns and promotional materials; and (4) an excerpt from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* pertaining to the occupation of Medical and Health Services managers.

Having found the initial evidence insufficient to establish eligibility for the benefit sought, the director issued an RFE on August 19, 2013, in which the director outlined the types of evidence to be submitted.

Counsel for the petitioner responded to the director's RFE and provided additional evidence, including a two-page "Job Duties" table which includes percentages of work time that the petitioner projects for each block of duties in the table. That table is introduced by the following statement, at the top of the table's first page:

Summary: Manage and monitor the operations of the clinic. Supervise clinical staff and non-clinical staff and oversee activities, adhere to policies, procedures, standards, and regulations and also ensure patient satisfaction. Provide support to clinicians and provide leadership for clinical problem solving. The person in this role is also responsible for clinical processes, policies and procedures as well as contributing at a business and strategic level.

In a letter in response to the RFE dated October 7, 2013, counsel for the petitioner explained that

the beneficiary, as Clinic Manager, "will spend the majority of his time handling therapy and complex medical data and issues," and that "he will supervise other physical therapists and occupational therapists - occupations that are clearly specialty occupations." Counsel contended that, since the beneficiary would be supervising individuals in specialty occupation positions, the beneficiary obviously must have at least the same specialized knowledge as his subordinates. Counsel's implication that a person can be licensed and practice as physical therapist with only a bachelor's degree in physical therapy is not substantiated anywhere in the record.

In support of this contention, the petitioner submitted a copy of its organizational chart, demonstrating that the beneficiary, in the position of Clinical Manager, would directly supervise one occupational therapist and two physical therapists, as well as the administration department of the petitioner which included a front office employee and a billing department. The organizational chart further indicates that subordinate to the therapists there are two "COTA" employees, one Rehab Tech., and one Massage Therapist. Finally, the chart indicates that the petitioner's "Administrator," is [REDACTED] - who signed the petition as the petitioner's president - whom the chart also identifies as one of the Physical Therapists.

In addition to the updated list of duties cited above, counsel also submitted: (1) an excerpt from the *Handbook's* section discussing the occupation of Medical and Health Services Managers (which had been previously submitted); (2) a copy of the regulation at 42 C.F.R. §§ 485.703 and 485.705; (3) job postings for positions the petitioner deems similar to that of the proffered position within the petitioner's industry; (4) a copy of the petitioner's owner's diploma, demonstrating that he holds a Doctor of Physical Therapy degree; (5) a copy of an article entitled [REDACTED] by [REDACTED] (6) an excerpt from "[REDACTED]" and (7) copies of various documents evidencing the work product of the beneficiary.

The director reviewed the information provided by the petitioner. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on October 22, 2013. Counsel submitted an appeal of the denial of the H-1B petition, asserting that the director's decision was arbitrary, capricious, and ignored probative and material evidence in the record. In support of the appeal, counsel submitted a brief and additional evidence.

For the reasons that will be discussed below, we find that the evidence of record does not establish that the proffered position is a specialty occupation. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

IV. ANALYSIS

The issue before us is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. We will first discuss some preliminary findings that are material to this decision's application of the H-1B statutory and

regulatory framework to the proffered position as described in the record of proceeding.

A. Regarding the RFE's Expansion of the Proposed Duties

One aspect of the petition that caught our attention early in our review is what we see as an attempt, in the RFE-response, to materially expand the scope of the proffered position beyond that for which the petition was filed. As will be explained, we see this attempt in the following duty-related items that initially appears in the RFE response.

The two-page "table of job duties" at Tab E of the RFE response includes the following phrases in its introductory "Summary": "[s]upervise clinical staff" and "provide leadership for clinical problem solving."³

We also invite the petitioner's attention to the first two boxes in the "Job Duties" table, for they include such apparently hands-on supervision of the actual delivery of clinical services as "design[ing] individual patient care plans by communicating with the rehabilitation team to bring out best outcomes"; "[t]ask designing and overlooking the clinic proceeding"; "provid[ing] . . . in service training and annual competencies."

Further, page 2 of counsel's letter replying to the RFE includes this language, advocating that the petitioner has satisfied criterion 4 of 8 C.F.R. § 214.2(h)(4)(iii)(A):

[T]he Clinic Manager will spend the majority of his time handling therapy and complex medical data and issues. He will supervise other physical and occupational therapists – occupations that are clearly specialty occupations. Obviously, to competently supervise other specialty occupations the Clinical Manager should have at least the same specialized knowledge.

We also note that the third page of counsel's letter on appeal includes this "bullet" phrase about the proffered position:

- Supervise, evaluate, and train physical and occupational therapists. In order to [do] this effectively, [the beneficiary] must be familiar with specialized terms and methods in the field of physical therapy.

³ The RFE response includes the following paragraph:

Summary: Manage and monitor the operations of the clinic. Supervise clinical staff and non-clinical staff and oversee activities, adhere to policies, procedures, standards, and regulations and also ensure patient satisfaction. Provide support to clinicians and provide leadership for clinical problem solving. The person in this role is also responsible for clinical processes, policies and procedures as well as contributing at a business and strategic level.

(Also, on appeal, counsel reiterates the clinical nature of the proposed duties as presented in the RFE response, claiming that "it probably would have been easier to rename the position to Therapy Clinic Supervisor.")

By contrast, we see that the one-page list of duties that accompanied the Form I-129 on its filing reads as follows:

Clinic Manager

Non technical job description

Direct and manage therapy services clinic

Job Description

The clinic manager is responsible for managing and monitoring the operations of the clinic.

Act as liaison between providers, patients, clinic staff, vendors and administrative/support departments.

Monitor and control expenditures, labor costs, staffing levels within budgeted levels.

Participate in the annual budgeting process, particularly with respect to income and expense forecasting. Monitor and supervise revenue posting to ensure maximum revenue. Complete annual budgets on time, provide supporting documentation and justification.

Manages all aspects of hiring, orientation, scheduling, performance evaluations, disciplinary actions, and compliance with Clinic policies and procedures.

Write and deliver performance evaluations. Review, approve and submit time worked to payroll. Organize staff scheduling. Conduct Clinic staff meetings at least monthly. Coordinate and record minutes of Clinic staff meetings.

Monitor clinic productivity through customer satisfaction reviews, daily traffic reports, and financial reports.

Remain current on innovative techniques and trends in the industry for enhancing organizational and technical skills.

Identifies, collects, analyzes, and presents information for resolution of operational problems within the Clinic and report recommendations to owner.

Develop and implement marketing programs and ensure that they are properly executed and maintained.

Monitor maintenance of equipment, building and grounds for attractiveness, state of repair and safety.

We find that, as so described above, the proposed duties were limited to overall general management of the Clinic as an ongoing business enterprise operating in a particular healthcare sector. However, we find no indication in those duties, viewed either alone or as a group, that they would include participation in supervising the actual delivery of clinical services. However, we also find that the above referenced language from the RFE-response does ascribe such clinical supervision to the position, and therefore materially expands the position beyond what was presented in the petition as filed. Such an expansion is not permissible, short of filing a new petition (of course, with appropriate fees and a corresponding LCA) that would identify such clinical activities as elements of the proffered position.

1. No weight to the newly inserted clinical supervision duties

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In response to an RFE, a petitioner cannot offer a new position to the beneficiary, elevate its level of authority within the organizational hierarchy, or materially alter its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Id.* A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). If significant changes are made to the initial request for approval, the petitioner must file a new or amended petition. (Likewise, too, the proper procedure for notifying USCIS of any material changes in the terms and conditions of employment or the beneficiary's eligibility as specified in the original petition, is to submit a new or amended petition, with a valid LCA and the proper fee(s), for the director to consider. *See* 8 C.F.R. § 214.2(h)(2)(E).)

If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record when the petition was filed.

Accordingly, in our determination of this appeal, we shall accord no weight to expansion of the proffered position by the above-noted clinical-supervision aspects, as they were newly presented at the RFE stage and, we find, materially expand, rather than clarify, the position and its constituent duties as presented in the petition as filed.

There is an additional aspect of the aforementioned expansion of the duties in the RFE response that negates any weight in favor of the petition, and that is that they are statements by counsel that are neither accompanied by corroborative documentation from the petitioner nor by any express endorsement by the petitioner of counsel's expansion of the duties in the RFE response. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

2. Negative impact of the newly expanded duties upon the credibility of the petition

That the record of proceeding includes such a statement, that the statement appears to materially expand the nature and scope of the position that was proffered in the petition, and that such assertions suggest that the petitioner may contemplate the position as a means of employing an unlicensed person to perform physical therapy functions requiring licensure are factors which we find materially undermine the credibility of the petition. They render uncertain what work the beneficiary would actually perform if this petition were approved, and consequently, we find that record of proceeding fails to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, these material conflicts preclude a determination that the petitioner's clinic manager position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions. This state of the evidence precludes approval of the petition.

3. Lack of evidence that the beneficiary is licensed

There is yet an additional impact of those newly-claimed duties of related to supervision of clinical services which are so clearly stated in the following statement, previously quoted in this decision:

[T]he Clinic Manager will spend the majority of his time handling therapy and complex medical data and issues. He will supervise other physical and occupational therapists – occupations that are clearly specialty occupations. Obviously, to competently supervise other specialty occupations the Clinical Manager should have at least the same specialized knowledge.

The petition proposes the beneficiary for hire in the State of Michigan. However, our review of the Michigan Public Health Code reveals that, in Michigan, "a person shall not engage in the practice of physical therapy or practice as a physical therapist assistant unless licensed or otherwise authorized under this part." Mich. Comp. Laws § 333.17820(1). According to the Michigan Public Health Code, the "practice of physical therapy" is defined in relevant part as follows:

"Practice of physical therapy" means the evaluation of, education of, consultation with, or treatment of an individual by the employment of effective properties of physical measures and the use of therapeutic exercises and rehabilitative procedures, with or without assistive devices, for the purpose of preventing, correcting, or alleviating a physical or mental disability. *Physical therapy includes **treatment planning, performance of tests and measurements, interpretation of referrals, initiation of referrals, instruction, consultative services, and supervision of personnel.***

Mich. Comp. Laws § 333.17801(1)(d) (emphasis added).

Thus, the supervision and training of physical therapy personnel and treatment planning, duties counsel claimed are associated with the proffered position, appear to constitute the practice of physical therapy in the State of Michigan. The petitioner does not claim, nor did it provide any evidence to suggest, that the beneficiary possesses a current physical therapist license in any state or territory of the United States. If the assertions of counsel were accepted, it appears that the beneficiary would be, to some extent, engaged in the practice of physical therapy as defined by the State of Michigan.

Thus, it appears that the range of services that counsel attributes to the proffered position would require that the beneficiary be licensed as a physical therapist – but the record of proceeding contains no evidence that the beneficiary is now so licensed, or, more importantly, was so licensed when this petition was filed. Consequently, the petition could not be approved even if the evidence of record had established the proffered position as a specialty occupation – which is not the case. See 8 C.F.R. § 214.2(h)(4)(v) (*Licensure for H classification*).

B. Application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

In the interests of a full and comprehensive review of this petition we will now address why the proffered position does not qualify as a specialty occupation when we consider the proffered position without the aforementioned materially expansive duties that would require the filing of a new petition, as we explained above. (It should be noted, of course, that when we hereafter refer to the proposed duties we mean all the duties presented in the record except those which, as we have discussed, constitute an attempt to materially expand the proffered position and its duties beyond the scope of the position presented in the petition as filed.

We turn first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

We recognize the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 11-9111, Medical and Health Services Managers from O*NET. The *Handbook* describes the occupation of "Medical and Health Services Managers" as follows:

What Medical and Health Service Managers Do

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

Duties

Medical and health services managers typically do the following:

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

In group medical practices, managers work closely physicians and surgeons, registered nurses, medical and clinical laboratory technologists and technicians and other healthcare workers.

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

⁴ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

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

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

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Medical and Health Services Managers," <http://www.bls.gov/ooh/management/medical-and-health-services-managers.htm#tab-2> (last visited July 25, 2014).

The duties of the proffered position appear to correspond to the occupational category above, in that the petitioner contends that the beneficiary will be responsible for managing the petitioner's entire facility. The *Handbook's* information about the education and training requirements for this occupational category, however, indicates that entry into the Medical and Health Services Managers occupational group does not normally require at least a bachelor's degree in a specific specialty or its equivalent.

According to the *Handbook*, the educational requirements of a medical and health services manager are as follows:

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

Education

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Medical and Health Services Managers, on the Internet at <http://www.bls.gov/ooh/management/medical-and-health-services-managers.htm#tab-4> (last visited July 25, 2014).

The *Handbook* does not report that a medical and health services manager needs, as a standard entry requirement, at least a bachelor's degree in a specific specialty or its equivalent. Rather, the *Handbook* simply reports that "most medical and health services managers have at least a bachelor's degree." (Emphasis added). Thus, the *Handbook* does not indicate that a bachelor's degree in a specific specialty is normally required for entry into this occupational category. Consequently, and contrary to counsel's view, the proffered position's inclusion within the Medical and Health Services Managers occupational group is not sufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of Medical and Health Services Manager positions would require at least a bachelor's degree in nursing or a closely related field, it could be said that "most" medical and health services manager positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

Next, we note that the *Handbook* indicates that those with general-purpose degrees in business administration may enter the occupation. However, an H-1B specialty-occupation petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a

specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

In sum, as the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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, as already 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 our previous discussion on the matter. Further, there are no relevant submissions from an industry professional association or from firms or persons in the petitioner's industry.

Next, for the purpose of evaluating the job advertisements submitted into the record, we note that to establish that a job-advertising organization is similar to it, the petitioner must demonstrate that it and the other organization share the same general characteristics. 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 job-posting organization share the same general characteristics, information regarding the nature or type of organization and, when pertinent, the

particular scope of operations, as well as the level of revenue and staffing (to list just a few elements) may be considered. It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a sound factual basis for such an assertion.

On the Form I-129 petition, the petitioner describes itself as a physical and occupational therapy services clinic established in 2010, with 5 employees. The petitioner claims that it has a gross annual income of approximately \$686,000 and a net annual income of approximately -\$78,000. As noted previously, on the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 621340 – "Offices of Physical, Occupational and Speech Therapists, and Audiologists."⁵ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments of independent health practitioners primarily engaged in one of the following: (1) administering medically prescribed physical therapy treatment for patients suffering from injuries or muscle, nerve, joint, and bone disease; (2) planning and administering educational, recreational, and social activities designed to help patients or individuals with disabilities, regain physical or mental functioning or to adapt to their disabilities; and (3) diagnosing and treating speech, language, or hearing problems. These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 621340 – Offices of Physical, Occupational and Speech Therapists, and Audiologists, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsreh> (last visited June 30, 2014).

To support the assertion that the proffered position satisfies this criterion of the regulations, counsel submitted copies of several job vacancy announcements for positions it deems are similar to that of the proffered position, which we will address below.

The petitioner submits three job postings for the position of Clinic Director with [REDACTED] in various geographic locations; a posting for the position of Clinic Manager/Physical Therapist with [REDACTED] and one for Director of [REDACTED]

The petitioner submitted company profiles obtained from the Internet which suggest that companies posting the job offers are similar to the petitioner in size and scope. However, for all postings, we note the same requirement not mandated in this petition: a current license in the state of practice.

⁵ 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 U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited June 30, 2014).

While we note that the postings submitted require a bachelor's degree in physical therapy or another related discipline, such as occupational therapy or speech-language pathology, all of these postings require candidates to hold the appropriate state license. Therefore, a review of the nature of these positions suggests that the positions are not truly akin to the position of clinic manager here, which the petitioner claims is included in the classification of medical and health services managers, but rather to that of a physical therapist, which requires a specific degree and satisfaction of state licensing requirements. Counsel's suggestion in her response to the RFE that the beneficiary will train and supervise physical therapists in the course of his work prompted us to review the Michigan Public Health Code. As previously noted, Michigan requires any individual who engages in the "practice of physical therapy" (which in this case includes supervision of personnel) to meet state licensing requirements. Therefore, the submitted postings, at best, further support our skepticism that the proffered position has not been accurately described herein.

In this matter, the job postings submitted appear to encompass the practice of physical therapy, and are distinguished from the proffered position in that they impose more rigid requirements for entry into the occupations. Whereas the *Handbook* indicates that medical and health services managers may hold a variety of degrees for entry into the occupation, including health administration, there is no requirement that the candidates possess a specific clinical license to enter the profession. Similarly, we note that the petitioner imposes no licensing requirement upon the beneficiary here, despite counsel's suggestion that the beneficiary will ultimately be engaging in the practice of physical therapy. Consequently, we find that, while the postings submitted here have similar job titles to that of the proffered position, they encompass the practice of physical therapy, a duty not established as being part of the duties of the proffered position here, and thus represent solicitations for positions not akin to the proffered position in this matter.⁶

In sum, while the petitioner may have submitted job vacancy announcements for positions located in organizations that are similar to the petitioner, the evidence of record does not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are parallel to the proffered position.⁷ Accordingly, we

⁶ For example, the *Handbook* states that "physical therapists need a Doctor of Physical Therapy (DPT) degree" and "all states require physical therapists to be licensed." See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Physical Therapists, on the Internet at <http://www.bls.gov/ooh/management/medical-and-health-services-managers.htm#tab-4> (last visited June 30, 2014). We find that the job postings submitted herein are representative of job advertisements for physical therapists and not medical and health services managers as claimed by the petitioner and contemplated by the *Handbook*.

⁷ USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these postings with regard to determining the common educational requirements for entry into

find that the job advertisements are not probative evidence towards satisfying this alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For all of the reasons discussed above, we find that the evidence of record has not 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.

We find that while the duties as described in the record comport with those generally associated with medical and health services managers, they are presented as relatively abstract and generalized functions that do not in themselves indicate that they comprise a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in physical therapy or any other related specialty. In this regard we also note that the record of proceeding contains no documentary evidence of any objective measure by which the proffered position as described in the record should be regarded as more complex or unique than medical and health services managers positions that can be performed by persons who have not attained at least a bachelor's degree in a specific specialty closely related to the proffered position.

The evidence of record simply does not develop the proffered position with sufficient substantive detail to demonstrate that it is more complex or unique than positions which may share those same generalized functions and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

Further, there is the implication of the LCA submitted by the petitioner. It was certified for use with a job prospect that only merits a Level I (entry level) wage. Level I (entry level) designation is appropriate for a comparatively low, entry-level position relative to others within the occupation.⁸

parallel positions in similar organizations in the same industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

⁸ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

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 it carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. We find that the submission of such an LCA is inconsistent with the relative complexity or uniqueness required to satisfy this particular criterion.

We observe that the petitioner has indicated that the beneficiary's educational background in physical therapy will assist him 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 requires both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty or its equivalent.

With regard to this second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), we incorporate here our earlier comments regarding the lack of probative detail in the petitioner's description of the duties of the proposed position. Again, as reflected in those comments, the petitioner has not focused upon, nor provided evidence that develops, relative complexity or uniqueness as attributes of the proposed position. Further, the evidence of record does not distinguish the proposed duties, or the proposed position that they collectively comprise, as more complex or unique than positions in the pertinent occupational group which may share those same generalized functions that the petitioner ascribes to its position and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, or, consequently, a person with at least a bachelor's degree in a specific specialty. Accordingly, the petitioner has not shown that its particular position is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

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

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

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

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.

but is necessitated by the performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner claims that its prior administrator, [REDACTED] holds a Doctor of Physical Therapy degree, thus establishing that it previously employed a specialty-degreed individual to serve in the proffered position. However, the petitioner submits no additional evidence to establish that, in fact, the [REDACTED] held the same position that is the subject of this petition.

In addition, as noted earlier, Mr. [REDACTED] is listed as a physical therapist on the petitioner's organizational chart, and the submission of his diploma in the record suggests that, contrary to the petitioner's assertions, he has been and would continue to be employed as a physical therapist or in the practice of physical therapy, not in the position here at issue.

In any event, one instance of a person holding a particular position would not be sufficient to establish the history of recruiting and hiring required to satisfy this criterion.

Thus, the petitioner has not satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Therefore, 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 even the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires (1) the theoretical and practical application of a body of highly specialized knowledge and (2) the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent as the minimum for entry into the occupation as required by the Act. According to the Court in *Defensor*, "To interpret the regulations any other

way would lead to an absurd result." *Id.* at 388. 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.*

Finally, 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 the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Counsel contends on appeal that the duties of the proffered position, which require the beneficiary to supervise and train professional employees, namely, physical therapists and occupational therapists, are sufficiently complex and involve a level of knowledge that require the services of a person who has at least a bachelor's degree in physical therapy. Counsel's claims notwithstanding, we find that evidence of record has not developed relative specialization and complexity as an aspect of the proffered position.

First, we hereby adopt and incorporate into this analysis our discussions of why we accord no weight to counsel's assertions at the RFE phase, which we quoted, with regard to the asserted participation of the beneficiary in what would appear to amount to an unlicensed practice of physical therapy under Michigan law. That being said, we also find that remainder of the proposed duties as have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of other positions in the pertinent occupational category whose performance would not require the application of knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. There is a lack of evidence substantiating counsel's 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. 1972)). Also, we note again that, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof: the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

As noted previously, counsel sought to elevate the position to a higher level of complexity in response to the RFE by including the practice of physical therapy (i.e., supervision of physical therapists) in the position description. As previously noted, these additional duties conflicted with the original statement of duties and encompassed duties attributed to that of a physical therapist, a position requiring a license and a higher academic degree for entry into the occupation. The apparent suggestion by counsel that the beneficiary will practice physical therapy, as defined by the State of Michigan, in addition to the administrative duties originally identified by the petitioner, and thus his duties are sufficiently complex to satisfy this criterion, are rejected. Such duties were not

included in the original statement of duties and consequently cannot be relied upon as establishing the position to be a specialty occupation.

Additionally, we incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the same occupational category. The petitioner designated the position of nurse manager as a Level I position (the lowest of four possible wage-levels). Again, DOL indicates that a Level I wage is appropriate for "beginning level employees who have only a basic understanding of the occupation." See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Counsel contends that the entry-level wage proffered to the beneficiary in this matter is not indicative of the level of complexity of the position. Rather, counsel asserts that the very designation by the Occupational Information Network (O*NET) of the occupation of health educators as being a Job Zone Five occupation counters this finding. As previously discussed, the fact that an occupation group may require "extensive preparation" does not automatically establish that the specific duties of a particular position within that group are 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 also note that counsel has not cited any statutory or regulatory authority or precedent decision for the claim.

As reflected in our discussion above of the criterion at second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the duties as described in the record of proceeding do not evidence such a level of specialization and complexity that the knowledge they would require is usually associated with any particular level of education in any particular specialty. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent.

We therefore find that the petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. That is, the petitioner has not established that the nature of the duties of the position 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. So, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, we note that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that the specialized study need not be in a single academic discipline.

While we agree that "[t]he knowledge and not the title of the degree is what is important," in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.⁹ We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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 petition appeal will be dismissed and the petition will be denied for this reason.

V. CONCLUSION

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

⁹ It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to our office. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, 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.