



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 08 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a "Skilled Nursing Facility" established in 2000, with 50 employees. In order to employ the beneficiary in what it designates as a "Medical and Health Services Manager" 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 on the ground that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.¹

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

Upon review of the entire record of proceeding, we find that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed and the petition will remain denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a Medical and Health Services Manager, to work on a part-time basis at a salary of \$777.80 per week. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2013 to September 17, 2016.

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the position is "Medical and Health Services

¹ The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As will be discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further.

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Managers" SOC (ONET/OES) Code 11-9111, at a Level I (entry-level) wage. The LCA was certified for a validity period beginning September 18, 2013 to September 17, 2016.

In a letter of support, dated April 1, 2013, the petitioner identified itself as a 45-bed skilled nursing facility d/b/a "[REDACTED]". The petitioner stated that the position of Medical & Health Service Manager is necessary to "deal" with the company's "growing needs." The petitioner stated that the position will work under the supervision of the President. As the Medical & Health Service Manager, the petitioner stated that the beneficiary's duties will be as follows:

- Conduct and administer fiscal operations, including accounting, planning budgets, authorizing expenditures, establishing rates for services, and coordinating financial reporting.
- Direct, supervise and evaluate work activities of medical, nursing, technical, clerical, service, maintenance, and other personnel.
- Maintain communication between governing boards, medical staff, and department heads by attending board meetings and coordinating interdepartmental functioning.
- Review and analyze facility activities and data to aid planning and cash and risk management and to improve service utilization.
- Plan, implement and administer programs and services in a health care or medical facility, including personnel administration, training, and coordination of medical, nursing, and physical plant staff.
- Direct or conduct recruitment, hiring and training of personnel.
- Establish work schedules and assignments for staff, according to workload, space and equipment availability.
- Maintain awareness of advances in medicine, computerized diagnostic and treatment equipment, data processing technology, government regulations, health insurances changes, and financing options.
- Monitor the use of diagnostic services, inpatient beds, facilities, and staff to ensure effective use of resources and assess the need for additional staff, equipment, and services.
- Develop and maintain computerized record management system to store and process data such as personnel activities and information to produce reports.

Notably, the job description duplicates virtually verbatim the tasks from the occupational category "Medical and Health Services Managers" as described in the U.S. Department of Labor's (DOL) Occupational Information Network (O*NET OnLine) Summary Report. See O*NET Online Summary Report for "Medical and Health Services Managers" <http://www.onetonline.org/link/summary/11-9111.00> (last accessed August 7, 2014). That is, all of the duties provided by the petitioner have been taken from the description in the O*NET Online Summary Report for the occupational category "Medical and Health Services Managers."

The petitioner stated that the proffered position "requires the application of principles that can only

be gained through attainment of at least a Bachelor's degree or its foreign equivalent in Business Management, Nursing or related field or related experience." In support of the petition, the petitioner also provided, *inter alia*: a copy of its "job offer" letter to the beneficiary stating that the position is part-time in nature and requires a minimum of twenty hours per week at the pay of \$38.89 per hour; and an "itinerary" showing that the beneficiary would be working at [REDACTED] for the duration of the period requested.

The director issued an RFE instructing the petitioner to submit, *inter alia*, evidence to establish that the proffered position qualifies as a specialty occupation.

In response to the director's RFE, the petitioner submitted a letter, dated October 28, 2013, providing the following job duties for the proffered position:

- Direct, supervise and evaluate work activities of medical, nursing, technical, clerical, service, maintenance, and other personnel.
- Establish objectives and evaluative or operational criteria for units they manage.
- Direct or conduct recruitment, hiring and training of personnel.
- Develop and maintain computerized record management system to store and process data such as personnel activities and information to produce reports.
- Develop and implement organizational policies and procedures for the facility or medical unit.
- Conduct and administer fiscal operations, including accounting, planning budgets, authorizing expenditures, establishing rates for services, and coordinating financial reporting.
- Establish work schedules and assignments for staff, according to workload, space and equipment availability.
- Maintain communication between governing boards, medical staff, and department heads by attending board meetings and coordinating interdepartmental functioning.
- Monitor the use of diagnostic services, inpatient beds, facilities, and staff to ensure effective use of resources and assess the need for additional staff, equipment, and services.
- Maintain awareness of advances in medicine, computerized diagnostic and treatment equipment, data processing technology, government regulations, health insurances changes, and financing options.
- Manage change in integrated health care delivery systems, such as work restructuring, technological innovations, and shifts in the focus of care.
- Prepare activity reports to inform management of the status and implementation plans of programs, services, and quality initiatives.
- Plan, implement and administer programs and services in a health care or medical facility, including personnel administration, training, and coordination of medical, nursing, and physical plant staff.
- Consult with medical, business, and community groups to discuss service

problems, respond to community needs, enhance public relations, coordinate activities and plans, and promote health programs.

- Inspect facilities and recommend building or equipment modifications to ensure emergency readiness and compliance to access, safety, and sanitation regulations.
- Review and analyze facility activities and data to aid planning and cash and risk management and to improve service utilization.
- Develop instructional materials and conduct in-service and community-based educational programs.
- Develop or expand and implement medical programs or health services that promote research, rehabilitation, and community health.

The provided job description duplicates virtually verbatim the tasks from the occupational category "Medical and Health Services Managers" as described in the O*NET Online Details Report. See O*NET Online Details Report for "Medical and Health Services Managers" <http://www.onetonline.org/link/details/11-9111.00> (last accessed August 7, 2014). That is, all of the duties provided by the petitioner have been taken from the description in the O*NET Online Details Report for the occupational category "Medical and Health Services Managers."

In the same letter, the petitioner pointed to the proffered position's rating as a Job Zone Five (5) and Specialized Vocational Preparation (SVP) Range (8.0 and above) according to O*NET Online, and the DOL's *Occupational Outlook Handbook's (Handbook)* description of the education and experience requirements for the proffered position, to support the assertion that the proffered position requires a baccalaureate or higher degree or its equivalent as a normal requirement for entry, which the petitioner equated to the standard for a specialty occupation position.

In response to the RFE, the petitioner submitted, *inter alia*, an opinion letter from Dr. [REDACTED] Professor [REDACTED] who is a Professor of business administration, logistics, accounting, and management and information systems. In pertinent part, this letter repeats the same job duties for the proffered position as described by the petitioner, and asserts that these duties "are complex and specialized – exceeding industry or normal standards." Dr. [REDACTED] states that the "Medical & Health Service Manager must perform at an extremely high level of knowledge, skills and business competencies." Dr. [REDACTED] further indicates that "a Bachelor's degree in nursing is a prerequisite for entry into the position;" specifically, that "[a] Bachelor's degree in Nursing represents a menu of courses that together provide the total learning experience . . . [and] provides the knowledge, skills and competencies that are required to perform the [proffered] duties." Dr. [REDACTED] letter lists the skills and knowledge necessary to perform the proffered position, such as "systems thinking, communication skills, computer literacy, technical writing, economics, data analysis, research techniques, information systems, [and] quantitative methods." Dr. [REDACTED] concludes that "[t]he equivalent of a Bachelor's degree in Nursing is a prerequisite for entry into the position" and that "it is essential for firms of all sizes to recruit and employ only individuals with a Bachelor's Degree in Nursing" and that "[t]his is standard for similar skilled nursing facilities."

In addition, the petitioner submitted the following job advertisements:

- Advertisement for the position of "Director, Physician Quality Services" at [REDACTED], a 467-bed acute care teaching facility that also includes a level II trauma center. This position requires its candidates to have: a "Diploma or Bachelor's Degree in nursing or other clinical health-related field; Bachelor's degree in health information administration may also be considered;" five years' experience in quality management/physician performance measurement; and two years' experience as a manager in quality management/medical staff administration;
- Advertisement for the position of "Director of Clinical Services – Registered Nurse – RN" at [REDACTED] which is self-described as "one of the leading providers of medical staffing, home health and wellness services" with 12 divisions and over 400 branch offices operating in 44 states and the District of Columbia. This position requires its candidates to be a registered nurse (BSN preferred);
- Advertisement for the position of "Behavioral Health Case Manager- Utilization Management" at [REDACTED]. No additional description of this company was provided. This position requires its candidates to be either a registered nurse (Associate's degree or diploma) and have a State RN License, or a "Masters Prepared Mental Health Professional (Social Worker, Mental Health Counselor, Marriage and Family Therapist) and NY State License LCSW [Licensed Clinical Social Worker] or LMSW [Licensed Master Social Worker];
- Advertisement for the position of "Behavioral Health Care Manager-Medicare/Medicaid" at [REDACTED]. No additional description of this company was provided. Qualified candidates must have a RN, Masters in Nursing, Psychology or Social Work, or a Doctorate in Psychology;
- The petitioner's advertisement for the proffered position, posted on [REDACTED] stating that the ideal candidate "[s]hould have a four-year degree, Bachelor's degree highly desirable;"
- The petitioner's advertisement for the proffered position, posted on [REDACTED] stating that the ideal candidate should have a "4-year degree, Bachelor's degree highly desirable;" and
- The petitioner's advertisement for the proffered position, posted on [REDACTED] stating that a "4-year degree required with minimum 1 year related experience, preferably in the health care industry is required [sic]."

The director denied the petition determining that the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel for the petitioner asserts that the director's denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Referring to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), counsel

asserts that the requirement that the degree must be in a specific academic major has recently been explicitly rejected by a United States District Court. Counsel further asserts that this case supports the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge." Counsel contends that it is "impossible to allocate a single degree major that all Medical & Health Service Manager[s] should have" because "the requirements of a particular job vary depending on the nature of the duties in light of the company's business."

II. STANDARD OF REVIEW

In light of counsel's reference to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states 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" 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.

Again, we conduct our review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determination in this matter was correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

III. LAW

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

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

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

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

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.

IV. ANALYSIS

The issue to be addressed in this matter is whether the petitioner has established that the duties of

the proffered position comprise a specialty occupation.³

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

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline. In the matter here, we find that the petitioner has failed to provide a detailed description.

As previously mentioned, the descriptions of the proffered position as provided by the petitioner are taken directly from the occupational category "Medical and Health Services Managers" as described in the O*NET Online Summary Report and Details Report. We note that simply copying job descriptions from O*NET (or other source) is not sufficient for establishing H-1B eligibility. That is, while this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. The description for an occupational category fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot be relied upon by a petitioner when discussing the duties attached to specific employment. More specifically, in establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of its business operations, as well as demonstrate a legitimate need for such an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.⁴

³ We reiterate that as we affirm the director's determination that the proffered position does not require a baccalaureate or higher degree in a specific specialty or its equivalent, it is unnecessary to discuss the beneficiary's qualifications.

⁴ For instance, the proffered position is labeled "Medical and Health Services Manager" and a number of the duties described involve the supervision of other medical, nursing, and technical staff. However, the petitioner has not provided any names, titles, or job descriptions of the beneficiary's subordinates. Similarly, the petitioner did not provide an organizational chart showing the beneficiary's place in the organization's hierarchy.

In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position, or its equivalent. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The descriptions of the beneficiary's duties lack the specificity and detail necessary to support the petitioner's assertion that the position is a specialty occupation. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "plan, implement and administer programs and services in a healthcare or medical facility" and "establish work schedules and assignments for staff." The petitioner's statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. In addition, the petitioner claims that the beneficiary will "monitor the use of diagnostic services, inpatient beds, facilities, and staff to ensure effective use of resources and assess the need for additional staff, equipment, and services." This statement also fails to provide any particular details regarding the demands, level of responsibilities and requirements necessary for the performance of these duties.

We acknowledge and agree with the proposition that "[t]he knowledge and not the title of the degree is what is important." *Residential Fin. Corp.*, 839 F. Supp. 2d 985. 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, for example, 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).⁵

⁵ While the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again,

Moreover, the petitioner in this matter has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp.*⁶ We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before this office, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Regarding counsel's assertion on appeal that it is "impossible to allocate a single degree major that all Medical & Health Service Manager[s] should have" because "the requirements of a particular job vary depending on the nature of the duties in light of the company's business," we find that the petitioner has not submitted the requisite evidence supporting its requirements for the position proffered here. Rather, as indicated above, the petitioner recites and paraphrases the broad occupational description found in the O*NET Online Summary Report and does not identify or further detail the specific duties the beneficiary will be required to perform in light of the petitioner's business operations.⁷

Further, upon review of the record, we note that there are discrepancies in the record of proceeding with regard to the proffered position. The petitioner's claims regarding the responsibility inherent in the proffered position is contrary to the petitioner's attestation on the LCA that the appropriate wage level for the proffered position is a Level I (entry) wage. That is, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Medical and Health Services Managers" at a Level I (entry) wage.

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

the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

⁶ It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to this office. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied in our *de novo* review of the matter.

⁷ As will be discussed *infra*, we also find that the petitioner's assertion is directly contrary to Dr. [REDACTED] conclusion that "firms of all sizes . . . recruit and employ only individuals with a Bachelor's Degree in Nursing" and that "[t]his is standard for similar skilled nursing facilities."

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.

Prevailing wage determinations start with an entry-level wage (Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁸ The DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL 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.

In the instant case, the petitioner claims that the duties of the proffered position are complex and specialized. Additionally, the petitioner relies upon an opinion letter from Dr. [REDACTED] which attests to the complex and specialized duties of the proffered position. Furthermore, it appears that the

⁸ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

proposed duties involve managerial and supervisory duties, such as "direct, supervise and evaluate work activities" of its employees, and "plan, implement and administer programs and services."

We, however, must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. The characterization of the position and the claimed duties and responsibilities as described by the petitioner conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Given that the LCA submitted in support of the petition is for a Level I wage, it must therefore be concluded that either (1) the position is a low-level, entry position relative to other Medical & Health Service Manager positions and, thus, based on the findings of the DOL's *Occupational Outlook Handbook* (*Handbook*), the proffered position is not a specialty occupation;⁹ or (2) the LCA does not correspond to the petition.¹⁰ In other words, even if it were determined that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to a Level III (experienced) or Level IV (fully

⁹ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. We hereby incorporate into the record the excerpt of the *Handbook* regarding the occupational category "Medical and Health Services Managers."

¹⁰ As will be discussed in further detail below, as the *Handbook* reports that "Medical & Health Services Manager" positions do not normally require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement. It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Medical & Health Services Managers," [http://www.flcdatcenter.com/OesQuickResults.aspx?code=11-9111&area=\[REDACTED\]&year=13&source=1](http://www.flcdatcenter.com/OesQuickResults.aspx?code=11-9111&area=[REDACTED]&year=13&source=1) (last accessed August 7, 2014).

competent) wage level position.¹¹ 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.

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

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

A review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial (which it has not), the petition could still not be approved.

The material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in the record that would also require dismissal of the appeal.

¹¹ While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. 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.

Assuming for the sake of argument that the proffered duties as generally described by the petitioner in its initial letter and reiterated on appeal would in fact be the duties to be performed by the beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.

Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, we hereby incorporate the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

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

We 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.

The petitioner indicated that the beneficiary would be employed as a Medical & Health Services Manager. Again, however, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We recognize the DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The petitioner attests in the submitted LCA that the proffered position falls under the occupational category "Medical and Health Services Managers."

We have reviewed the chapter of the *Handbook* entitled "Medical and Health Services Managers," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Medical and Health Services Managers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become a Medical and Health Services Manager" states, in pertinent part, the following about this occupational category:

Education

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

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

Work Experience

Some facilities may hire those with specialized experience in a healthcare occupation in addition to administrative experience. For example, nursing service administrators usually are supervisory registered nurses with administrative experience and graduate degrees in nursing or health administration.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Medical and Health Services Managers, on the Internet at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-4> (last visited August 7, 2014).

When reviewing the *Handbook*, we must note again that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. Thus, the petitioner's designation of the proffered position as a Level I (entry) position strongly suggests that the beneficiary will not serve in a high-level or senior position in the occupation.

Although the *Handbook* states that medical and health services managers typically need at least a bachelor's degree to enter the occupation, the *Handbook* does not indicate that such a degree must be in a specific specialty. Although the *Handbook* notes that prospective medical and health services managers should have a bachelor's degree in health administration, the *Handbook* does not report that this is a requirement and then discusses common paths to enter into the occupation. The narrative of the *Handbook* reports that a degree in health services, long-term care administration, public health, public administration, or business administration are common for entry into the

occupation. Notably, a degree in nursing requires further administrative experience and graduate degrees in nursing or health administration.

The *Handbook's* report that a degree in business administration may also be acceptable to perform the duties of the occupation suggests that the position is not a specialty occupation. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation.¹² See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty degree in business administration is sufficient for entry into the occupation also strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum entry requirement for this occupation.

For the reasons discussed above, we do not find that the *Handbook* supports a claim that "Medical and Health Services Managers" comprise an occupational group for which at least a bachelor's degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation.

The information from O*NET OnLine, specifically, the occupation's Job Zone Five and SVP Range (8.0 and above) ratings, does not establish that the proffered position satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Furthermore, the SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O*NET OnLine excerpt submitted is of little evidentiary value to the issue presented on appeal.

¹² Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

The opinion letter prepared by Dr. [REDACTED] also is not persuasive in establishing the proffered position qualifies as a specialty occupation position. While Dr. [REDACTED] repeatedly asserts that the duties of the proffered position are complex and specialized, he does not explain this assertion with any specificity or provide the factual basis upon which he relied for the basis of his claims. As such, these are conclusory statements. We note that Dr. [REDACTED] lists the same job duties that the petitioner submitted as his basis of knowledge for the position and the requirements to perform the duties of the position. As previously noted, the duties are recited from the O*NET Online Summary Report and Details Report for the occupational category "Medical and Health Services Manager." Thus, the tasks are general to the occupation rather than specific to the petitioner and its business operations. We hereby incorporate our previous discussion on the matter and reiterate that without a correlation between the duties of a position and the petitioner's business operations, we cannot discern the nature of the position and whether the actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position, or its equivalent.

Overall, Dr. [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. There is no evidence that Dr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. Dr. [REDACTED] does not provide a sufficiently substantive and analytical basis for his opinion.

Furthermore, there is no indication that the petitioner advised Dr. [REDACTED] that it characterized the proffered position as a low, entry-level medical and health services manager, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. It appears that Dr. [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Dr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

It is also noted that Dr. [REDACTED] letter is inherently inconsistent with the petitioner's claims and evidence. Specifically, Dr. [REDACTED] letter states that it is "essential" for health services firms,

including skilled nursing facilities, "of all sizes," to recruit and employ "*only individuals with a Bachelor's Degree in Nursing* (emphasis added)." However, this is in direct contradiction to the petitioner's assertion on appeal that it is "impossible to allocate a single degree major that all Medical & Health Service Manager[s] should have" because "the requirements of a particular job vary depending on the nature of the duties in light of the company's business." In addition, Dr. [REDACTED] assertion is in direct contradiction to the evidence in the record that indicates that degrees in disparate fields (e.g., health services, long-term care administration, public health, public administration, and business administration) are acceptable for entry into the occupation.

In summary, and for each and all of the reasons discussed above, we conclude that the opinion letter rendered by Dr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Dr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and we find that the opinion is not in accord with other information in the record. Therefore, we find that the letter from Dr. [REDACTED] does not establish that the proffered position is a specialty occupation. We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As such, neither Dr. [REDACTED] findings nor his ultimate conclusions are worthy of any deference, and his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

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

Next, we review the record 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. at 1102).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Further, incorporating our previous discussion, Dr. [REDACTED] letter is not probative in establishing that organizations similar to the petitioner routinely employ and recruit only degreed individuals.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided several job postings. We have reviewed the evidence submitted, but find that the documentation does not establish that the petitioner has met this prong of the regulations.

In the Form I-129 petition, the petitioner describes itself as a skilled nursing home, established in 2000, with 50 employees. The petitioner indicated that the gross annual income is \$2.1 million. Although requested, the petitioner did not provide its net annual income on the Form I-129. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 623110. According to the U.S. Department of Commerce, Census Bureau website, the NAICS code 623110 is for nursing care facilities. The NAICS website describes this industry as follows:

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

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 623110-Nursing Care Facilities, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 7, 2014).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

First, these advertisements are discounted because the petitioner has not established that the hiring organizations are similar to the petitioner. For instance, [REDACTED] is a 467-bed care and training facility and trauma center, and [REDACTED] is a medical staffing and home health service encompassing over 400 branch offices in 44 states and the District of Columbia. No information was submitted establishing the nature of the other companies, and consequently, the record lacks sufficient information regarding the advertising employers to conduct a legitimate comparison of the organization to the petitioner. Furthermore, the petitioner has not established that these advertised positions are "parallel" to the proffered position. Two of the positions required the candidates to be a registered nurse and have a state RN license, or be licensed as a social worker, i.e., LCSW or LMSW. Nor has the petitioner established that the positions advertised in these job-vacancy announcements require a bachelor's degree in a specific specialty, or the equivalent. For instance, the advertisement from [REDACTED] states only that a bachelor's degree is "preferred," and the advertisement from [REDACTED] states that an associate's degree or unspecified diploma as a registered nurse is sufficient. Finally, the petitioner has not submitted any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the positions advertised.¹³ Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

Again, we acknowledge the opinion letter from Dr. [REDACTED]. However, as previously discussed, the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

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

We 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 the particular position proffered in this petition 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.

¹³ USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these 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).

In this matter the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Medical and Health Services Managers" at a Level I (entry level) wage. The wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will 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 example, 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."¹⁴

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties 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. That is, the record of proceeding does not establish that the requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or its equivalent.

As previously discussed, the descriptions of duties for the proffered position were copied verbatim from the O*NET Online Summary Report and Details Report, and are generic to the occupational category. The descriptions for the proffered position do not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. In fact, the record of proceeding fails to adequately establish that the job duties described relate any dimensions of complexity and uniqueness such that a bachelor's degree in a specific specialty would be required.

Therefore, the evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of educational backgrounds that is suitable for entry into such positions. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

¹⁴ For additional information regarding the prevailing wage level, 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.

While the petitioner has indicated that the beneficiary is "well qualified for this position" and noted "the beneficiary's academic accomplishments and experience in the field ensure that he possesses the academic foundation essential to successfully perform the duties of [the proffered position]," the test to establish a position as a specialty occupation is not the experience or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not 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 the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), to determine whether the evidence establishes that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position. In that regard we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. To satisfy this criterion, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.

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").

Moreover, to satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the

specific specialty or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has 50 employees and that it was established in [REDACTED] (approximately thirteen years prior to the submission of the H-1B petition). The petitioner did not provide the total number of people it has employed to serve in the proffered position. Furthermore, the petitioner did not provide the day-to-day responsibilities of the position and it did not provide any information regarding the complexity of the job duties, independent judgment required or the amount of supervision received.

Significantly, the petitioner submitted three job postings placed by the petitioner for a Medical and Health Services Manager. None of the postings are sufficient to establish eligibility under this criterion of the regulations. For example, the posting on www.jobvertise.com does not indicate that the position for medical and health services manager requires a bachelor's degree; instead, it states that the ideal candidate "should have a four-year degree, Bachelor's degree highly desirable." Likewise, the petitioner also states in the advertisement posted on [REDACTED] that a "4 year degree, Bachelor's degree [is] highly desirable." As discussed, a *preference* for a degree does not indicate a *requirement* for such a degree. Furthermore, the petitioner does not indicate that it requires a degree *in a specific specialty*, or its equivalent. The posting on [REDACTED] states that a 4-year degree is required, but does not indicate that a degree *in a specific specialty*, or its equivalent, is required.

The evidence submitted by the petitioner is insufficient to satisfy this criterion of the regulations. The record does not establish that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Upon review of the record of the proceeding, the petitioner has not provided probative evidence to satisfy this criterion of the regulations. As reflected in this decision's earlier comments and findings with regard to the generalized level at which the proposed duties are described, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to even establish relative specialization and complexity as distinguishing characteristics of those duties, let alone that they are at a level that would require knowledge usually associated with attainment of at

least a bachelor's degree in a specific specialty, or its equivalent. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

We acknowledge Dr. [REDACTED] letter asserting that the duties of the proffered position are complex and specialized, and that a bachelor's degree in nursing is a "prerequisite for entry into the position" because it "represents a menu of courses that together provide the total learning experience . . . [and] provides the knowledge, skills and competencies that are required to perform the [proffered] duties." However, as previously discussed, the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation. In particular, this letter did not explain with any specificity *how* a detailed course of study leading to a nursing degree is necessary to perform the duties of the generically described duties he claims are so complex or unique.

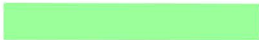
Finally, we again incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Medical and Health Services Managers." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Again, the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are 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. Accordingly, 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 appeal will be dismissed and the petition denied for this reason.

V. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to



establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.