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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

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

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

JUL 06 2011

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 recommended denial of the nonimmigrant visa petition and certified the matter for review to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The petition will be denied.

The petitioner is a nonprofit hospital that seeks to employ the beneficiary as a critical care nurse, BSN. The record of proceeding establishes that the petitioner filed this visa petition in order to obtain H-1B classification for the beneficiary 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 recommended denial of the petition, finding that the petitioner failed to establish that: (1) the beneficiary possessed the required licensure as required by the proffered position; (2) the petitioner would employ the beneficiary in a specialty occupation position; and (3) that the beneficiary was qualified to perform the services of a specialty occupation. The decision was certified to the AAO for review and, while the petitioner was afforded an opportunity to provide a brief directly to the AAO, none was submitted.

As will be discussed below, the AAO finds that the director did not err in denying the petition. The AAO bases its decision upon its review of the entire record of proceeding, 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 (RFE); (3) the response to the RFE; and (4) the director's decision recommending denial of the petition and certification to the AAO.

The AAO will first address the issue of whether the proffered position is a specialty occupation.

The AAO applies the following statutory and regulatory framework in its review of specialty occupation issues.

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 employ 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.

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 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 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 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.

In an October 26, 2010 letter appended to the petition, the petitioner described the occupation of Critical Care Nurse, BSN, as follows:

The principal duties of the Critical Care Nurse – BSN can be classified in the following categories: Specialized Clinical Practice Knowledge, Clinical Leadership, Performance Improvement and Professional Development.

- **Specialized Clinical Practice Knowledge:** Practices autonomously in accordance with Professional Nursing Standards and Nursing Department Policy & Procedures
 - a) Demonstrates ability to assess, interpret and report diagnostic data relevant to patient age and condition;
 - b) Incorporates analysis and interpretation of diagnostic application of standards and transformation of knowledge in daily practice;
 - c) Identifies and explores subtle or unstated patient concerns;
 - d) Intuitively “zeroes in” on the region of the problem, evaluates patient status and implements appropriate intervention;
 - e) Develops an individualized Plan of Care based on patient’s needs and values;
 - f) Provides patient/family education by selecting or creating educational tools that match learning objectives and styles;
 - g) Formulates strategies to decrease barriers to patient care;
 - h) Facilitates and manages patient outcomes;
 - i) Performs nursing history and evaluates age-appropriate behavior, motor skills, and physiological norms of the patient;
 - j) Completes the admission assessment, including pain screening and signs of abuse or neglect;
 - k) Performs treatment and administers medications according to policy and procedure;
 - l) Evaluates effectiveness of interventions and medications;
 - m) Follows Center for Disease Control Isolation Guidelines by demonstrating appropriate use of PPE and performing correct hand-washing;
 - n) Investigates and researches questionable situations;
 - o) Properly documents and reports all procedures and assessments;
 - p) Investigates potential safety issues;
 - q) Analyzes and problem-solves unusual or unexpected findings; and

- r) Incorporates research findings to improve patient care.
- **Clinical Leadership:** Serves in a clinical leadership role by assuming the responsibilities of Unit Assistant Nurse Manager or Charge Nurse or Team Leader.

Management of Staff

- a) Directs and manages staff (Associate Degree Registered Nurse, Advanced Licensed Practical Nurse, Nurse Technician, Patient Care Technician and specific ancillary personnel);
- b) Synthesizes patient data and determines staff patient assignment;
- c) Reviews nursing documentation and patient assessment performed by staff;
- d) Staff Performance Evaluations;
- e) Evaluates performance of staff (Associate Degree Registered Nurse, Advanced Licensed Practical Nurse, Nurse Technician, Patient Care Technician and specific ancillary personnel) daily;
- f) Completes 90-Day and Annual Employee Performance Evaluations in accordance with Human Resource Department Policies and Procedures;
- g) Develops individualized performance improvement plan (to include opportunities for improvement) for staff not meeting performance expectations;
- h) Staff Development;
- i) Provides coaching and mentoring to assist staff in attaining personal and professional goals;
- j) Mentors nurses during their participation in the Professional Practice Program;
- k) Guide staff to earn national certification in clinical specialty;
- l) Acts as advisor for staff in accessing non-routine information requests;
- m) Serves as a Resource Nurse by acting as a change agent in disseminating information;
- n) Partners with Unit Education Specialist in developing individualized Staff Education Growth Plan;
- o) Interpersonal Relations;
- p) Serves as a positive role model and actively supports hospital mission;
- q) Demonstrates effective relationships with other caregivers and uses techniques to promote team building;
- r) Collaborates and coordinates patient care activities among the interdisciplinary patient care team;
- s) Adapts personal communication style according to specific situations and people involved;

- t) Applies refined conflict resolution skills to arbitrate complicated unit (conflict management skills); and
- u) Negotiates with high levels of management and physicians to achieve patient outcomes.

Budget/Financial

- a) Manages cost-reduction strategies in daily practice by monitoring staff overtime and efficient use of hospital resources and supplies;
 - b) Researches current evidence-based practices that enhance management of unnecessary cost to the Unit; and
 - c) Meets patient and staff needs within designated annual budget.
- **Performance Improvement:** Responsible and accountable for participation in quality and performance activities with the goal to improve patient outcomes
 - a) Utilizes clinical performance improvement skills to solve unit-specific problems;
 - b) Critiques research articles to analyze a problem, collaborates with the Clinical Nurse Specialist to develop a plan to resolve the problem;
 - c) Analyzes risk management issues and suggests performance improvement projects to the Risk Management and Performance Improvement Department; and
 - d) Facilitates Performance Improvement Project at the unit or campus level.
 - **Professional Development**
 - a) Independently seeks learning opportunities and incorporates learning into practice;
 - b) Seeks opportunities to develop and improve leadership qualities in unit/hospital-focused projects;
 - c) Sets goals for personal/professional growth within the organization;
 - d) Attains national certification in area of specialty (CCRN, PCCRN, ONS, CEN) and/or pursues advanced education at the Masters level;
 - e) Member of Florida Hospital Practice Council; and
 - f) Member of Professional Organization (American Association for Critical Care Nurses, Emergency Nurses Association, etc)[.]

The petitioner also submitted copies of the beneficiary's foreign degree and transcripts, an educational evaluation, two expert opinion letters, and the beneficiary's CGFNS certification.

On February 23, 2011, the director issued an RFE requesting additional information pertaining to the beneficiary's responsibilities and duties in the proffered position, specifically requesting

evidence that would establish that the proffered position was a specialty occupation. The director noted that most general registered nurse positions did not qualify as specialty occupation positions, although certain advanced practiced registered nurse positions may qualify based on the advanced level of education and training required for such positions. As will be discussed in further detail in this decision, the director also requested additional evidence demonstrating that the beneficiary had met requirements for licensing in the State of Florida.

In a response dated April 5, 2011, counsel for the petitioner addressed the director's request. Counsel clarified that the proffered position was a nursing specialty position and not an advanced practice registered nurse position as suggested by the director in the RFE. Counsel further contended that the proffered position was so complex and unique that it could only be performed by an individual with a bachelor's degree, and contended that the four main areas of concentration of the duties of the position reflect this complexity. Specifically, counsel clarified that the breakdown of the four areas of duties represented above was as follows: Specialized Clinical Practice Knowledge (30%); Clinical Leadership 30%; Performance Improvement (20%); and Professional Development (20%).

Counsel restated the list of duties set forth in the letter of support dated October 26, 2010, and further contended that the proffered position of Critical Care Nurse – BSN differs from that of a registered nurse in that the petitioner provides incentive packages for nurses such as these who complete advanced studies beyond an associate's degree. Counsel contended that a nurse who completes a BSN program is eligible to receive \$18,600 whereas a nurse who completes only an ASN program can receive only \$750.00, and concludes that its tuition reimbursement program promotes its goals to recruit and employ nurses holding bachelor's degrees. Counsel submits a copy of the petitioner's tuition reimbursement application in support of this contention.¹

On May 17, 2011, the director recommended denial of the petition, finding that the proffered position is not a specialty occupation.

As will be discussed later in this decision, the 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 bachelor's degree, but does not specify that the bachelor's degree must be in a specific specialty.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. As indicated in the following excerpt from the "Training, Other Qualifications, and Advancement" section of the *Handbook's* "Registered Nurses"

¹ Counsel also refers to a letter from [REDACTED] of the [REDACTED] Florida Hospital, in support of the petitioner's mission to hire nurses with bachelor's degrees. Although this letter is referred to as part of Exhibit 12 of the response to the RFE, there is no evidence of this letter in the record.

chapter, a BSN is neither required for licensure as an RN nor normally required for the general range of RN jobs, regardless of their specialty.² 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.

² All of the AAO's references to the *Handbook* are to the "Registered Nurse" chapter of the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO>.

* * *

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.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-2011 ed., available at <http://www.bls.gov/oco/ocos083.htm> (last accessed June 28, 2011).

The petitioner refers to the proffered position as a critical care nurse who will work in any number of seventeen critical care units, including but not limited to the cardiac intensive care unit, the surgical progressive care unit, and the emergency department. Despite counsel's claim that the proffered position is thus a specialty occupation, the *Handbook* indicates that "RNs can specialize in one or more areas of patient care." *Id.* The *Handbook* indicates that a BSN or BSN equivalency is *not* normally a requirement for most nursing specialties in which RNs engage, including the following that the *Handbook's* chapter on registered nurses lists, along with the

emergency room or trauma specialty, as distinct nursing specialties: diabetes management; dermatology; geriatrics; 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. *See id.*

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).³ *Id.* In any event, the *Handbook's* information does not support the proposition that critical care nurse positions as an occupational category or the particular position proffered in this petition normally require at least a BSN. *See id.*

Moreover, the petitioner's October 26, 2010 letter of support conclusively establishes that a BSN or equivalent is *not* a prerequisite for employment at the petitioner's hospital. Specifically, the petitioner contends under the heading of "Position Requirements" that it "prefers" graduation from a four-year baccalaureate degree program and a minimum of one year of experience in an acute care hospital for entry into the proffered position. Although both the petitioner and counsel assert throughout the record that the petitioner is seeking to exclusively employ nurses with bachelor's degrees and offers a tuition reimbursement program to support this goal, it nevertheless demonstrates that a BSN is not a prerequisite for entry into the position of critical care nurse with the petitioner, but encouraged after employment is commenced via the tuition reimbursement program. Consequently, since the petitioner indicates that it does not require a BSN or BSN equivalency for entry into the proffered position, this decisively and conclusively establishes that the proffered position is *not* a specialty occupation. This fact in itself is sufficient basis for dismissing the appeal and denying the petition.

³ 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 matter, as the petition was not filed for such a position. Also, counsel clarified for the record in response to the RFE that the proffered position was not an APN position.

The AAO will next address the evidentiary impact of the Memorandum from [REDACTED]

[REDACTED] relied upon by the petitioner in support of the contention that the proffered position is a specialty occupation. 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 [REDACTED] Memo indicates to be a specialty occupation.⁴ 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 [REDACTED] 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.

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).

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.

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

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. In response to the RFE, counsel for the petitioner submitted an opinion letter from [REDACTED] dated May 26, 2009. In concluding that the proffered position is a

⁴ The four types of RN positions that the [REDACTED] 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. Moreover, counsel definitively stated in response to the RFE that the proffered position was not an APN position.

specialty occupation requiring a BSN [REDACTED] states:

Therefore, largely based on my 25 years of experience as a nurse and my ten years of teaching nursing students at all levels, it is my opinion that the industry standard for such organizations as the petitioner [sic] routinely employ and recruit only individuals with a bachelor's in science in nursing for the position of **Critical Care Nurse, BSN**. Additionally, if I was hiring for this position of **Critical Care Nurse, BSN**, there would be no question but to hire the nurse with the minimum education of a bachelor's degree.

The letter writer bases her opinion on the "detailed job description for the position of Critical Care Nurse, BSN," and a "detailed company description" of the petitioner. It therefore appears that [REDACTED] did not base her opinion on any objective evidence, but instead restates the proffered position description as provided by the petitioner. Although [REDACTED] includes the petitioner's educational requirements for the position in her letter, i.e., that a four-year baccalaureate degree is sufficient to be hired into the proffered position, [REDACTED] independently concludes, contrary to the petitioner's requirements, that a BSN is required for entry into the position of critical care nurse. There is no attempt by the petitioner or counsel to reconcile the general four-year degree requirement of the petitioner with [REDACTED] conclusion that a BSN is required for the proffered position. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner also submits an opinion letter from [REDACTED], [REDACTED] College dated May 14, 2009. [REDACTED] states that "the skills, knowledge and analytical thinking acquired through the acquisition of a Bachelor's degree or its equivalent, with a concentration in Nursing, or a related field is considered necessary by people in the industry seeking to hire a Critical Care Nurse, BSN in the field of Nursing, and thus the degree is considered an industry standard requirement for the position." [REDACTED] concludes that it is her opinion that the position of Critical Care Nurse, BSN is a specialty position that "requires the services of someone with a minimum of a bachelor's degree in nursing or a related field."

[REDACTED] fails to identify the sources upon which her conclusions are based. For example, stating that "people in the industry" require a BSN for entry into the position of Critical Care Nurse is insufficient in itself to establish a common degree requirement within the petitioner's industry. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

For the reasons discussed above, the petitioner has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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.” The evidence of record does not refute the Handbook’s information to the effect that a bachelor’s degree or its equivalent is not required in a specific specialty. As evident in the earlier discussion, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than registered nursing positions that can be performed by persons without a specialty degree or its equivalent. The job description and additional information provided in response to the RFE indicate that a primary part of the proffered position’s function is direct patient care, and the petitioner does not demonstrate that the supervisory functions rise to a level of complexity that requires a bachelor’s degree in a specific specialty.⁵

The petitioner has likewise not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which requires the petitioner to demonstrate that it normally requires a degree or its equivalent for the position. In response to the RFE, the petitioner submitted a chart under Exhibit 9 which demonstrates that it employs 296 nurses. Of this total, the chart indicates that 168 nurses have associates degrees, 123 nurses have bachelor’s degrees, and 6 nurses have master’s degrees. However, the petitioner does not provide copies of these degrees, so the petitioner’s chart cannot be verified. Nevertheless, since the chart is indicative of nurses in the petitioner’s critical care units, and at least 123 of these nurses employed in critical care units hold only an associate’s degree, it must be concluded that the petitioner does not routinely hire only nurses with a bachelor’s degree in a specific specialty for employment as a critical care nurse. As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor’s degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position’s 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. The AAO does not find that the proffered duties, as described by the petitioner in support of the petition and in response to the RFE, reflect a higher degree of knowledge and skill than would normally be required of registered nurses working in various critical care departments. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a registered nurse, a position which in general is not a specialty occupation. *See Defensor v. Meissner*, 201 F.3d at 387. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

⁵ It is noted that the supervisory duties as described by the petitioner are simply not credible when considering that the labor condition application (LCA) submitted in support of the petition was only certified for a Level I, entry level position. Supervisory duties denote at least a Level III or Level IV position and, as such, either (1) the proffered position is a general, low-level, entry position that could not possibly be deemed as being so complex or unique that it could only be performed by an individual with at least a bachelor’s or higher degree in nursing or (2) the LCA does not correspond to the petition.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the petition will be denied.

The director also found that the beneficiary is not qualified to perform the duties of the proffered position in that she (1) failed to possess the appropriate licensure required by the position, and (2) that the beneficiary's education failed to qualify her to perform the duties of the proffered position, and recommended denial of the petition on these additional bases. Generally, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. However, because the issue was addressed by the director, the AAO will review the record.

As a preliminary matter, the AAO will withdraw the director's finding that the beneficiary does not possess the educational qualifications to perform the duties of the proffered position. The petitioner submitted evidence demonstrating that the beneficiary holds a bachelor of science in nursing from ██████████ in Cebu City, the Philippines. Also submitted in support of her qualifications was an educational evaluation prepared by ██████████ of the ██████████, which concluded that the beneficiary possessed the U.S. equivalent of a bachelor of science in nursing. The director found that the beneficiary's education was insufficient to qualify her to perform the duties of a specialty occupation, since she did not possess the graduate-level education discussed in the ██████████ memorandum with regard to APN/nursing specialties. However, as discussed above, the proffered position is not an APN position as contemplated by the ██████████ memorandum. Regardless, since the director found, and the AAO concurs, that the proffered position is not a specialty occupation, the beneficiary's qualifications to perform the duties of such a position are no longer relevant. Consequently, the director's comments with regard to this issue are withdrawn.

The AAO, however, concurs with the director's findings that the beneficiary lacked the appropriate licensure required for the proffered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. *See also* 8 C.F.R. § 214.2(h)(4)(v)(A). Although this issue becomes moot as a result of the finding that the proffered position is not a specialty occupation, the AAO notes that, even if the proffered position had been deemed to be a specialty occupation, the beneficiary would not be qualified to perform the duties of such a position based on her lack of the appropriate licensure.

The Nurse Practice Act, found in section 464 of Florida Statutes at Title XXXII, Regulation of Professions and Occupations, states:

464.008 Licensure by examination.—

- (1) Any person desiring to be licensed as a registered nurse or licensed practical nurse shall apply to the department to take the licensure examination. The department shall examine each applicant who:
- (a) Has completed the application form and remitted a fee set by the board not to exceed \$150 and has remitted an examination fee set by the board not to exceed \$75 plus the actual per applicant cost to the department for purchase of the examination from the National Council of State Boards of Nursing or a similar national organization.
 - (b) Has provided sufficient information on or after October 1, 1989, which must be submitted by the department for a statewide criminal records correspondence check through the Department of Law Enforcement.
 - (c) Is in good mental and physical health, is a recipient of a high school diploma or the equivalent, and has completed the requirements for:
 - 1. Graduation from an approved program;
 - 2. Graduation from a prelicensure nursing education program that the board determines is equivalent to an approved program;
 - 3. Graduation on or after July 1, 2009, from an accredited program; or
 - 4. Graduation before July 1, 2009, from a prelicensure nursing education program whose graduates at that time were eligible for examination.
- Courses successfully completed in a professional nursing education program that are at least equivalent to a practical nursing education program may be used to satisfy the education requirements for licensure as a licensed practical nurse.
- (d) Has the ability to communicate in the English language, which may be determined by an examination given by the department.
- (2) Each applicant who passes the examination and provides proof of meeting the educational requirements specified in subsection (1)

shall, unless denied pursuant to s. 464.018, be entitled to licensure as a registered professional nurse or a licensed practical nurse, whichever is applicable.

- (3) Any applicant who fails the examination three consecutive times, regardless of the jurisdiction in which the examination is taken, shall be required to complete a board-approved remedial course before the applicant will be approved for reexamination. After taking the remedial course, the applicant may be approved to retake the examination up to three additional times before the applicant is required to retake remediation. The applicant shall apply for reexamination within 6 months after completion of remediation. The board shall by rule establish guidelines for remedial courses.

In the letter of support dated October 26, 2010, which accompanied the petition, the petitioner states that the beneficiary “will obtain her Nursing License from the State of Florida when she receives her social security number.” The petitioner also submitted a letter dated September 27, 2010 from the Florida Department of Health, which indicated that a United States social security number was necessary for licensure in the State of Florida. However, the letter also indicated that, while a license may not be issued until a social security number was obtained by the applicant, the NCLEX examination could be taken prior to the issuance of the social security number.

Consequently, in the RFE dated February 23, 2011, the director requested evidence demonstrating that the beneficiary, at the time of filing, had completed all necessary requirements for obtaining a license prior to the petition’s filing on November 10, 2010. The director noted that the beneficiary’s lack of a social security number prohibited the issuance of a license; however, the director required documentation to demonstrate that the lack of a social security number was the only bar to the beneficiary’s obtaining a license in the State of Florida.

In a response dated April 5, 2011, counsel for the petitioner addressed the director’s request. Counsel resubmitted the September 27, 2010 letter from the Florida Board of Health, noting that this letter demonstrated that the beneficiary had in fact applied for a state license. Counsel concluded that, since the only obstacle in obtaining a license was the beneficiary’s lack of a social security number, the beneficiary had satisfied all requirements and thus should be granted approval for one year under 8 C.F.R. § 214.2(h)(4)(v)(E).⁶

⁶ Title 8 C.F.R. § 214.2(h)(4)(v)(E) provides as follows:

Where licensure is required in any occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires licensure may not be granted an

The AAO disagrees.

Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien seeking H classification in that occupation must have that license prior to the approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation. Current policy guidance indicates that licensure would not preclude the granting of a petition if the only bar to licensure is the fact that a beneficiary cannot obtain a social security card because the beneficiary is not yet present in the United States. See Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Office of Adjudications, *Social Security cards and the Adjudication of H-1B Petitions*, HQISD 70/6.2.8-P (November 20, 2001). This memorandum, at page 2 states the following:

An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period 1-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the SSA [emphasis in original]. Petitions filed for these aliens must contain evidence from the state licensing board clearly stating that the only obstacle to the issuance of state licensure is the lack of a social security card.

The petitioner has not established that the *only* obstacle to the beneficiary obtaining licensure is the fact that she cannot obtain a social security card. The letter from the Florida Department of Health does not indicate that the beneficiary's lack of a social security card is the *sole* obstacle to the beneficiary obtaining licensure. The September 27, 2010 letter indicates that, while a license will not be issued until a social security card is presented, the beneficiary is still permitted to take the NCLEX examination in the interim. Since the record contains no evidence to demonstrate that the beneficiary has taken and passed the NCLEX examination, it is evident that the beneficiary has not fulfilled this critical requirement.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Since the beneficiary must also pass the NCLEX examination in order to be eligible to obtain the required license, the beneficiary had not met all applicable requirements at the time of the filing of this petition.

extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

Accordingly, the director properly recommended denial on this additional ground. The petitioner has not established that the beneficiary meets the licensure requirements as set forth at 8 C.F.R. § 214.2(h)(4)(v).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The director's decision is affirmed. The petition is denied.