



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: MAR 27 2014 OFFICE: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and subsequently reopened the matter on a government motion to reopen and reconsider. Upon review of the petition, the director recommended that the petition be denied and certified the decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on June 8, 2012.¹ In the Form I-129, the petitioner describes itself as a home health care services and staffing company provider established in 2005. In order to employ the beneficiary in what it designates as a health educator position, 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation. Thereafter, U.S. Citizenship and Immigration Services (USCIS) issued a Service Motion to Reopen/Reconsider and requested additional evidence from the petitioner. Upon review of the evidence, USCIS recommended denial of the petition and certified the matter to the AAO. Counsel for the petitioner supplemented the record with a brief and additional evidence, asserting that the director's findings with regard to the proffered position were erroneous and contending that the petitioner met its burden of proof in this matter.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE) dated November 16, 2012; (3) counsel's response to the RFE dated January 25, 2013; (4) the notice of decision dated February 22, 2013; (5) the Service Motion to Reopen/Reconsider and accompanying RFE dated September 6, 2013; (6) counsel's November 12, 2013 response to the second RFE; (7) the Notice of Certification dated December 19, 2013; and (8) counsel's supplemental brief dated January 16, 2014.

The AAO reviewed the record in its entirety before issuing its decision.² For the reasons that will be discussed below, the AAO agrees with the director that the record as currently constituted does not establish eligibility for the benefit sought. Accordingly, the decision certified to the AAO will be affirmed, and the petition will be denied.

I. PRELIMINARY PROCEDURAL ERROR CLAIM

¹ On the Form I-129, the petitioner requested a "Change of Employer" based on a prior approval with a different employer ([REDACTED]). The record, however, demonstrates that the beneficiary's H-1B employment under this petition was terminated effective June 1, 2012, approximately four months prior to the end of its approved validity period and one week prior to the filing of the instant petition seeking to change this employment.

² The AAO conducts review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As a preliminary matter, the AAO notes that counsel raises a procedural error claim and asserts that the certification of the instant case to the AAO was erroneous and warrants a remand to the service center for an initial decision. Specifically, counsel contends that the director erred by certifying this case to the AAO with a recommendation of denial.

The circumstance to which counsel refers, however, is an instance where no decision was entered by the director. In this matter, the director issued a recommended or initial decision and certified that decision to the AAO for review, as opposed to certifying the case to the AAO without first adjudicating the petition and entering a decision. The director's recommended decision is considered the initial decision for purposes of certification, and is not a final administrative decision until the AAO reviews the case and enters its findings. Consequently, certification of this matter to the AAO was proper and within the authority granted to the director by 8 C.F.R. § 103.4(a)(5).

II. THE LAW

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable 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), 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 both 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. *See* section 214(i)(1) of the Act.

III. FACTUAL AND PROCEDURAL HISTORY

On the Form I-129 petition, the petitioner indicates that it is seeking the beneficiary's services as a health educator at an annual salary of \$32,656. In its June 4, 2012 letter of support, the petitioner provided the following overview of the beneficiary's proposed duties:

The responsibilities of the Petitioner's proffered job of Health Educator will include:

1. Collect and analyze data to determine individual patient and group needs.
2. Develop operational plans and policies necessary to achieve health education objectives and services to patients, families, and staff.
3. Plan, implement, and evaluate programs designed to encourage healthy lifestyles, habits, policies, and environments.
4. Consult with other health professionals and social service professionals.
5. Prepare materials and distribute to patients and staff.
6. Develop and present health education programs such as training workshops and presentations.
7. Meet with managing staff for periodic evaluation of health education program.
8. Develop and maintain cooperative working relationships with agencies and organizations interested in public health care.

As Petitioner is in the business of home health care, it is necessary to educate patients, families and staff on the appropriate activities that will maximize health knowledge and practices. The Beneficiary will play a key role in this goal as the Health Educator will utilize a variety of the health field's concepts, practices, and procedures along with a personalized analysis of a patient, as diagnosed by licensed medical professionals, to educate on the best practices one can take to improve one's well-being and health.

Besides pointed tips and comprehensive health assessments, the Health Educator will produce educational materials that families and individuals will be able to use as reference guides to determine how to incorporate a health program into their lifestyle. Many people's initial dealings with home health care is their first exposure to such a service. Thus, it is important for patients and family members to have the Health Educator as a resource for information about health conditions, treatment plans, and progress/deterioration. It is simply impossible for the general health care staff such as nurses or licensed practical nurses to devote the necessary time patients and families need to understand treatment plans, needed behavioral changes to promote healthy lifestyles and other health education objectives. Thus, the position

of Health Educator is an integral part of the overall goal to keep patients and family members informed, knowledgeable, and proactive about the health realities and treatment or care of the patient.

As well, the Health Educator will need to be knowledgeable of health care issues, including but not limited to diseases and their treatment or containment, pharmaceuticals, psychiatry, psychology and the confluence of all types of health care issues to form comprehensive education treatments [sic] plans based on licensed medical professionals' diagnoses of patients.

The Health Educator position is a highly important role in a home health care practice and it requires the understanding of complex medical issues as well as the knowledge of diseases, their prevention or containment and the ability to research and analyze data present to the health community. The complexity of the job requires the minimum of a bachelor's degree in a health concentration and at least one (1) year of related experience. Such educational training at the bachelor's level is necessary due to the Health Educator's need to accomplish the above-mentioned duties to analyze the overall health goals of patients in order to produce comprehensive health education assessments and to be knowledgeable at a superior level on a plethora of health care issues. To accomplish the goals herein presented, the Health Educator will work with many other health care staff, including doctors, psychiatrists, psychologists, nurses, and nutritionists. As well, [t]he Health Educator will be a liaison between the home health care practice and other health organizations.

Another significant duty of the Health Educator will be research and the collection and analysis of data for the purposes of designing and presenting/implementing preventative health care programs, for use both by patients and staff. The Health Educator must stay abreast of changes and/or advancements in health care technology to implement the safest policies in dealing with the containment of diseases and infections for the health of the home health community of health care workers, general staff, and patients. Research completed by the Health Educator will be used [by] management to determine health care policies and to implement changes in procedures when necessary. Thus, the Health Educator will report to managers and superiors to disclose research results and all educational plans of action given to patients.

As summarized above, the petitioner also stated that it "requires the applicant to have a minimum of a Bachelor's degree in a health-care related field such as Nursing and one (1) year of experience working in a health-care related field."

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, as well as a credential evaluation from [REDACTED] Inc. The evaluation states that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in nursing.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Health Educators" – SOC (ONET/OES) Code 21-1091, at a Level I (entry level) wage.

Furthermore, in support of the petition, the petitioner submitted: (1) Paystubs for the beneficiary issued by his former employer, [REDACTED], (2) evidence that the beneficiary is currently a licensed registered nurse in the State of Illinois; and (3) a copy of the beneficiary's certification from the Commission on Graduates of Foreign Nursing Schools (CGFNS).

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 16, 2012. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary, as well as evidence clarifying the nature of the petitioner's business. The director outlined the specific evidence to be submitted.

On January 25, 2013, counsel for the petitioner submitted a letter in response to the director's RFE accompanied by additional evidence. In the letter, counsel provided a revised description of the duties of the proffered position, claiming that the beneficiary's duties could be broken down in the following manner:³

1. **60%: Plan, implement, and evaluate programs designed to encourage healthy lifestyles, habits, policies and environments.** To do this, the Health Educator will do the following:
 - a. Consult and work directly with other health professionals, including the Administrator of the agency, and social service professionals, the majority of whom will be university degreed and licensed individuals.
 - b. Utilize a variety of the health field's concepts, practices, and procedures along with a personalized analysis of a patient, as diagnosed by licensed medical professionals, to educate on the best practices one can take to improve one's well-being and health.

³ The response to the RFE and the updated description of duties is printed on counsel's letterhead. It is noted that this revised description of the duties and the requirements of the proffered position is not probative evidence as the information was provided by counsel, not the petitioner. Counsel's submission was not endorsed by the petitioner and the record of proceeding does not indicate the source of the revised duties and responsibilities that counsel attributes to the proffered position. 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). Although counsel ultimately submitted a letter dated October 28, 2013 from [REDACTED], the petitioner's Chief Executive Officer (CEO) in response to the second RFE, the CEO's letter does not restate or explain the revised duty description submitted by counsel, nor does it provide any new details regarding the nature of the proffered position.

- c. Maintain knowledge of healthcare issues, including but not limited to diseases and their treatment or containment, pharmaceuticals, psychiatry, psychology and the confluence of all types of healthcare issues to form comprehensive education treatments [sic] plans based on licensed medical professionals' diagnoses of patients.
 - d. Prepare materials and distribute to patients and staff.
- 2. 15%: Collect and analyze data to determine individual patient and group needs**
- a. Research, collect and analyze, data for the purposes of designing and presenting/implementing preventative healthcare programs, for use both by patients and staff.
 - b. Maintain knowledge of diseases, their prevention or containment and the ability to research and analyze data present to the health community.
 - c. Stay abreast of changes and/or advancements in health care technology to implement the safest policies in dealing with the containment of diseases and infections for the health of healthcare workers, general staff, and patients.
- 3. 15%: Meet with managing staff for periodic evaluation of health education program & Develop and present health education programs such as training workshops and presentations**
- a. Work with other healthcare staff, including doctors, psychiatrists, psychologists, nurses, and nutritionists to evaluate and implement the best home health care policies.
 - b. Discuss research findings with management so that management can make educated and informed decisions and implement necessary changes, as needed.
 - c. Produce educational materials that families and individuals will be able to use as reference guides to determine how to incorporate a health program into their lifestyle.
 - d. Act as [a] resource for information about health conditions, treatment plans, and progress/deterioration.
- 4. 10%: Develop and maintain cooperative working relationships with agencies and organizations interested in home health care and public health care**
- a. Act as liaison between the home health care company and other health organizations.

In response to the RFE, counsel submitted documents in support of the petition, including: (1) a copy of the petitioner's Illinois Department of Public Health License as a Home Health Agency;⁴ (2) a copy of the petitioner's commercial lease; (3) copies of marketing materials for the petitioner, including a pamphlet, informational page, and 2013 calendar; (4) printouts from the petitioner's website; (5) the petitioner's organizational chart; (6) a copy of an article discussing the occupation

⁴ The AAO notes that the license submitted into the record expired on September 30, 2013.

of Nurse Educator by [REDACTED] and (7) copies of job postings for positions the petitioner deems parallel to the proffered position in similar organizations.

The director reviewed the information provided by counsel to determine whether the petitioner had established eligibility for the benefit sought. 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 February 22, 2013.

On September 6, 2013, USCIS issued a Service Motion to Reopen/Reconsider and requested additional evidence from the petitioner. Upon review of the evidence, USCIS recommended denial of the petition, and certified the matter to the AAO. Counsel for the petitioner supplemented the record with a brief and additional evidence, and referenced the preponderance of the evidence standard.

The AAO notes that 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.

* * *

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.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS

examines 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. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, a petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). In addition, in visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

IV. ANALYSIS

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The petitioner stated that the beneficiary would be employed in a health educator position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter, the *Handbook*), as an authoritative source on the duties and educational requirements

of the wide variety of occupations that it addresses.⁵ As previously noted, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Health Educators."

The AAO reviewed the chapter of the *Handbook* entitled "Health Educators and Community Health Workers" but did not find that the duties of the proffered position correspond to this occupational classification.⁶ The *Handbook* describes the duties of "Health Educators" in the subsection entitled "What Health Educators and Community Health Workers Do" and states, in part, the following about the duties of this occupation:

Health educators teach people about behaviors that promote wellness. They develop and implement strategies to improve the health of individuals and communities. Community health workers provide a link between the community and health educators and other healthcare workers and develop and implement strategies to improve the health of individuals and communities. They collect data and discuss health concerns with members of specific populations or communities. Although the two occupations often work together, responsibilities of health educators and community health workers are distinct.

Duties

Health educators typically do the following:

- Assess the needs of the people and communities they serve
- Develop programs and events to teach people about health topics
- Teach people how to cope with or manage existing health conditions
- Evaluate the effectiveness of programs and educational materials
- Help people find health services or information
- Provide training programs for other health professionals or community health workers
- Supervise staff who implement health education programs
- Collect and analyze data to learn about their audience and improve programs and services
- Advocate for improved health resources and policies that promote health

* * *

The duties of health educators, who are sometimes called health education specialists, vary with their work settings. Most work in health care facilities, colleges, public

⁵ All of the AAO's references are to the 2014-15 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>.

⁶ For additional information regarding the occupational category "Health Educators and Community Health Workers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Health Educators and Community Health Workers, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-1> (last visited March 25, 2014).

health departments, nonprofits, and private businesses. Health educators who teach health classes in middle and high schools are considered teachers. For more information, see the profiles on middle school teachers and high school teachers.

In *health care facilities*, health educators may work one-on-one with patients and their families. They teach patients about their diagnoses and about any necessary treatments or procedures. They may be called patient navigators because they help consumers find out about their health insurance options and direct people to outside resources, such as support groups and home health agencies. They lead hospital efforts in community health improvement. Health educators in health care facilities also help organize health screenings, such as blood pressure checks, and health classes on topics such as installing a car seat correctly. They also create programs to train medical staff to interact better with patients. For example, they may teach doctors how to explain complicated procedures to patients in simple language.

* * *

In *private businesses*, health educators identify common health problems among employees and create programs to improve health. They work with management to develop incentives for employees to adopt healthy behaviors, such as losing weight or controlling cholesterol. Health educators recommend changes to the workplace, such as creating smoke-free areas, to improve employee health.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Health Educators and Community Health Workers, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-2> (last visited March 25, 2014).

In the section of the *Handbook* entitled "Work Environment," the *Handbook* states that health educators work in the following industries:

Health educators held about 58,900 jobs in 2012. Community health workers held about 40,500 jobs in 2012.

The industries that employed the most health educators in 2012 were as follows:

Government	23%
Hospitals; state, local, and private	21
Ambulatory health care services	17
Religious,	11


grantmaking,
civic,
professional,
and similar
organizationsSocial
assistance

11

Handbook, 2014-15 ed., Health Educators and Community Health Workers, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-3> (last visited March 25, 2014).

In its letter of support dated June 4, 2012, the petitioner claimed that it "is in the business of home health care," and that in this industry "it is necessary to educate patients, families and staff on the appropriate activities that will maximize health knowledge and practices." The petitioner also submitted excerpts from its website, where it indicated that it provides both in-home care as well as supplemental staffing for a variety of settings including hospitals, clinics, care facilities, rehabilitation centers, nursing homes, and private residences.

The AAO notes that 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 621610 – "Home Health Care Services."⁷ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments primarily engaged in providing skilled nursing services in the home, along with a range of the following: personal care services; homemaker and companion services; physical therapy; medical social services; medications; medical equipment and supplies; counseling; 24-hour home care; occupation and vocational therapy; dietary and nutritional services; speech therapy; audiology; and high-tech care, such as intravenous therapy.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 621610 – Home Health Care Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited March 25, 2014).

As a preliminary matter, the AAO notes that the director raised issues with regard to the claimed duties of the proffered position in the context of the petitioner's business operations as described above. Specifically, the director faulted the petitioner for failing to present evidence that it was licensed to provide health education services. Noting that the petitioner submitted its Illinois license authorizing the provision of home health services such as skilled nursing, various therapy

⁷ 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 March 25, 2014).

services, home health aides, and medical social services, the director found that in light of the nature of the business and the omission of health education services from the services listed on its business license, it was consequently not providing the services claimed in the petition. The AAO disagrees.

Currently, as noted by counsel, health educators or similar occupations are not occupations subject to Illinois state licensing requirements. The petitioner failed to submit a license for the provision of health education services simply because there is no requirement for such a license in the state of intended employment. The director's conclusions regarding this particular issue are hereby withdrawn. However, contrary to counsel's assertions, the misplaced comments by the director with regard to applicable licenses surrounding the proffered position are harmless, as the AAO conducts its review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145 (3d Cir. 2004).

Consequently, the absence of a license to provide health education services does not mandate a finding that the petitioner is not providing the claimed services. Rather, the AAO finds that the focus here must be on the manner of the services provided and the intended recipients of the beneficiary's services.

The AAO reviewed the record of proceeding but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category for health educator positions. While the AAO concurs with counsel's assertions that the absence of a license authorizing the petitioner to provide health education services does not warrant a presumption that the petitioner is not providing such services, a careful review of the record demonstrates that the duties of the proffered position are not those of a health educator as contemplated by the *Handbook*.

Upon review of the record of proceeding and the chapter regarding "Health Educators" in the *Handbook*, the AAO finds that the petitioner has not provided sufficient evidence to demonstrate that its health educator position has the same or similar duties, tasks, knowledge, work activities, requirements, etc. that are generally associated with "Health Educators." The duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may perform a few tasks in common with this occupational group, but not that the beneficiary's duties would constitute a health educator position.

Although the petitioner claimed in its letter dated June 4, 2012 that "it is important for patients and family members to have the Health Educator as a resource for information about health conditions, treatment plans, and progress/deterioration," both the petitioner and counsel later claim that the beneficiary will have no direct patient contact and, rather, that the proffered position is primarily administrative in nature. Counsel affirms this in its November 12, 2013 response to the RFE dated September 6, 2013, and this is further exemplified and corroborated by the petitioner's CEO in her October 28, 2013 letter, where she states that "[t]he position of Health Educator works in an office setting to enhance the knowledge of Registered Nurses and thus their administration of care to patients in the patients' homes." Neither the petitioner nor counsel attempt to clarify these inconsistent claims. 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).

Moreover, while the petitioner claims that the beneficiary will collect and analyze data to determine individual patient needs, it is unclear how such tasks would be accomplished with no direct patient contact. In addition, the petitioner does not claim that the beneficiary will create and distribute health-related posters, pamphlets, and other educational materials, and it definitively states that the beneficiary will not work one-on-one with patients and their families in teaching patients about their diagnoses and about necessary treatments or procedures. The *Handbook* identifies health educators employed by health care facilities as "patient navigators" based on their interaction with and attempts to assist patients and families.⁸ However, these duties are not attributed to those of the beneficiary, since both counsel and the petitioner confirm that the beneficiary's duties do not involve direct patient care.

The record contains documentation establishing that the beneficiary conducted in-house training programs for staff in four areas: (1) infection control; (2) hand washing techniques; (3) general home safety; and (4) pain management measures. While this suggests that the beneficiary provides training programs for other health professionals, a task identified as a duty of a health educator in the *Handbook*, there is insufficient evidence that the beneficiary's position will primarily encompass the identified duties of this occupation. Although the petitioner claims that the beneficiary will collect and analyze data and evaluate programs for healthy lifestyles, neither the petitioner nor counsel provide any evidence with regard to how such claimed duties would be carried out or for whom these services would be beneficial.⁹

Moreover, the *Handbook* indicates that the academic background for this occupation is in health education or health promotion. Notably, the *Handbook* does not state that a degree in any "health-care related field such as nursing" is an acceptable field of study for these positions. According to the *Handbook*, programs in health education and health promotion teach students theories and methods of health education and help students gain the knowledge and skills to develop health education materials and programs. The *Handbook* continues by stating that some employers hire only health educators who are Certified Health Education Specialists (CHES), certification offered by the National Commission for Health Education Credentialing, Inc. There is no indication in the record of proceeding that the petitioner requires an individual to be certified under CHES. Rather, both the petitioner and counsel express a preference that the ideal candidate for the proffered position hold a degree in nursing. Moreover, although a beneficiary's credentials to perform a

⁸ While the AAO acknowledges that the petitioner is not by definition a health care facility, this industry categorization is more relevant to the petitioner's business than other business types identified in this section of the *Handbook*, which include nonprofits, public health departments and colleges. The *Handbook's* description of health educators in private businesses is likewise not on point, since the tasks identified in that category include creating programs to improve the health and well-being of employees, such as weight loss or controlling cholesterol.

⁹ The AAO notes that the organizational chart for the petitioner identifies managerial/executive positions as well as therapists, nurses, aides, and other positions. However, the record is not accompanied by corroborating evidence or a statement verifying the composition of the petitioner's staff which, according to the petitioner, totals 13 employees.

particular job are relevant only when the job is found to be a specialty occupation, the AAO notes that the beneficiary does not possess a degree in health education or health promotion, further raising doubt that the proffered position is in fact a health educator.¹⁰

As the petitioner has not demonstrated by a preponderance of the evidence that the proffered position falls under the occupational category of "Health Educators," the AAO will not further address this occupational category as it is not relevant to this proceeding.

The director reviewed the job description provided by the petitioner and found that the proffered position falls under the occupational classification of "Registered Nurses." The *Handbook* states, in part, the following about this 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.

* * *

Some nurses have jobs in which they do not work directly with patients, but they

¹⁰ In the brief dated January 16, 2014, counsel contends that the beneficiary is in fact qualified for the position of health educator as described in the *Handbook* because the beneficiary's transcripts demonstrate that he majored in "public health nursing" and completed courses such as "Health Education in Nursing" and "Community/Public Health Nursing." As discussed above, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Nevertheless, as there is no evidence the beneficiary's credentials were evaluated for equivalence to a bachelor's degree in health education or health promotion, these unsupported assertions by counsel do not constitute evidence of the beneficiary's academic qualifications. See *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.

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.

Handbook, 2014-15 ed., Registered Nurses, on the Internet at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-2> (last visited March 25, 2014).

The subchapter of the *Handbook* entitled "How to Become a Registered Nurse" states, in part, the following about this occupation:

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.

Handbook, 2014-15 ed., Registered Nurses, on the Internet at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4> (last visited March 25, 2014).

The *Handbook* states that some registered nurses work as nurse educators. While the occupational category of registered nurses as described in the *Handbook* does not fully encompass all of the duties of the proffered position, the AAO observes that there are numerous aspects that correspond to the description of the proffered position, including attributes regarding the duties and requirements as stated in the petition. Moreover, as previously mentioned, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation; however, the AAO notes that both the petitioner and counsel indicated that the beneficiary is qualified to serve in the proffered position as a result of his qualifications as a nurse.

Counsel concedes in his brief that the title of "nurse educator" can be used interchangeably with the position title of "health educator" as used in this petition. However, counsel qualifies the proffered position as a "clinical nurse educator," and asserts that this occupational title falls under the category of "health educators" in O*NET Online. Counsel concludes, therefore, that since the proffered position is that of a *clinical* nurse educator, as opposed to a nurse educator in general, the proffered position qualifies as a specialty occupation. The AAO disagrees.

The term "clinical" is defined in part as "of or relating to direct observation and treatment of patients."¹¹ However, as discussed above, the petitioner and counsel also claim in the record that the beneficiary will have no direct patient contact and, rather, that the proffered position is primarily administrative in nature. Again, the petitioner's letter dated October 28, 2013 states that "the position of Health Educator works in an office setting to enhance the knowledge of Registered Nurses and thus their administration of care to patients in the patients' homes." This statement by the petitioner confirms that the beneficiary will not be performing clinical health education services as claimed by counsel; rather, the petitioner will be performing the more general nurse educator duties identified above. Furthermore, counsel's addition of the title "clinical" to the proffered position in his brief constitutes a material change to the original position. A petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the 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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). 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 AAO, therefore, is not persuaded by counsel's claim that the proffered position is a specialty occupation position based on the new titling of the position as "clinical nurse educator."

Returning to the analysis of the proffered position under the *Handbook's* description of registered nurses, it is further noted that the *Handbook* does not report that, as an occupational group, "Registered Nurses" require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation. More specifically, 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,

¹¹ See "clinical," *Webster's New College Dictionary* 215 (Third Edition, Hough Mifflin Harcourt 2008).

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. Thus, for this occupation, a baccalaureate or higher degree in a specific specialty, or its equivalent, is not the standard, minimum requirement for entry.

Upon review of the totality of the evidence in the entire record of proceeding, the AAO finds that the petitioner has not established that the proffered position, as described in the record of proceeding, falls within an occupational category for which the *Handbook*, or other authoritative source, indicates that a minimum requirement of at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. When, as here, the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or its equivalent, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. As previously noted, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." 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)).

In addition, 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 "[t]he knowledge and not the title of the degree is what is important" and in support of the contention that the specialized course of study for the proffered position need not be in a specific academic discipline.

The AAO agrees with the aforementioned proposition 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*.¹² Further, in regard to the materiality of a district court decision to the instant proceedings, the AAO notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is 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 the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

The AAO further notes that the petitioner and counsel submitted copies of prior H-1B approval notices filed by [REDACTED], a former employer of the beneficiary, as evidence that USCIS has previously approved H-1B petitions for the "exact same" position on behalf of the beneficiary.¹³ However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. The AAO is 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, the AAO's 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 petitions on behalf of a beneficiary, the AAO 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).

Despite the contentions of the petitioner and counsel, the evidence of record does not support their contention that the prior approvals were for the "exact same" position. Specifically, the pay records contained in the record demonstrate that the beneficiary was paid \$26 per hour while working in the previous position, whereas the petitioner in this matter proffers an hourly wage of \$15.70.

¹² 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. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO 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 the AAO in its *de novo* review of the matter.

¹³ The petitioner also provided an H-1B approval notice for what it claims is another employee of [REDACTED] in the position of health educator. However, the approval notice pertains to a different employer and a different nonimmigrant beneficiary of whom the record contains no information or details.

Although the petitioner repeatedly contends throughout this petition that wage levels should not be considered conclusory evidence of the level of complexity or specialization associated with the duties of a particular position, the petitioner fails to explain this discrepancy and, though raised by the director in the notice of certification, fails to submit any further evidence to clarify how each position would be the same despite this significant wage difference other than to claim that in a free market setting, the petitioner is permitted to offer any wage it wishes.¹⁴ As stated previously, 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. at 591-92.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. More importantly, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

¹⁴ While this free market wage statement of the petitioner is generally true, the Act places additional restrictions on the minimum wage that may be paid to an H-1B worker. According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. See 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009). As such, a petitioner is only free to pay a wage that is equal to or higher than this minimum required wage described in section 212(n)(1)(A) of the Act. 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].").

Here and 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, the AAO incorporates by reference its previous discussion on the matter.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the 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 advertising 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 legitimate basis for such an assertion.

On the Form I-129 petition, the petitioner describes itself as a health care provider established in 2005, with 13 employees. The petitioner claims that it has a gross annual income of approximately \$1.4 million and a net annual income of "sufficient." As previously noted, the petitioner designated its business operations under the NAICS code 621610 – "Home Health Care Services."

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the petitioner submitted documentation regarding two H-1B petitions filed on behalf of the beneficiary by another employer. The AAO observes that the support letter submitted from the other employer includes a list of identical job duties to those listed in the petitioner's letter. More specifically, the description of duties matches verbatim, raising the question of whether those duties are in fact those of the beneficiary's former employer and casting doubt on the letter's validity.

In addition, the petitioner and counsel submitted copies of eleven job advertisements as evidence that the degree requirement is common amongst similar organizations for parallel positions in the home health care services industry. The AAO notes that the petitioner and counsel did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. Moreover, as the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

Furthermore, the advertisements do not appear to be for parallel positions. That is, the positions do not appear to have similar duties and requirements to the proffered position. Specifically, the petitioner submitted a job posting for a nurse educator position later referred to as a "staff educator" position within the posting for [REDACTED] which requires the incumbent to assess, plan, implement and evaluate orientation, staff development, and continuing education programs. Moreover, there is no specific information regarding the programs to be implemented or of the nature of the posting company's business. In addition, the petitioner provided a posting for a part-time health educator for the Social Health Association of Indiana, a nonprofit organization, which requires the candidate to provide health education to youth across Indiana. This posting identifies a position that is completely different from the proffered position in this matter.

Another posting identifies a clinical educator position with a clinical education solutions company, which provides such personnel in support of pharmaceutical and biotech organizations, as well as consulting services. Further, the petitioner submits a posting for a nurse educator position with [redacted] which requires a degree, a registered nursing license, plus "5 years [of] clinical nursing experience." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as an entry-level position and indicated in its letter of support that it only required one year of experience in a health-care related position. In addition, as also discussed above, the proffered position is a non-clinical, administrative position. Accordingly, upon review of the advertisements, the AAO finds that the petitioner has not established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Moreover, the petitioner and counsel have submitted advertisements that are devoid of information regarding the employers' operations. As noted above, some of the employers do not appear to be similar to the petitioner. The job postings include positions with a nonprofit charitable organization, a medical center, and an educational consulting services company. Without further information, these advertisements appear to be for organizations that are not similar to the petitioner, and the petitioner has not provided sufficient probative evidence to suggest otherwise.

Further, out of the eleven postings submitted, only one identifies the proffered position as a health educator as originally claimed in the petition. The AAO notes that the health educator posting requires the candidate to possess a bachelor's degree in health education or health promotion as set forth in the *Handbook*. The remaining posts identify a variety of position titles. For instance, four identify the position as RN/nurse educator, four identify the position as clinical educator; one identifies the position as clinical education specialist; and one identifies the position as home health staff educator. The petitioner and counsel failed to supplement the record of proceeding to establish that the proffered positions in these advertisements are parallel to the proffered position. Moreover, the record fails to establish that the advertising organizations are similar to the petitioner. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with these advertising organizations. Although a number of postings are by home health care companies, the record contains no evidence with regard to the size and scope of these businesses in comparison to that of the petitioner's 13-employee home health care company.

The AAO reviewed all of the advertisements submitted in support of the petition.¹⁵ However, upon review of the documentation, the petitioner and counsel fail to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.¹⁶

¹⁵ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

¹⁶ 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

Lastly, counsel also submitted a printout from www.nursesource.org, which provides an overview of the occupation of "Nurse Educator" by [REDACTED]. Notably, the printout does not provide any detailed information regarding this association (e.g., its primary function, the size of the association, or the requirements for membership). In any event, the printout defines a nurse educator as a "registered nurse who has advanced education, including advanced clinical training in a healthcare specialty." Rather than supporting the petitioner's claim that the proffered position is a health educator, however, this evidence further supports the conclusion that it is a registered nurse. Again, as discussed previously, there are three educational paths for becoming a nurse: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. At no point does the printout state that a bachelor's degree in a specific specialty, or its equivalent, is required for entry into the occupation.

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

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

In the instant case, the record of proceeding contains information regarding the petitioner's business operations, including a brochure, printouts from the petitioner's website, as well as other (minimal) documentation regarding the proffered position. While it is acknowledged that the petitioner and counsel may believe that the duties of the proffered position are complex or unique, the petitioner failed to demonstrate how the health educator duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty, baccalaureate degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a health educator position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition.

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 few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

On the LCA, the petitioner attested to DOL that the wage level for the proffered position - under the occupational classification of "Health Educators" - was at a Level I (entry level) wage. Even if the LCA had been properly submitted under the occupational classification of "Registered Nurses," the \$15.70 per hour wage offered to the beneficiary was approximately \$10 per hour below that of a Level I (entry level) wage for a registered nurse at the time the petition was filed. See <http://www.flcdatcenter.com/OesQuickResults.aspx?code=29-1111&area=16974&year=12&source=1> (last visited March 25, 2014).

Level I (entry level) designation is indicative of a comparatively low, entry-level position relative to others within the occupation.¹⁷ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he 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.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." 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.

Moreover, the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks

¹⁷ 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.

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.

sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. In other words, the petitioner has failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

Finally, the AAO again notes counsel's reliance on *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985, in the supplemental brief submitted on certification. As noted previously, 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*.

The AAO observes that the petitioner has indicated that the beneficiary's educational background 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. The petitioner and counsel do not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 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. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held 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 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.

While a petitioner may believe or otherwise 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 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.*

The petitioner makes no claim that it currently or in the past has employed a specialty-degreed individual to serve in the proffered position. The petitioner, therefore, has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Moreover, the AAO reviewed the record of proceeding but finds that the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Counsel contends that the duties of the proffered position "involve specialized or complex medical issues." In the instant case, however, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties 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 does 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.

Moreover, the AAO incorporates its 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 health educator as (or alternatively offered a wage for a registered nurse position below that of) 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), available 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 Four occupation counters this finding. First, even if the proffered position were a health educator position, the fact that an occupation may require "considerable preparation" does not automatically establish that the specific duties of the proffered position in this matter 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.¹⁸ Second, as previously discussed, the proffered position is properly classified as a registered nurse (a Job Zone Three occupation) and, therefore, the Job Zone Four designation for a health educator is irrelevant.

Upon review of the record, the AAO finds 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 the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish 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 will be denied for this reason.

¹⁸ The AAO notes that the O*NET Summary Report, referenced by counsel, is insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. The AAO accessed the pertinent section of the O*NET OnLine Internet site relevant to 21-1091.00 – Health Educators. Contrary to the assertions of counsel, O*NET OnLine does not state a requirement for a bachelor's degree. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty directly related to the occupation. A designation of Job Zone Four indicates simply that a position requires "considerable preparation." It does not, however, demonstrate that a bachelor's degree in any specific specialty is required and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Therefore, the O*NET OnLine information is not probative of the proffered position being a specialty occupation.

V. BEYOND THE DECISION OF THE DIRECTOR

Beyond the decision of the director, the petition must also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition. Specifically, the LCA submitted with the petition was certified for SOC (O*NET/OES) Code 21-1091 or "Health Educators." For the reasons discussed, *supra*, the job as described by the petitioner, however, is best classified under SOC (O*NET/OES) Code 29-1111 or "Registered Nurses." As such, the petitioner was required to provide at the time of filing an LCA certified for SOC (O*NET/OES) Code 29-1111, not SOC (O*NET/OES) Code 21-1091, in order for it to be found to correspond to the petition.

To permit otherwise may result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing that petitioner to submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for. As noted above, 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]."). Again, according to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See* 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

In this matter, this would result in an LCA certified for a Level I prevailing wage of \$32,656 per year for a health educator when a certified LCA should have been submitted for a registered nurse position with a minimum, Level I prevailing wage at that time of \$52,894 per year (a difference of over \$20,000 per year). As such, the attested annual wage rate of \$32,656 on the Form I-129 would fall well below that required by law at that time for the proffered position of registered nurse in Cook County, Illinois.

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

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

classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that has been certified for the proper occupational classification, and the petition must be denied for this additional reason.

Lastly, as discussed in this decision, the petitioner did not submit sufficient evidence to establish that the proffered position qualifies as a specialty occupation. Absent the determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, even if the proffered position were a health educator position that qualified as a specialty occupation, there is insufficient evidence that the beneficiary is qualified to perform the duties of such a position.

Specifically, and as noted above, there is no evidence the beneficiary's credentials were evaluated for equivalence to a bachelor's degree in health education or health promotion, the specialties indicated by the *Handbook* as being required for a health educator position. See *Handbook*, 2014-15 ed., Health Educators, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-4> (last visited March 25, 2014). As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in the specific specialty of health education or health promotion, or the equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established for a health educator position.

VI. 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).

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 director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial. 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. at 128. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.