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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Dr.

DATE: **DEC 28 2011** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a home health services company that seeks to employ the beneficiary as a part-time medical research assistant. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition, finding that the position was not a specialty occupation.

On appeal, the petitioner submits a brief and contends that the proffered position is a specialty occupation, arguing that the director's findings to the contrary were erroneous. Specifically, the petitioner contends that the director mischaracterized the proffered position as that of a medical assistant, when in fact it is most akin to that of a physician assistant.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B and the petitioner's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the position must 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 illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires 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 the Act.

In a March 30, 2009 letter of support, the petitioner explained that it "treats patients and constantly seeks to implement the most advanced techniques to diagnose and treat medical problems and organize preventive strategies." The petitioner claimed that in order to provide such advanced techniques for treating patients, it required the services of a part-time research assistant to "review major professional medical journals, reference works, research publications, and statistical records." Regarding the proffered position, the petitioner provided the following overview of associated duties:

In the position of Medical Research Assistant with our facility, [the beneficiary] will assist licensed medical doctors and nurses in appraising us of the latest and most innovative medical treatment through research. She will review major professional medical journals, reference works, research publications, and statistical record to provide diagnostic, therapeutic, and preventive health care services. She will research general health issues as well as specific developments in pediatrics, internal medicine, family care and many other areas of concern. [The beneficiary] will research medical literature to find research suggestions, and assist doctors in making diagnoses based upon patient age and medical conditions. [The beneficiary] will analyze statistical data to prepare reports and recommendations. She will write reports or present research in formats such as abstracts, bibliographies, graphs, and presentations for inclusion in patient charts and records.

The petitioner further contended that only a researcher trained in the life sciences, with at least a bachelor's degree in biology, chemistry, medicine, etc., could perform the duties of the proffered position. Regarding the beneficiary, the petitioner stated that she possessed a bachelor of science degree in zoology from Mindanao State University in the Philippines, which was equated to that of a U.S. bachelor's degree in zoology by an independent education evaluator.

In a May 9, 2009 RFE, the director requested additional information. Specifically, the director requested more evidence demonstrating that the proffered position is a specialty occupation, including but not limited to a more detailed description of the proffered position and information

pertaining to the petitioner's business, its hiring practices, and its organizational chart. The director also requested additional information pertaining to the petitioning entity, including an overview of the employment circumstances under which the beneficiary would work as well as documentation such as tax returns, quarterly wage reports, and a company profile.

In response, the petitioner addressed the director's queries in a response dated June 15, 2009. The petitioner provided the following updated description of the duties of the proffered position with a breakdown of the time to be spent performing certain duties:

Duties	% of time spent
Assist licensed medical doctors and nurses in appraising us of the latest and most innovative medical treatment through research. Review major professional medical journals, reference works, research publications, and statistical records to provide diagnostic, therapeutic, and preventive health care services.	40%
Research general health issues as well as specific developments in pediatrics, internal medicine, family care and many other areas of concern. Elicit detailed patient histories through interview and examination. Discuss patient charts and files with doctors, and interpret laboratory tests and x-rays. Research medical literature to find research suggestions, and assist doctors in making diagnoses based upon patient age and medical conditions.	40%
Analyze statistical data to prepare reports and recommendations. Write reports or present research in formats such as abstracts, bibliographies, graphs, and presentations for inclusion in patient charts and records.	20%
Total:	100%

The petitioner also provided copies of job postings for what it claimed were parallel positions in similar organizations in support of the contention that the petitioner's degree requirement was common in the industry, as well as tax documents, its organizational chart, and a company profile.

On August 18, 2009, the director denied the petition, determining that the petitioner had failed to establish that the proffered position was a specialty occupation. The director found that the proffered position was akin to that of a medical assistant and that it failed to meet any of the criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner contends that, contrary to the director's findings, the proffered position is more akin to that of a physician assistant. The petitioner contends that the director misinterpreted the stated duties and thus erroneously classified the position as a medical assistant, and asserts that the proffered position is much more complex than that of a medical assistant. No additional documentary evidence is submitted in support of the appeal.

In reviewing the record, the AAO observes that the critical element is not the title of the position or 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 or its equivalent as the minimum for entry into the occupation in the United States, as required by the Act.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, to determine whether it reports that the industry requires a degree in a specific specialty.

The petitioner claims that the proffered position is that of a medical research assistant. Even though the *Handbook* does not contain an occupational category entitled "medical research assistant," a thorough review of the stated duties, regardless of the job title, is required in order to ascertain or otherwise determine the occupation most akin to the proffered position. The director found that the proffered position was that of a medical assistant, whereas the petitioner contends that the proffered position most closely resembles the occupation of a physician assistant. The AAO will review both sections in order to determine the proper classification of the proffered position.

The AAO first turns to the *Handbook's* section pertaining to medical assistants, which is the occupational category in which the director classified the proffered position. As stated by the 2010-2011 *Handbook*, the occupation of medical assistant is described as follows:

Medical assistants perform administrative and clinical tasks to keep the offices of physicians, podiatrists, chiropractors, and other health practitioners running smoothly. The duties of medical assistants vary from office to office, depending on the location and size of the practice and the practitioner's specialty. In small practices, medical assistants usually do many different kinds of tasks, handling both administrative and clinical duties and reporting directly to an office manager, physician, or other health practitioner. Those in large practices tend to specialize in a particular area, under the supervision of department administrators. Medical assistants should not be confused

with physician assistants, who examine, diagnose, and treat patients under the direct supervision of a physician. (Physician assistants are discussed elsewhere in the *Handbook*.)

Administrative medical assistants update and file patients' medical records, fill out insurance forms, and arrange for hospital admissions and laboratory services. They also perform tasks less specific to medical settings, such as answering telephones, greeting patients, handling correspondence, scheduling appointments, and handling billing and bookkeeping.

Clinical medical assistants have various duties, depending on State law. Some common tasks include taking medical histories and recording vital signs, explaining treatment procedures to patients, preparing patients for examinations, and assisting physicians during examinations. Medical assistants collect and prepare laboratory specimens and sometimes perform basic laboratory tests, dispose of contaminated supplies, and sterilize medical instruments. As directed by a physician, they might instruct patients about medications and special diets, prepare and administer medications, authorize drug refills, telephone prescriptions to a pharmacy, draw blood, prepare patients for x rays, take electrocardiograms, remove sutures, and change dressings. Medical assistants also may arrange examining room instruments and equipment, purchase and maintain supplies and equipment, and keep waiting and examining rooms neat and clean.

The director concluded that the proffered position was that of a medical assistant based on the petitioner's description of the duties of the proffered position. The AAO, however, disagrees with the director's finding. A review of the *Handbook's* section addressing this occupational category indicates that medical assistants, unlike physician assistants, perform administrative and clinical tasks. Specifically, the *Handbook* indicates that administrative medical assistants maintain patient medical records and also perform some non-medical tasks including answering phones, greeting patients, and bookkeeping. Additionally, clinical medical assistants interact with patients in a limited manner, and perform such tasks as taking medical histories, recording vital signs, and collecting laboratory specimens. They also are responsible for maintaining supplies and equipment.

When comparing the occupational category of medical assistant to that of the position offered by the petitioner, the AAO finds no tasks in the petitioner's description of duties that would indicate the beneficiary will be acting as a medical assistant. She will not be performing administrative tasks, and the petitioner indicates that her duties are more complex than those of a clinical medical assistant in that she will be directly involved in the diagnosis and treatment of patients based on her research and analysis of statistical data. Consequently, the AAO finds that the proffered position is not that of a medical assistant and withdraws this finding of the director.¹

¹ The director's error is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The AAO now turns to the *Handbook's* section pertaining to physician assistants, which, according to the petitioner, is the occupational category most appropriate for the proffered position. As stated by the 2010-2011 *Handbook*, the occupation of physician assistant is described as follows:

Physician assistants (PAs) practice medicine under the supervision of physicians and surgeons. They should not be confused with medical assistants, who perform routine clinical and clerical tasks. (Medical assistants are discussed elsewhere in the *Handbook*.) PAs are formally trained to provide diagnostic, therapeutic, and preventive healthcare services, as delegated by a physician. Working as members of a healthcare team, they take medical histories, examine and treat patients, order and interpret laboratory tests and x rays, and make diagnoses. They also treat minor injuries by suturing, splinting, and casting. PAs record progress notes, instruct and counsel patients, and order or carry out therapy. Physician assistants also may prescribe certain medications. In some establishments, a PA is responsible for managerial duties, such as ordering medical supplies or equipment and supervising medical technicians and assistants.

Physician assistants work under the supervision of a physician. However, PAs may be the principal care providers in rural or inner-city clinics where a physician is present for only 1 or 2 days each week. In such cases, the PA confers with the supervising physician and other medical professionals as needed and as required by law. PAs also may make house calls or go to hospitals and nursing care facilities to check on patients, after which they report back to the physician.

The duties of physician assistants are determined by the supervising physician and by State law. Aspiring PAs should investigate the laws and regulations in the States in which they wish to practice.

Many PAs work in primary care specialties, such as general internal medicine, pediatrics, and family medicine. Other specialty areas include general and thoracic surgery, emergency medicine, orthopedics, and geriatrics. PAs specializing in surgery provide preoperative and postoperative care and may work as first or second assistants during major surgery.

The AAO concurs with the petitioner's contention that the proffered position is similar to that of a physician assistant. As described by the petitioner, the beneficiary will be responsible for making diagnoses after examining patient information and interpreting lab results and x-rays. It further indicates that these diagnoses will be based on the beneficiary's extensive medical research and analysis of statistical data.

The educational and training requirements for a physician assistant, according to the *Handbook*, are as follows:

Requirements for admission to training programs vary; most applicants have a college degree and some health-related work experience. All States require physician assistants to complete an accredited, formal education program and pass a national exam to obtain a license.

Education and training. Physician assistant educational programs usually take at least 2 years to complete for full-time students. Most programs are at schools of allied health, academic health centers, medical schools, or 4-year colleges; a few are at community colleges, are part of the military, or are at hospitals. Many accredited PA programs have clinical teaching affiliations with medical schools.

In 2008, 142 education programs for physician assistants were accredited or provisionally accredited by the Accreditation Review Commission on Education for the Physician Assistant. Eighty percent, or 113, of these programs offered the option of a master's degree, 21 of them offered a bachelor's degree, 3 awarded associate degrees, and 5 awarded a certificate.

Most applicants to PA educational programs already have a college degree and some health-related work experience; however, admissions requirements vary from program to program. Many PAs have prior experience as registered nurses, emergency medical technicians, and paramedics.

PA education includes classroom and laboratory instruction in subjects like biochemistry, pathology, human anatomy, physiology, clinical pharmacology, clinical medicine, physical diagnosis, and medical ethics. PA programs also include supervised clinical training in several areas, including family medicine, internal medicine, surgery, prenatal care and gynecology, geriatrics, emergency medicine, and pediatrics. Sometimes, PA students serve in one or more of these areas under the supervision of a physician who is seeking to hire a PA. The rotation may lead to permanent employment in one of the areas where the student works.

Based on the *Handbook's* section cited above, the position of physician assistant does not require a bachelor's degree or its equivalent in a specific specialty for entry into the occupation. According to the section quoted above, "[p]hysician assistant educational programs usually take at least 2 years to complete for full-time students. Most programs are at schools of allied health, academic health centers, medical schools, or 4-year colleges; a few are at community colleges, are part of the military, or are at hospitals." While it acknowledges that many candidates possess college degrees prior to entry into the occupation, the *Handbook* does not state that a bachelor's degree or its equivalent in a specific specialty is a prerequisite for entry into the occupation. Therefore, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position of physician assistant. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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. Factors considered by the AAO when determining this criterion include whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Finally, as briefly addressed above and for the reasons discussed in greater detail below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of eight advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the home health care industry. The advertisements provided, however, establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent was required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. All postings submitted are for the position of research assistant or research associate. Since the nature of the positions represented in these postings are sufficiently different from that of a physician assistant as described by the *Handbook* and as claimed counsel on appeal to be the proper classification of the proffered position, they cannot be deemed acceptable evidence of eligibility under this criterion. Even if the postings were for physician assistant positions, none of the postings are for positions in the home health care industry. Rather, they appear to be research positions for pharmaceutical companies or university programs, or research positions within charitable organizations. As such, the jobs cannot be considered parallel to that of the proffered position. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.²

² According to the *Handbook's* detailed statistics on physician assistants, there were approximately 100 persons employed as physician assistants by companies engaged in home health care services in 2008. *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos081.htm> (last accessed

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." To begin with and as discussed previously, the petitioner itself does not require at least a baccalaureate degree or its equivalent in a specific specialty. In addition, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of physician assistant.

Specifically, even though the petitioner and its counsel claim that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the physician assistant duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique.

Therefore, the evidence of record does not establish that this position is significantly different from other physician assistant positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred courses of training acceptable for physician assistant positions, including two-year degrees, and degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than physician assistant or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of physician assistant is so complex or

December 2, 2011). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from eight dissimilar job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the home health care industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the job of physician assistant for a fourteen-person home health care organization required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

unique relative to other physician assistant positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In this matter, the petitioner, through counsel, asserts that it has not previously employed anyone in the proffered position. Therefore, the petitioner cannot establish eligibility under this criterion.

It is noted that in response to the RFE and again on appeal, counsel relies on *Young China Daily v Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), asserting that the director's reliance on the petitioner's past hiring practices was erroneous. Counsel's assertions, however, are misplaced. The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) provides four alternative criteria, one of which must be established in order to demonstrate that the proffered position qualifies as a specialty occupation. One of the four alternative criteria requires evidence that it has routinely employed degreed individuals in the proffered position. While counsel correctly asserts that the size and business practices of a petitioner are not factors typically considered by USCIS when determining whether a position is a specialty occupation, the director did not focus on the petitioner's past business practices as a basis for denial in this matter. Rather, the director properly evaluated the evidence submitted by the petitioner under the four alternative criteria available at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, since the petitioner clearly stated that it had not previously employed any individuals in the proffered position, correctly found that the petitioner had failed to meet the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Although USCIS will often analyze whether a job is a specialty occupation by looking at the duties of the position and the industry of the petitioner's operations when the position offered is not typically associated with the petitioner's services, that was not the intent or focus of the director in this matter. As asserted on appeal, the fact that the petitioner may have a legitimate reason for hiring an individual for the proffered position for the first time is not a factor that USCIS weighs negatively in this matter. Instead, it simply means the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), since there is no hiring history for USCIS to examine. Counsel's reliance on *Young China Daily* as it pertains to the director's findings with regard to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), therefore, is misplaced and not persuasive.³

³ Regardless, even if relevant to the director's analysis, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district (in contrast to the broad precedential authority of the case law of a United States circuit court). See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In addition, the AAO observes that the petitioner's desire to employ an individual with a bachelor's degree or equivalent does not establish that the position is a specialty occupation. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – 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.

The petitioner provides a general overview of the duties of the proposed position in the initial letter of support and in response to the RFE. The petitioner, however, has not established that the duties to be performed exceed in scope, specialization, or complexity those usually performed by physician assistants, an occupational category that does not normally require a baccalaureate or higher degree in a specific specialty or its equivalent. The AAO finds nothing in the record to indicate that the beneficiary, in his role, would face duties or challenges any more specialized and complex than those outlined in the *Handbook*.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, aside from the claims of the petitioner and its counsel, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement in a specific specialty. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the proposed position does not meet any of the four additional criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied for this reason. The proposed position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform its duties are inconsequential. Accordingly, the AAO will not disturb the director's denial of the petition.

Even if the proffered position had been deemed a specialty occupation, the petition could not be approved since the petitioner has failed to establish that the beneficiary is qualified to perform the duties associated with the occupation of physician assistant.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

According to the *Handbook*, all states require physician assistants to possess the appropriate license. Specifically, the *Handbook* states:

Licensure. All States and the District of Columbia have legislation governing the practice of physician assistants. All jurisdictions require physician assistants to pass the Physician Assistant National Certifying Examination, administered by the National Commission on Certification of Physician Assistants (NCCPA) and open only to graduates of accredited PA education programs. Only those who have successfully completed the examination may use the credential "Physician Assistant-Certified." To remain certified, PAs must complete 100 hours of continuing medical education every 2 years. Every 6 years, they must pass a recertification examination or complete an alternative program combining learning experiences and a take-home examination.

In this case, the beneficiary holds the U.S. equivalent of a bachelor's degree in zoology. Without addressing whether a zoology degree is sufficient to satisfy the educational entry requirements of a physician assistant position, no claim has been made and no evidence has been submitted to demonstrate that the beneficiary possesses both the appropriate licensure to practice as a physician

assistant under the laws of the State of California or that she has passed the Physician Assistant National Certifying Examination. As such, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the appeal shall be dismissed and the petition denied for this additional reason.

Beyond the decision of the director, the petitioner has not submitted a certified labor condition application (LCA) which corresponds to the petition.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

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

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

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

In the instant matter, the petitioner filed the Form I-129 with USCIS on April 8, 2009. The LCA provided at the time of filing was certified (1) for a medical research assistant, (2) pursuant to occupational code 019 - occupations in architecture, engineering, and surveying, N.E.C., (3) within the Los Angeles metropolitan statistical area (MSA), and (4) at a prevailing wage of \$20.03 per

hour. However, counsel contends on appeal that the proffered position is actually that of a physician assistant, and the AAO has concurred with counsel's contentions.

As the proffered position is in fact a physician assistant, not a medical research assistant, it would have to have been certified for (1) for a physician assistant, (2) pursuant to occupational code 079 - occupations in medicine and health, N.E.C., (3) within the Los Angeles MSA, and (4) at a minimum prevailing wage of \$26.05 per hour (the Level I wage for physician assistants in the Los Angeles MSA at the time the LCA was certified) in order for the LCA submitted with the petition to be found to correspond to that petition. Although the LCA was certified for the proper MSA, it does not otherwise correspond to the petitioner's claimed proffered position of a physician assistant.

Thus, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty for the requested employment for the beneficiary. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B) by providing a certified LCA that corresponds to the instant petition. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Soltane v. DOJ*, 381 F.3d at 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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