

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



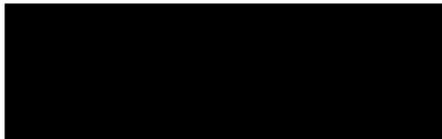
D2

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JAN 04 2011

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 the petitioner stated that it performs health care recruitment for hospitals. To employ the beneficiary in a position it designates as a Registered Nurse – Pediatric Specialty (RN-PS) position at [REDACTED], the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the petitioner would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it, (2) the service center's request for additional evidence, (3) the response to the request for evidence, (4) the director's denial letter, and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health,

education, business specialties, accounting, law, theology, and the arts, and which (2) requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry

into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

As will be discussed further below, the registered nurse (RN) occupational category typically includes persons with one of three types of educational credentials. These are (1) a bachelor's of science degree in nursing (BSN), (2) an associate degree in nursing (ADN), and (3) a diploma granted by certain hospitals. The petitioner contends that performance of the proffered RN position requires at least a BSN. The AAO finds that the record of proceeding does not support this contention.

At the outset, it is important to note that where, as here, the petitioner is doing business as a healthcare staffing firm that is petitioning for a beneficiary that it would assign to a client hospital (here, CMCD) that would directly determine and supervise the substantive work of the nursing position to which the beneficiary would be assigned, it is the content and weight of the documentation submitted by that client hospital that is determinative on the specialty occupation issue. Specialty occupation classification is dependent upon the extent and quality of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of specialized knowledge in a specific specialty necessary for or usually associated with such performance requirements. Thus, where, as here, the substantive nature of the work to be performed is determined not by the petitioner but by its client, the AAO focuses on whatever documentary evidence the client entity generating the work has issued or endorsed about the work and the educational credentials necessary to perform it.

In support of this approach, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had “token degree requirements,” to “mask the fact that nursing in general is not a specialty occupation.” *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that legacy Immigration and Naturalization Service (INS) had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* In *Defensor*, the court found that that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations.¹ As to the education required for entry into registered nurse positions in general, the *Handbook* states,

There are three typical educational paths to registered nursing—a bachelor's of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. BSN programs, offered by colleges and universities, take about 4 years to complete. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. Diploma programs, administered in hospitals, last about 3 years.

The record contains (1) an April 14, 2009 letter from the [REDACTED] letter); and (2) the January 21, 2009 [REDACTED] provided for the petitioner by [REDACTED], an associate [REDACTED] (hereinafter referred to as the associate professor's evaluation).

As the following comments will demonstrate, the submissions (a) do not support the proposition for which they were submitted, namely, that the proffered position is a specialty occupation, and (b) in fact indicate that the petition must be denied for its failure to include substantive evidence that actual performance of the proffered position would require the practical and theoretical application of at least a BSN level of highly specialized knowledge in nursing.

[REDACTED] letter states that 70% of its 1,200 registered nurses have bachelor's degrees in nursing. Further still, counsel provided a vacancy announcement from [REDACTED]. That vacancy announcement indicates that the position requires graduation from an accredited school of nursing, but not that it requires a bachelor's degree, rather than an associate's degree.

The letter from [REDACTED] the client hospital to which the beneficiary would be assigned and which would directly supervise the beneficiary and determine her specific duties in the pediatric ward – does not suggest that a BSN or the equivalent is a prerequisite for employment. Again, according to the letter, only 70% of the hospital's 1,200 registered nurses hold a Bachelor's Degree in Nursing or equivalent. Further, both that letter and the vacancy announcement provided establish that the direct employer of the proffered position does not require a BSN or BSN equivalency for the proffered position. [REDACTED] letter and the vacancy announcement, therefore, decisively and conclusively establish that the proffered position does not qualify as a specialty occupation position. This fact in itself is a sufficient basis for dismissing the appeal and denying the petition.

Further, as indicated in the following excerpt from the "Training, Other Qualifications, and Advancement" section of the *Handbook's* "Registered Nurses" chapter, a BSN is neither required for

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed December 20, 2010.

licensure as an RN nor normally required for the general range of RN jobs, regardless of their specialty. In pertinent part, this section reads:

Training, Other Qualifications, and Advancement

The three typical educational paths to registered nursing are a bachelor's degree, an associate degree, and a diploma from an approved nursing program. Nurses most commonly enter the occupation by completing an associate degree or bachelor's degree program. Individuals then must complete a national licensing examination in order to obtain a nursing license. Advanced practice nurses—clinical nurse specialists, nurse anesthetists, nurse-midwives, and nurse practitioners—need a master's degree.

Education and training. There are three typical educational paths to registered nursing—a bachelor's of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. BSN programs, offered by colleges and universities, take about 4 years to complete. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. Diploma programs, administered in hospitals, last about 3 years. Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as a staff nurse. There are hundreds of registered nursing programs that result in an ADN or BSN; however, there are relatively few diploma programs.

Individuals considering a career in nursing should carefully weigh the advantages and disadvantages of enrolling in each type of education program. Advancement opportunities may be more limited for ADN and diploma holders compared to RNs who obtain a BSN or higher. Individuals who complete a bachelor's degree receive more training in areas such as communication, leadership, and critical thinking, all of which are becoming more important as nursing practice becomes more complex. Additionally, bachelor's degree programs offer more clinical experience in nonhospital settings. A bachelor's or higher degree is often necessary for administrative positions, research, consulting, and teaching[.]

Many RNs with an ADN or diploma later enter bachelor's degree programs to prepare for a broader scope of nursing practice. Often, they can find an entry-level position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. Accelerated master's degree in nursing (MSN) programs also are available. They typically take 3-4 years to complete full time and result in the award of both the BSN and MSN.

* * *

All nursing education programs include classroom instruction and supervised clinical experience in hospitals and other healthcare facilities. Students take courses in

anatomy, physiology, microbiology, chemistry, nutrition, psychology and other behavioral sciences, and nursing. Coursework also includes the liberal arts for ADN and BSN students.

Supervised clinical experience is provided in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in nursing care facilities, public health departments, home health agencies, and ambulatory clinics.

Licensure and certification. In all States, the District of Columbia, and U.S. territories, students must graduate from an approved nursing program and pass a national licensing examination, known as the National Council Licensure Examination, or NCLEX-RN, in order to obtain a nursing license. Other eligibility requirements for licensure vary by State. Contact your State's board of nursing for details.

Other qualifications. Nurses should be caring, sympathetic, responsible, and detail oriented. They must be able to direct or supervise others, correctly assess patients' conditions, and determine when consultation is required. They need emotional stability to cope with human suffering, emergencies, and other stresses.

RNs should enjoy learning because continuing education credits are required by some States and/or employers at regular intervals. Career-long learning is a distinct reality for RNs.

Some nurses may become credentialed in specialties such as ambulatory care, gerontology, informatics, pediatrics, and many others. Credentialing for RNs is available from the American Nursing Credentialing Center, the National League for Nursing, and many others. Although credentialing is usually voluntary, it demonstrates adherence to a higher standard and some employers may require it.

The *Handbook* indicates that the proffered "RN-PS" position would fall within the population of RNs serving as pediatric nurses. The *Handbook* indicates that a BSN or BSN equivalency is *not* normally a minimum requirement for serving in either the pediatric nursing specialty or most other nursing specialties in which RNs engage, including the following that the *Handbook's* chapter on registered nurses lists, along with the pediatric specialty, as distinct nursing specialties: diabetes management; dermatology; geriatrics; perioperative, pediatric oncology; ambulatory care; critical care; emergency or trauma; transport; holistic; home health care; hospice and palliative care; infusion; long-term care; medical-surgical; occupational health; perianesthesia; psychiatric-mental health; radiology; rehabilitation; transplant; addictions; intellectual and developmental disabilities; diabetes management; genetics; HIV/AIDS; oncology; wound, ostomy, and continence; cardiovascular; gastroenterology; gynecology; nephrology; neuroscience; ophthalmic; orthopedic; otorhinolaryngology; respiratory; urology; neonatology; and gerontology or geriatrics.

For the purposes of this appeal, it is important to note that the *Handbook* states, and its discussion of the RN occupational category and its specialties reflects, that RNs' "duties and title are often determined by their work setting or patient population being served," rather than by degree type (i.e., ADN or BSN).² In any event, the *Handbook's* information does not support either the propositions that RN-PS positions as an occupational category or the particular RN-PS position proffered in this petition normally require at least a BSN.

Further, a Memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002) (hereinafter referred to as the Williams Memo) indicates that a petitioner seeking to employ a pediatric nurse may, in a given instance, demonstrate that the position proffered qualifies as a specialty occupation position, but that RN-PS positions do not categorically qualify as specialty occupation positions.

The AAO finds that, as described in the record of proceeding, the proffered position and the duties comprising it do not fit any type of direct-care RN position that the Williams Memo recognizes to be a specialty occupation.³ Rather, the proffered position fits within the range of RN specialty positions described at section E of the Memo as those for which qualification as a specialty occupation would depend upon the extent and weight of the evidence presented in the petition. Thus, while the Williams Memo summarizes the statutory and regulatory standards for establishing an H-1B specialty occupation, it is not evidence that the particular position that is the subject of this petition is a specialty occupation.

² The *Handbook* notes an important exception, namely, the four types of "advanced practice nurses [(APNs)], who work independently or in collaboration with physicians," which the *Handbook* identifies as "clinical nurse specialists, nurse anesthetists, nurse-midwives, and nurse practitioners." The *Handbook*, states:

All four types of advanced practice nurses require at least a master's degree. In addition, all States specifically define requirements for registered nurses in advanced practice roles. Advanced practice nurses may prescribe medicine, but the authority to prescribe varies by State. Contact your State's board of nursing for specific regulations regarding advanced practice nurses.

However, the requirements for APN positions are not relevant to this appeal, as the petition was not filed for such a position. Also, the record of proceeding indicates that the beneficiary is neither qualified nor licensed or certified for any type of APN position.

³ The four types of RN positions that the Williams Memo recognizes as categorically requiring at least a specialty-occupation level of education are Clinical Nurse Specialists; Nurse Practitioners; Certified Registered Nurse Anesthetists; and Certified Nurse-Midwife. The AAO finds these categories to be the same as the four APN specialties that the *Handbook* identifies as requiring at least a master's degree in nursing. The AAO reiterates that the record of proceeding establishes that the proffered position does not fit within any of these APN specialties.

As will now be explained, the AAO finds no probative value in the associate professor's evaluation, which concludes that the position of RN-PS requires at least a BSN, or the equivalent.

The evaluation lists various duties of an RN-PS and abstractly states, "Skills in these areas can be acquired only through Bachelor's-level classes in those areas" The associate professor did not indicate which of the listed duties could not be performed by a registered nurse who did not have a minimum of a bachelor's degree or the equivalent in nursing or a related discipline. The associate professor further stated, "The skills for the position are developed in the junior and senior years of an undergraduate program, as well as in a graduate program in Nursing, or a related field," but did not indicate which skills are not taught in, for instance, an ADN program at an accredited nursing school.

In a request for evidence, the service center requested, *inter alia*, that the petitioner explain why a registered nurse without a bachelor's degree or the equivalent in nursing or a related field could not perform the duties of the proffered position. In response, counsel submitted two journal articles, a letter from [REDACTED] a decision in a previous Form I-129 visa petition case filed by the petitioner for the instant beneficiary, and counsel's own letter.

Both of the articles provided assert that a higher percentage of nurses with bachelor's degrees on a hospital's staff decreases mortality.

The letter from the hospital indicates that it employs 30 registered nurses in its "C4 Acute Care Surgical Unit," of whom 80% hold bachelor's degrees. That letter further states that the instant petition for the beneficiary is for an acute care nurse to work in that unit. Nothing previously in the record indicated that the petitioner was attempting to hire the beneficiary for employment in an acute care or intensive care specialty. The previous submissions state that the beneficiary would be employed as a RN-PS.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The assertion that the beneficiary would work on an acute care ward will not be considered.

The previous visa petition filed for this beneficiary was decided at the California Service Center. In his letter, counsel noted that the previous petition was denied on grounds unrelated to whether the proffered position is a position in a specialty occupation and stated that this indicates that the

director determined that the proffered position is in a specialty occupation. The AAO observes that the decision contains no such finding and that, even if it did, the AAO would not be bound by it.

As to the January 21, 2009 evaluation of the proffered position, it is apparent on its face that the associate professor's evaluation has not taken into account either the *Handbook's* information to the effect that pediatric nursing RN positions do not normally require a BSN or higher degree in nursing, or [REDACTED] clear indication that the proffered position does not require a BSN or higher degree. This alone reduces the associate professor's evaluation to evidentiary insignificance.

The AAO also discounts the associate professor's evaluation because it appears to have focused upon on the wrong entity under the previously mentioned *Defensor* analysis. That is, the author focuses upon "companies seeking to employ a Specialty Nurse," not upon the companies' client hospitals which would set the actual educational thresholds for their RN-PSs. For this reason also, the associate professor's evaluation has negligible evidentiary value and is certainly not probative on the issue of whether the assigned position at [REDACTED] which is the subject of this petition, qualifies as a specialty occupation.

Further, the associate professor provides no substantive analysis of why particular performance requirements of the proffered position, as it would be performed for [REDACTED] would require at least a BSN or the equivalent. Rather, she addresses RN-PSs only as a general category, and only on the level of generalized and generic functions that appear as applicable to the vast range of RNs as to this petition's RN position.⁴ Further, as such, the evaluation does not indicate substantive familiarity with the type of position about which the associate professor opines, and it certainly indicates no familiarity with the particular position which is proffered in this petition for performance at [REDACTED]. For these reasons also, the evaluation fails to be of any material value to the AAO's consideration of this appeal.

The AAO also finds that the content of the evaluation is cursory, superficial, and conclusory, and, as such, of no probative value. In this regard, the AAO notes that the evaluator fails to identify specific duties of the proffered position whose performance would require at least a BSN or the equivalent, and that the evaluator fails to explain any nexus between such duties and the degree requirement that she declares. The AAO further notes that the evaluator neither cites to nor provides any reports, studies, reviews, abstracts, or authoritative documentary evidence of any kind to support her conclusion. Additionally, the evaluator does not disclose whatever analytical process she used to reach her conclusion. Further, the attention and analysis that the associate professor applied in her evaluation is highly questionable on the face of the evaluation.

The AAO further notes that the evaluator's conclusion is fatally undercut by the *Handbook's* contrary information reviewed earlier in this decision and also by the client hospital's

⁴ Two examples are the following abstract duties that the associate professor ascribes to the position that she is evaluating: "Evaluate and revise plans of care based on evolving needs," and "Identify problems and report these to appropriate personnel."

acknowledgment that it employs in the exact type of position proffered in this petition RNs holding less than a BSN or equivalent.

In short, the AAO finds that the associate professor's evaluation lacks an adequate factual and analytical basis for its conclusion. Consequently, the reliability of the evaluation has not been established, and the evaluation merits no evidentiary weight.

Additionally, the AAO notes that neither the associate professor's evaluation document nor her résumé establishes her as either an expert or a recognized authority on the educational requirements for the RN-PS position for which this petition was filed. Also, the unsubstantiated content of her evaluation, as reflected in the AAO's discussion above, would require the AAO to discount her evaluation's conclusion and not defer to her even if she were an expert, because the evaluation and its conclusion appear unsound.

For all of the reasons discussed above, the AAO discounts the associate professor's evaluation as unsubstantiated, as lacking substantive analysis, as contradicted by the information in the *Handbook* and in the letter from the very hospital where the beneficiary would perform as an RN-PS, and also as not focused upon the requirements of the correct entity under the *Defensor* analysis. In short, the associate professor has not provided factual and analytical grounds by which the AAO may reasonably conclude that her opinion is well founded, reliable, and probative. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the associate professor's opinion as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

For all of the above reasons, the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The articles counsel provided indicate that hospitals with a greater percentage of nurses with bachelor's degrees have a lower mortality rate. If those results are replicable, even after controlling for other salient factors, those articles may result, in the future, in bachelor's degrees becoming a necessity for entry into nursing. They do not suggest, however, that this is currently so. The petitioner has not demonstrated, with those articles or with any other evidence, that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Contrary to establishing that [REDACTED] - the entity whose performance requirements are determinative under the previously discussed *Defensor* analysis - has an established history of recruiting and hiring only persons with a BSN or higher degree for the proffered position, the [REDACTED] letter and vacancy

announcement conclusively establish that the proffered position has been routinely filled by RNs with ADN's, as well as by BSN holders. This fact precludes the approval of this petition not only under the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), but also under any other criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. In addition to the absence of credible evidence establishing such dimensions in the proffered position, [REDACTED] letter affirmatively establishes that such complexity, uniqueness, or specialization do not characterize the proffered position. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For the reasons discussed above, the AAO finds that the director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO's review of the entire record of proceeding indicates an additional basis for denying the petition, namely, that the petitioner failed to establish that it is qualified to file an H-1B petition, that is, as either (a) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

In his June 3, 2009 letter counsel stated,

While the work performed by its nurses takes place at its client sites, the petitioner is the nurses' employer. It pays the nurses' wages and provides the nurse with full employee benefits including medical insurance, liability insurance, and workers compensation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a “United States employer” as authorized to file an H-1B petition. “United States employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Although counsel asserted that the petitioner would be the beneficiary’s employer, the nature of the arrangement counsel described suggests that the petitioner would not be controlling or supervising her work. The AAO finds that the petitioner would not, in fact, be the beneficiary’s employer pursuant to the scenario counsel described. The AAO further finds that the petitioner does not appear, and does not claim, to be filing as an agent pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director’s decision shall not be disturbed. As this adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO will not further dwell on the additional finding that the petitioner has failed to establish its standing to file this petition as either a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or as a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

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. The appeal will be dismissed and the petition denied.

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