



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF [REDACTED]

DATE: JUNE 19, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a hospital, seeks to temporarily employ the Beneficiary as a “registered/staff nurse” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the evidence of record does not establish that the proffered position is a specialty occupation. The Petitioner filed a motion to reopen and a motion or reconsider, which was dismissed.

On appeal, the Petitioner states that the proffered position is a position within a hospital recognized by the American Nurses Credentialing Center (ANCC) Magnet Recognition Program and, therefore, it qualifies as a specialty occupation. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “registered/staff nurse.” In response to the Director’s request for evidence (RFE), the Petitioner provided the following job duties for the position:

Record patient’s medical histories and symptoms:	23%
Administer patient’s medicines and treatments:	10%
Set up plans for patient’s care or contribute to existing plans:	5%
Observe patients and record observations:	15%
Consult with doctors and other healthcare professionals:	15%
Operate and monitor medical equipment:	15%
Help perform diagnostic tests and analyze results:	10%
Teach patients and their families how to manage illnesses or injuries:	5%
Explain what to do at home after treatment:	2%

According to the Petitioner, the position requires a bachelor’s degree in nursing.

III. ANALYSIS

A motion to reopen is based on documentary evidence of new facts. Alternatively, a motion to reconsider is based on a claim of incorrect application of law or policy to the prior decision. After reviewing the

record of proceedings, we conclude that the Director properly dismissed the combined motion to reopen and reconsider.

For the purposes of assisting the Petitioner in understanding why the petition cannot be approved, we will now discuss the reasons that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.¹ Specifically, the record (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

A. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), 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. To inform this inquiry, we recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³

On the labor condition application (LCA)⁴ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Registered Nurses" corresponding to the Standard Occupational Classification code 29-1141.⁵ Thus, we reviewed the *Handbook's* subchapter entitled "How to Become a Registered Nurse," which states, in pertinent part: "Registered nurses usually take one of three education paths: a Bachelor of Science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing

¹ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

² The Petitioner submitted documentation in support of the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

³ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information.

⁴ The Petitioner is required to submit a certified LCA to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

⁵ The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.*

program. Registered nurses also must be licensed.” Bureau of Labor Statistics, U.S. Dep’t of Labor, *Occupational Outlook Handbook*, Registered Nurses (2016-17 ed.). The *Handbook* also states: “BSN programs typically take 4 years to complete; ADN and diploma programs usually take 2 to 3 years to complete.” *Id.* The *Handbook* does not indicate that registered nursing positions require a bachelor’s degree. To the contrary, it indicates that an associate’s degree, or a diploma program that takes two to three years to complete, would be sufficient for entry into positions falling within this occupational category.

In response to the RFE, the Petitioner submitted a copy of the Policy Memorandum regarding the Adjudication of H-1B Petitions for Nursing Occupations.⁶ The Petitioner stated that “[w]hile lesser degrees are accepted in some employment situations, the Petitioner seeks individuals with Bachelor Degrees or higher in order to maintain their ANCC Certification.”⁷

The policy memorandum states that “achieving [the ANCC] Magnet status indicates that the nursing workforce within an institution has attained a number of high standards relating to quality and standards of nursing practice.” According to the ANCC website, some of these standards are that 100% of nurse managers must have at least a bachelor’s degree in nursing upon submission of the Magnet application.⁸ However, the Petitioner does not claim that the proffered position is for a nurse manager position.

In addition, the ANCC website states that to qualify for Magnet status, the organization must show what plans it has in place to achieve the recommendation of having an 80% baccalaureate prepared registered nurse workforce by 2020.⁹ It is important to notice that a recommendation is not an indication of a requirement. Moreover, the stated goal is for a future date, specifically 2020. Further, that goal relates only to a percentage of an organization’s registered nurse workforce. Therefore, neither the policy memorandum nor the ANCC website state that a bachelor’s degree in nursing, or its equivalent, is currently required for registered nursing positions.¹⁰

⁶ USCIS Policy Memorandum PM-602-0104, *Adjudication of H-1B Petitions for Nursing Occupations* (Jul. 11, 2014), <http://www.uscis.gov/laws/policy-memoranda>.

⁷ While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were we limited solely to reviewing a petitioner’s claimed self-imposed requirements, then any individual with a bachelor’s degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. See *Defensor*, 201 F. 3d at 387. In other words, if a petitioner’s degree requirement is only symbolic and 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 section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “specialty occupation”).

⁸ For additional information, see the ANCC website at <http://www.nursecredentialing.org/>.

⁹ *Id.*

¹⁰ The memorandum concludes that we must review 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 proffered position more likely than not qualifies as a specialty occupation. As noted above, we have reviewed and considered each piece of evidence; however, we find that the Petitioner has not established that the proffered position qualifies as a specialty occupation.

In the instant matter, the Petitioner has not provided sufficient documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

B. Second Criterion

The second criterion presents two alternative prongs: “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[.]” 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner’s specific position.

1. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

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

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

In support of this criterion of the regulations, the Petitioner submitted three job advertisements.¹¹ More specifically:

¹¹ The Petitioner does not demonstrate what inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Without more, it cannot be found that such a limited number of postings that appear to have been consciously selected outweigh the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

- A job posting for staff and charge registered nurses. The advertisement states “Bachelor of Sciences degree in nursing (individuals hired without a BSN will be required to complete a degree program within 5 years of their hire date).”
- A job posting for a registered nurse intern – intensive care unit. The advertisement states that a bachelor’s degree is preferred. A preference for a degree is not an indication of a minimum requirement.
- A job posting for registered nurse critical care float pool. The primary tasks and responsibilities of the advertised position, however, do not appear to be parallel to those of the proffered position. Further, the posting states that graduation from an accredited school of nursing is necessary; however, as discussed, the *Handbook* indicates that ADN and diploma programs usually take 2 to 3 years to complete.

Thus, these job postings do not support the Petitioner’s assertion that a bachelor’s degree in a specific specialty (or its equivalent) is required.

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.¹² That is, not every deficit of every job posting has been addressed.

For the reasons discussed, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

2. Second Prong

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner described the proffered position and its business operations. On appeal, the Petitioner asserts that since it is an ANCC Magnet hospital, it meets this criterion. We reiterate that neither the policy memorandum nor the ANCC website support the Petitioner’s statement that a registered nurse working at a Magnet hospital is currently required to possess a baccalaureate or higher degree.

Moreover, the Petitioner designated the proffered position as an entry-level position within the occupational category (by selecting a Level I wage).¹³ This designation, when read in combination

¹² The Petitioner 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. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

with the Petitioner's job description, further suggests that the particular position is not so complex or unique that the duties can only be performed an individual with bachelor's degree or higher in a specific specialty, or its equivalent. While related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The Petitioner claims that the Beneficiary is well-qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

C. Third Criterion

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.

Upon review of the record, we find that the Petitioner did not submit information regarding employees who currently or previously held the position. The record does not establish that the Petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of the position. Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

D. Fourth Criterion

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.

¹³ The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, unique, and specialized compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

In the instant case, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. The Petitioner does not establish how the generally described duties elevate the proffered position to a specialty occupation. We again refer to our comments regarding the implications of the Petitioner's designation of the proffered position at a Level I wage level.

Upon review of the totality of the record, the Petitioner has not established 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. For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

III. CONCLUSION

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of* [REDACTED], ID# 421346 (AAO June 19, 2017)