



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

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

MATTER OF E-H-, INC.

DATE: SEPT. 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a healthcare service provider, seeks to temporarily employ the Beneficiary as a [REDACTED] 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 Form I-129, Petition for a Nonimmigrant Worker, concluding that the record did not establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits a brief and additional evidence, and asserts that the previously submitted evidence established eligibility.

Upon *de novo* review, we will dismiss the appeal.¹

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.

¹ We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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 offered 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 petition, the Petitioner stated that the Beneficiary will serve as a [REDACTED]. In response to the Director’s request for evidence (RFE), the Petitioner submitted a letter that provided the following job duties:

- Apply education and skills to provide care, assess patients, and assist doctors with various forms of treatment, evaluation and surgery/operation procedures.
 - Neuro ICU nurses must understand not only how to treat and monitor neurological issues, but also how to evaluate patients with a devastating brain injury that could impact the rest of the body. They must carefully evaluate all potential symptoms and signs for deteriorating neurological function or other organ system failures. This requires advanced critical thinking skills as recognizing even minute symptoms or changes could make the difference in patient outcome. In our experience, these critical thinking skills require a nurse with at least a bachelor’s degree.
 - Assist physicians with critical bedside procedures, including the following:
 - Drain insertion in the patient’s skull to reduce pressure (EVD);

- Burr hole insertion for Subdural hematomas, performed to remove a hemorrhage from the brain;
- Airway management of the critically ill patient by intubation, it is especially critical to monitor this as any lack of oxygen to the brain could detrimentally affect our neuro patients;
- Surgical tracheostomy insertion; and
- Percutaneous endoscopic gastrostomy placement.
- Neuroscience/Neurosurgical Intensive care nurses are also required to be competent with a wide variety of technologies and equipment and their uses in the critical care setting. These include hemodynamic and cardiac monitoring systems, mechanical ventilator therapy, ventricular assist devices (LVAD and RVAD), continuous renal replacement equipment (CRRT/CVVHDF), extracorporeal membrane oxygenation circuits (ECMO) and many other advanced life support devices.
- The advanced Clinical Practicum of a BSN program is invaluable for the necessary clinical competence and knowledge and requisite skills
- Maintain patient medical and internal hospital records, clearly communicate diagnoses and treatment plans to patients and doctors, and analyze patient data and medical history.
 - A Bachelor's degree provides RN's with training in Pathophysiology, Theoretical Basis of Holistic Nursing & Health preparing them to be more comfortable dealing with patients' family crisis and appropriate interventions.
- Assist and support various pre-operative and post-operative surgical patients and procedures and ensure that all safety, hospital and state/federal health regulations are in place and enforced.
 - Receive patients who are Post-op Craniotomy, tumor resection, traumatic brain injury, etc.
 - These are very critical patients and keeping the patients hemodynamically stable is essential to their ultimate recovery. This requires advanced monitoring procedures and complex medical calculations and assessments for any minor change in vitals.
- Provide detailed assessment hourly and review of data using various medical techniques and technologies in order to present key findings to doctors and other health professionals.
 - For effective Interdisciplinary Functioning the entire Neuro ICU team must be in constant communication as this is imperative to the recovery of the unit's patients. The team includes neurologists, neurosurgeons, anesthesiologists, nurse practitioners, critical care nurses, clinical pharmacologists, physical therapists, speech-language pathologists, occupational therapists, nutritionists and social workers.

- Meet with the clinical team at least once a day (45-60 mins) to discuss the patient's progress and treatment plans and rationale for any changes.
- Use the Synergy Model for Patient Care to recognize the uniqueness of each patient situation and modify care and treatment to meet patient/family needs.
 - The synergy model describes eight nurse competencies. These competencies consist of clinical judgment, advocacy and moral agency, caring practices, collaboration, systems thinking, response to diversity, facilitation of learning, and clinical inquiry.
 - According to synergy model, nursing care reflects an integration of knowledge, skills, experience, and attitudes needed to meet the needs of patients and families.
- Monitor, record and report systems or changes in patients' conditions and record patient's medical information and vital signs.
 - Neuro ICU nurse continually assesses a patient's vital signs, and ability to speak, and reflexes and responses. Nurses are required to be comfortable and competent with a wide variety of monitoring equipment, for example, nurses analyze information on brain oxygen monitoring, intracranial pressure monitoring, neuroimaging, Electroencephalography (EEG), Transcranial Doppler(TCD) [*sic*] and monitoring of cerebral blood flow, intracranial pressure and brain tissue chemistry. This technology gives nurses a glimpse into what is going on in a patient's brain, even when the person cannot communicate. These are high-level, complex medical instruments that in our experience require a nurse with at least a bachelor's degree to appropriately utilize to the fullest extent and appropriately analyze the results.
- Order, interpret and evaluate diagnostic tests to identify and assess patient's condition.
 - Fully utilize requisite knowledge, skills and attitudes in caring for high acuity patients in ordering appropriate tests and interpreting the results in a timely manner. This includes obtaining serum sample or ABG via Arterial line for critical ill patients, replacing electrolytes or treating critical emergency cases per protocol so as to keep the patient hemodynamically stable. With critically ill patients, every second counts with treatment and any delay could be a matter of life or death for this patient. Due to this high-stress environment, we require nurses with advanced critical thinking skills. Our experience and numerous studies have proven that a bachelor's degree improves these skills.
- Consult and coordinate with healthcare team members to assess, plan, implement and evaluate patient care plans.

- A bachelor's degree better prepares nurses to perform research for evidence-based practice and to be more effectively involved and to appropriately evaluate patient care plans and effective decision making. As a research hospital, this is critical to our hospital.
- Document the nursing process accurately and in the appropriate format.
- Evaluate patient's response to planned care and identify patient and family learning needs in order to utilize resources to meet those needs.
 - Education of patients and family is a very important part of RNs routine daily job. Holistic Nursing and communication skill in a bachelor's program play a vital role in facilitating a [patient's] positive outcome through the education process. As a magnet designated hospital we are committed to improving our patients' outcomes.
- Identify and implement various courses of action for non-routine situation and work as part of team with other doctors and nurses in providing quality care to our patients.
 - Critical care nurses are specialty nurses and their duties require more detailed and specialized training than regular RNs. The ICU is a dynamic and interactive environment that has an intensive nursing workload and requires different professional expertise, where decision-making must be timely and definitive. For example, critical care nurses are trained in advanced cardiac life support (ACLS) which is not standard among RNs. As we have stated above, in our experience and based on numerous studies, a bachelor's degree in nursing is imperative to this role.
 - Our critical care nurses take a lead role on our patient care team and are expected to mentor new nurses and always supervise unlicensed assistive personnel including nursing aides and nurse techs.

The Petitioner stated that the position requires a bachelor's degree (or foreign equivalent degree) in nursing and a registered nurse license (RN) in the state of Georgia.

III. ANALYSIS

We have reviewed the entire record of proceedings before us. For the reasons discussed below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.

A. Labor Condition Application

As an initial matter, the labor condition application (LCA)² the Petitioner submitted in support of the H-1B petition designated the proffered position under the occupational category “Registered Nurses,” corresponding to the Standard Occupational Classification code 29-1141 at a Level I (entry-level) wage.

The U.S. Department of Labor (DOL) guidance states that wage levels should be determined only after selecting the most relevant occupational 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. Factors an employer should consider when determining the wage level for a position include the complexity of the job duties, as well as the levels of judgment, supervision, and understanding required to perform the job duties.

According to DOL guidance, a Level I wage rate is appropriate for a position that involves routine tasks that require limited, if any, exercise of judgment. An indication that a Level I designation would be appropriate is when the proffered position requires the years of education and/or experience that are described in the Occupational Information Network (O*NET) Job Zones. The occupational category “Registered Nurses,” has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupations in this zone “require training in vocational schools, related on-the-job experience, or an associate’s degree.”³ Therefore, the designation of the proffered position at a Level I on the LCA suggests that the Petitioner’s requirements for the proffered position would equate to work under close supervision and receiving specific instructions on required tasks and results expected such as a research fellow, a worker in training, or an internship. In other words, the Petitioner’s designation of the position at a Level I on the LCA suggests that its academic and professional experience requirements for the proffered position would equate to “training in a vocational school, related on-the-job experience, or an associate’s degree.”⁴

The Petitioner’s assertion that the proffered position requires a significant level of responsibility and expertise does not appear to be reflected in the wage level it designated on the LCA.⁵ Specifically,

² 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).

³ *See* O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

⁴ *See* O*NET OnLine Summary Report for “29-1141.00 – Registered Nurses,” <https://www.onetonline.org/link/summary/29-1141.00> (last visited Sept. 27, 2017).

⁵ In general, a petitioner must distinguish its proffered position from others within the same occupation through the proper wage level designation to indicate factors such as the relative 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. DOL, *Emp’t &*

the Petitioner claims that the Beneficiary will “take a lead role on our patient care team,” “mentor new nurses,” and “always supervise unlicensed assistive personnel including nursing aides and nurse techs.” The Petitioner also claims that due to the “dynamic and interactive environment of the ICU,” the Beneficiary will have an intensive nursing workload, and thus her decision-making must be “timely and definitive.” The Petitioner’s statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position, as well as the requirements, appear to be materially inconsistent with the certification of the LCA for a Level I position. This conflict challenges the overall credibility of the petition in establishing the nature of the proffered position and in what capacity the Beneficiary will be employed.⁶

Therefore, we are precluded from finding that the proffered position is a specialty occupation. Nevertheless, we will analyze the evidence of record to determine whether the proffered position as described qualifies as a specialty occupation pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).⁷

B. First Criterion

We turn to the first 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. To inform this inquiry, we recognize the DOL’s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁸

The *Handbook* does not support the Petitioner’s position that a bachelor’s degree is normally the minimum requirement to qualify as an RN. Within the *Handbook*, we note that the chapter on “Registered Nurses” states: “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

Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009) (DOL Policy Guidance), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Through the wage level, the Petitioner reflects the job requirements, experience, education, special skills/other requirements and supervisory duties. *Id.*

⁶ In addition to the inconsistencies between the Petitioner’s claims that the position is highly complex and the Level I position on the LCA, the Level I wage designation is the lowest of four assignable wage levels. We will consider this selection in our analysis of the position. The DOL Policy Guidance 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 he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. See the DOL Policy Guidance. 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.*

⁷ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

⁸ 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/OCO/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information.

from an approved nursing program.” The *Handbook* also states: “BSN programs typically take 4 years to complete; ADN and diploma programs usually take 2 to 3 years to complete.” Therefore, the *Handbook* does not indicate that a bachelor’s degree in nursing is required for entry into this occupation. Rather, the *Handbook* states 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.

Within its appeal brief, the Petitioner asserts that the Director erred when discussing “the specific and narrow occupation of a ‘registered nurse,’” and instead should have considered “the critical care nursing position of [REDACTED].” The Petitioner’s contention is that while the *Handbook* alone is insufficient to establish that it has satisfied the first criterion, a 2015 U.S. Citizenship and Immigration Services (USCIS) policy memorandum may establish that the proffered position, as a critical care nursing position, is a qualifying one.⁹ Furthermore, the Petitioner states that we cannot rely solely on the Occupational Employment Statistics (OES)¹⁰ classification, noting that choices are limited with regard to occupations available for LCA purposes, and often the selected occupation is simply the “closest fit.” The Petitioner concludes that proper analysis of this issue, in order to evaluate the complexity of the proffered position, would not only evaluate the *Handbook*, but also the nursing occupation policy memorandum.

We do not find this argument persuasive. First, as previously noted, while we consider the *Handbook* to be an authoritative source, we do not maintain that it is the exclusive source. The burden to submit other authoritative sources resides with the Petitioner. However, the Petitioner has not shown that we should consider the policy memorandum an authoritative source verifying its claims that the position qualifies as a specialty occupation.

Moreover, while the policy memorandum expresses the possibility of a critical care nursing position qualifying as a specialty occupation, it also indicates that such a determination will depend on the facts of each case. Although the Petitioner states the proffered position is a “critical care nursing position,” it has neither provided sufficient documentation that the position requires, nor that its current employees occupying the position meet the requirements for advanced certification as a critical care registered nurse. The policy memorandum discusses such advanced certifications stating: “There are many advanced certifications available to nurses, including certifications for Critical Care Registered Nurse, Progressive Care Certified Nurse, Critical Care Registered Nurse e-ICU, Critical Care Clinical Nurse Specialist, Acute Care Nurse Practitioner, Certified Nurse Manager and Leader, Cardiac Medicine Sub-Specialty Nurse, and Cardiac Surgery Sub-Specialty Nurse.” The Petitioner has not demonstrated that the specific facts in this case illustrate that the

⁹ USCIS Policy Memorandum PM-602-0104, *Adjudication of H-1B Petitions for Nursing Occupations* 7, fn 19 (February 18, 2015), <http://www.uscis.gov/laws/policy-memoranda>.

¹⁰ While the Petitioner’s appeal brief refers to the OES classification, it appears it intended to refer to the Standard Occupational Classification (SOC) system used to classify workers into occupational categories within the *Handbook* for the purpose of collecting, calculating, or disseminating data.

position qualifies as a specialty occupation. Likewise, the Petitioner has not explained the manner in which the policy memorandum sufficiently overcomes the material within the *Handbook*.

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 a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Therefore, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

C. 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 concentrates on 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. USCIS generally considers the following factors to determine whether there is such a common degree requirement: 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 establish 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. Also, there are no submissions from the industry’s professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner’s industry attesting that such firms “routinely employ and recruit only degreed individuals.”

The Petitioner submitted multiple online articles that discussed the American Nurses Credentialing Center (ANCC) Magnet Recognition Program, which “recognizes health care organizations that advance nursing excellence and leadership through . . . high standards relating to quality and standards of nursing practice.”¹¹ The Petitioner asserts on appeal that the Director erred in

¹¹ USCIS Policy Memorandum PM-602-0104, *supra*, at 3.

comparing the petitioning organization with other general hospitals, when the appropriate comparison was with other institutions that have attained Magnet status under the Magnet Recognition Program. The Petitioner further claims the articles demonstrate that magnet hospitals normally require at least a bachelor's degree for nursing positions as part of maintaining their Magnet designation. Finally, the Petitioner asserts that the evidence proves that it is industry standard among Magnet institutions to require at least a bachelor's degree for nursing positions.

We do not find the articles to be persuasive to the Petitioner's eligibility arguments. The article from the ANCC website titled, "The Impact of Education on Nursing Practice," recognized the higher standards at Magnet hospitals. However, it also states that Magnet hospitals "typically employ a higher proportion of baccalaureate prepared nurses, 59% BSN [Bachelor of Science in Nursing] as compared to 34% BSN at other hospitals." This information is insufficient to corroborate the Petitioner's claim that a bachelor's degree in nursing "is common to the industry in parallel positions among similar [Magnet] organizations."¹² Similarly, the article from nursinglicensure.org titled, "The Future of the Associate Degree in Nursing Program," reflected that a small but growing number of U.S. hospitals hire nurses that have a bachelor's degree, or higher degree, in nursing. This article states that approximately 55 percent of nurses had attained a bachelor's degree in nursing as of 2013. The remaining articles also do not further the Petitioner's eligibility claim under this criterion.¹³ Such statistics do not support the Petitioner's contention that a bachelor's degree in a specific specialty is common to the industry.

Further, the policy memorandum discusses Magnet status, and states that "[the ANCC] Magnet Recognition Program recognizes health care organizations that advance nursing excellence and leadership. In this regard, achieving [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."¹⁴ 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.¹⁵ However, as the Petitioner does not claim that the proffered position is for a nurse manager position, this information from the ANCC website is not relevant to this petition.

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 percent baccalaureate prepared RN workforce by 2020.¹⁶ It is important to recognize 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 80 percent of an organization's RN workforce; not 100 percent of

¹² 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

¹³ When USCIS provides a reasoned consideration to the petition, and has made adequate findings, it will not be required to address every piece of evidence the Petitioner presents. *Martinez v. INS*, 970 F.2d 973, 976 (1st Cir.1992); *aff'd Morales v. INS*, 208 F.3d 323, 328 (1st Cir. 2000); *see also Pakasi v. Holder*, 577 F.3d 44, 48 (1st Cir. 2009); *Kazemzadeh v. U.S. Atty. Gen.*, 577 F.3d 1341, 1351 (11th Cir. 2009).

¹⁴ USCIS Policy Memorandum PM-602-0104, *supra*, at 3.

¹⁵ For additional information, see the ANCC website at <http://www.nursecredentialing.org/>.

¹⁶ *Id.*

RNs at a given healthcare facility. 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, even among institutions that have attained Magnet status.¹⁷

Without more, the Petitioner has not provided sufficient evidence to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations.¹⁸ Thus, the Petitioner has not satisfied the first 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.

Throughout the proceedings, the Petitioner has not claimed to qualify, or offered evidence to apply under this prong. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

D. 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.

The record must establish that a petitioner's stated degree requirement is not a matter of preference for high-caliber candidates but is necessitated instead by performance requirements of the position. *See Defensor*, 201 F.3d at 387-88. Were USCIS limited solely to reviewing the 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 created a token degree requirement. *Id.* Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner's past recruitment and hiring practices, as well as information regarding employees who previously held the position.

¹⁷ 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.

¹⁸ The Director also concluded that the state licensing requirements where the Beneficiary will work do not require a bachelor's degree, or higher, in nursing. Within the appeal, the Petitioner did not offer an argument or evidence to rebut the Director's determination on this issue. As a result, the Petitioner has not established that a prospective employee in the proffered position must obtain at least a bachelor's degree in nursing as a minimum for entry into the occupation in the local jurisdiction.

The Petitioner provided a statement from its Director of [REDACTED] which states that it is the Petitioner's policy to hire RNs that have obtained at least a bachelor's degree, and that this is in line with the current industry standards. The Petitioner also provided a chart that it asserts contains information relating to the critical care nurses it has hired over the previous two years, and information relating to the petitioning organization's Magnet status. On appeal, the Petitioner asserts that the Director did not consider some of the submitted evidence.

[REDACTED] declarations on behalf of the Petitioner, without sufficient and probative supporting documentation, are of limited probative value and are insufficient to satisfy its burden of proof. After considering whether the remaining material sufficiently corroborates [REDACTED] assertions, we find it lacking. The Petitioner claims the informational chart, which contains information for eight personnel, represents the "critical care nurses" hired over the last two years. First, a self-generated chart containing information such as an employee's name and their attained degree is insufficient to establish the Petitioner's hiring practices. The Petitioner has not submitted probative material documenting the names of its employees, the position each employee occupies, or the degree each employee achieved prior to his or her hire date. Additionally, the Petitioner did not provide the job duties and day-to-day responsibilities for these individuals. The Petitioner also did not submit any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required, or the amount of supervision received. We will not presume the duties for the proffered position are sufficiently similar to other positions with a comparable title; additional probative, corroborating evidence must also be part of the record.

Within the RFE response, the Petitioner stated that "[d]ue to the excessive nature of [the Director's] request for personal employee information, [we] will only provide the items . . . demonstrating the degrees held by critical care nurses hired in the past two years. Privacy laws prohibit further disclosure of employee information." On appeal, the Petitioner indicates that two years of records is all that it maintains, any material beyond the two year period was not available and would be an abuse of discretion, and that "[p]roviding information on all other nurses was not relevant and exceeded the limitations."

The Petitioner provided inconsistent information for its reasoning behind not providing more than two years of employee information. Within the RFE response, it claimed that privacy laws prohibited any information disclosure beyond two years.¹⁹ Then on appeal, it claims that its records are limited to a two-year timeframe. We do not find its amended reasoning within the appeal to be persuasive, as it did not mention any records retention limitations when it first addressed the issue. The Petitioner must resolve the ambiguity in its reasons for not supplying more than two previous years of information in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

¹⁹ The Petitioner did not identify the privacy laws it referred to within the RFE response, and therefore, did not satisfy its burden of proof.

On appeal, the Petitioner claims that it requires at least a bachelor's degree for all registered nurse positions in order to maintain its Magnet designation. It also opines that page 3 of the policy memorandum explains "the correlation between Magnet designation and a baccalaureate requirement for registered nurses," as it states that critical care nurses may qualify for H-1B status since they provide "care to patients with serious, complex, and acute illnesses and injuries that need very close monitoring and treatment." Again, the Petitioner has not established that it requires any advanced certification to designate the job as a critical care nursing position. Additionally, the portion of the policy memorandum the Petitioner refers to actually indicated that an RN's duties and titles depend on their work that can focus on specific areas. The memorandum then listed 12 RN positions and stated that depending on the facts of a particular case, "some of these RN positions may qualify as specialty occupations." We distinguish between the Petitioner's broad reading of this portion of the memorandum and the actual text, which conveyed that eligibility will depend on case specific facts. The facts in the present case do not support the Petitioner's claim that the proffered position qualifies as a specialty occupation.

Without more, the Petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, it has not satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

E. 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.

On appeal, the Petitioner contends that the Director referenced to the wage level listed within the LCA and how the Level I wage designation correlated to the complexity of the position. The Petitioner asserts that this correlation was irrelevant as it requires a bachelor's degree for all critical care nursing positions due to the complexities of critical care nursing positions regardless of the fact that the position is an entry-level one.²⁰ The Petitioner closed stating that "relying solely on the wage level for the denial to the exclusion of the other evidence provided is a misapplication of the law."

²⁰ 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").

We disagree as the Director's decision acknowledged the revised duties the Petitioner offered within the RFE response, and that such duties require a certain amount of skill, training, and attention to detail. The Director however, determined that the Petitioner did not illustrate the position is more specialized or complex than other RN positions that may be performed by one that does not possess a bachelor's or higher degree in a specific specialty. Therefore, the Director determined that the Petitioner's evidence did not distinguish the proffered position from other RN positions. As an additional note, the Director discussed the Level I wage designation similar to our findings within this decision. Specifically, the Director noted that the proffered position was not likely distinguishable by relatively specialized and complex duties based on the Petitioner's designation of the position as Level I (of the lowest of four assignable wage-levels) relative to others within the occupational category.²¹

Without further evidence, the Petitioner has not demonstrated that its proffered position is one with specialized and complex duties as such a position within this occupational category would likely be classified at a higher-level, requiring a substantially higher prevailing wage.²²

Although the Petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the Petitioner has submitted insufficient evidence to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

IV. CONCLUSION

For the reasons outlined above, the Petitioner has not established eligibility for the benefit sought. This petition's denial does not preclude the Petitioner from refiling if it is able to establish that this position is a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of E-H-, Inc.*, ID# 751675 (AAO Sept. 28, 2017)

²¹ Nevertheless, a low wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a high wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level II position would still require a minimum of an advanced 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.

²² 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" and requires a significantly higher wage. For additional information regarding wage levels as defined by DOL, see the DOL Policy Guidance.