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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

[Redacted]

DATE: **JUL 07 2011** Office: CALIFORNIA SERVICE CENTER FILE: [Redacted]

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:

[Redacted]

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
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 care provider that seeks to employ the beneficiary as what it describes as its director of quality/utilization review. Therefore, the petitioner endeavors to classify the classification of 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 denied the petition, finding that the proffered position was not a specialty occupation. On appeal, counsel for the petitioner argues that the denial was arbitrary, capricious, and an abuse of discretion, and contends that the proffered position is in fact a specialty occupation. In support of these contentions, counsel submits a brief and additional evidence.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's responses to the RFE; (4) the notice of decision denying the petition; and (5) Form I-290B and supporting materials 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 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 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, 8 U.S.C. § 1184(i)(1), 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. *Cf. 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 as the minimum for entry into the occupation, as required by the Act.

According to its letter of support dated [REDACTED] 2009, the petitioner is a full-service home health agency that provides skilled nursing, physical therapy, occupational therapy, speech therapy, and home health aide services in client homes. The letter further stated that the petitioner wished to employ the beneficiary as its Director of Quality/Utilization Review, and stated that her duties would be as follows:

- Conducts documentation review for completeness, appropriateness of documentation, proper utilization of services provided, and evidence of reimbursable services and communicates deficiencies to Administrator, Supervisor and/or Director of Patient Care Services.
- Provides education regarding quality management.
- Establishes and convenes the [REDACTED] Committee quarterly to evaluate the appropriateness and completeness of cares as reflected in the patient record.
- Reports quality management data to the management team.
- In conjunction with and in support of the management team, develops, monitors and documents quality management activities that reflect the agency's philosophy, standards of care and service, and ensures that desired outcomes can be achieved.
- Assists management in identifying strengths and weaknesses of field staff, in order to improve agency performance.
- Conducts follow-up activities.

The petitioner further stated that the position required "specialized extensive knowledge of health care and nursing standards and principles," and thus required the incumbent to hold at least a bachelor's degree in nursing or its equivalent. The petitioner indicated that the beneficiary possessed such a degree from the [REDACTED] in the Philippines.

The director found the initial evidence insufficient to establish eligibility, and thus issued an RFE on August 17, 2009. The director requested a more detailed description of the duties of the proffered position, as well as evidence demonstrating that the position met the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner also requested additional information pertaining to the petitioner's business.

In a response dated [REDACTED], 2009, the petitioner, through counsel, addressed the director's queries. The following updated overview of the duties of the proffered position was provided:

The duties of the position are three-fold: 1) ensure the quality of health care services being provided, 2) ensure that the health care services being provided are adequate, 3) ensure that the health care services are covered. These are highly complex tasks, as they entail not only having knowledge of nursing principles, but also knowledge of the appropriate standards of care and of the intricacies of medical insurance coverage.

The position is effectively required by state law, as it requires that health care providers have internal quality of care review systems, a quality assurance program, as well as personnel competent to handle inquiries regarding care and plan contracts, among other standards required by law.

Among the duties of the position are the review of medical records, as required by law, to ensure that the entries establish the diagnosis stated, including appropriate history and physical findings, and that the therapies noted reflect an awareness of current therapies.

Quality health care entails observance of six principles:

1) Safety. In *To Err is Human: Building a Safer Health System*, the Institute of Medicine of the National Academies found that 44,000 to 98,000 hospitalized patients die each year from medical errors, and another million are injured. It is the job of the Director of Quality/Utilization Review to ensure that the petitioner[s] delivery of care is as safe as possible and to train personnel, as necessary, to ensure this safety.

2) Timeliness. It is axiomatic that quality health care can only occur when it is timely. It is the job of the Director of Quality/Utilization Review to ensure that the delivery of care is timely, and to ascertain the causes of untimely care, when the care was not delivered in a timely manner. It is only [by] ascertaining the causes of untimely care, that the Director of Quality/Utilization Review can ensure that the delivery of care will be timely in the future.

3) Effectiveness. The Institute of Medicine defines effectiveness as providing services based on scientific knowledge and refraining from

services not likely to benefit. Effectiveness requires knowledge of both the standards of care and the therapies available for treatment. It is the responsibility of the Director of Quality/Utilization Review to ensure that the standards of care are adhered to, and to provide the education required to ensure this adherence.

4) Patient Centered. This means that the care provided must be respectful and responsive to the patients needs. Again, it is the responsibility of the Director of Quality/Utilization Review to provide the education necessary to ensure that the care delivered is patient centered, and to review the care provided to ensure that it was patient centered.

5) Efficiency. Quality health care is health care that avoids unnecessary costs, overuse of medications, preventable hospitalizations, etc. In the context of the petitioner, efficiency is more a matter of ensuring that the care is optimized to ensure that the patient can learn to function as independently as possible. This entails ensuring that patients are given appropriate instructions, etc.

6) Equity. Quality healthcare must be given equally to patients regardless of race, ethnicity, English proficiency, type of insurance, or socioeconomic status.

At the outset, it should be noted that the AAO accords no evidentiary weight to counsel's assertion that the position "is effectively required by state law," as counsel submits no statutory or regulatory support for this proposition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO observes that the duties of the proffered position as described in the petitioner's 2009 letter of support and as further described in the petitioner's response to the RFE are generalized statements of generic functions. As such, the AAO finds, they fail to delineate the specific tasks in which they would be expressed in the day to day performance of the beneficiary's work; and, equally as important, the duties as described also fail to establish a particular level of educational attainment of a body of highly specialized knowledge, in nursing, healthcare, or healthcare quality/utilization, or any other specific specialty for that matter, that would have to be theoretically and practically applied to perform the proffered position. Thus, the duty descriptions failed to establish the basic elements of a specialty occupation as specified by section 214(i)(1) of the Act. Put another way, the petitioner's descriptions of the proffered position and its constituent duties fail to establish why the knowledge required for the proffered position exceeds that obtained by a registered nurse, fully licensed to practice as such, with less than a bachelor's degree, or the equivalent, in nursing. The need for at least a bachelor's degree in nursing is not evident in any of

the duties as described in the record of proceeding (such as, for example, “[c]onduct[ing] documentation review for completeness, appropriateness of documentation, proper utilization of services provided, and evidence of reimbursable services and communicates deficiencies,” “[e]stablish[ing] and conven[ing] the [redacted] Committee quarterly to evaluate the appropriateness and completeness of cares as reflected in the patient record,” and “[r]eport[ing] quality management data to the management team.”) Likewise, the record of proceeding does not document a requirement for a particular level of education in a specific specialty in order to promote the six principles that counsel attributes, also without documentation, to the proffered position. The AAO finds that cardinal evidentiary deficiency is in itself requires the AAO to dismiss the appeal and deny the petition, and accordingly does so. However, the AAO will continue its analysis in order to specifically address the failure of the evidence of record to satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

While it is noted that counsel refers to an expert opinion evaluation by [redacted] in its [redacted] 2009 letter, a review of the record indicates that no such evaluation was submitted into the record prior to the director’s decision.

It should also be noted that, in response to the RFE, counsel referenced an expert opinion evaluation by [redacted] dated [redacted] 2009. However, a review of the package submitted in response to the RFE showed that the referenced document was omitted, and a review of the documents submitted with the initial petition yielded the same result. The AAO notes that, as this evaluation is submitted for the first time on appeal, it was not before the director when she issued her decision. However, the AAO will consider this evaluation as part of its *de novo* review. (In this regard, it should be noted that the AAO would disregard this document if it was within the scope of the evidence requested in the RFE, as it was not submitted until the appeal. See the rules governing the RFE process, at 8 C.F.R. § 103.2(b). See also *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) and *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988) (If a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal.))

For the reasons that will now be discussed – which, it should be emphasized, render the document of no evidentiary value to the application of any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) - the evaluation that Professor Mick provided the petitioner is not probative evidence that the proffered position is a specialty occupation.

The document in question is a September 3, 2009 “Expert Opinion Evaluation” provided for the petitioner by [redacted] of [redacted] Rochester, New York (hereinafter referred to as the associate professor’s evaluation). The AAO will now explain why the AAO finds no probative value in the associate professor’s evaluation, which concludes that “the position of “Director of Quality/Utilization Review is clearly a specialty [sic] position, and requires the services of someone with the minimum of a Bachelor’s degree in Nursing or a related field,” and which ends with the disclaimer that the evaluation “is strictly my opinion and is not the opinion of any of the universities with which I am affiliated or any of its departments of affiliates.”

Early in the document, the associate professor's evaluation states:

Companies seeking to employ a "Director of Quality/Utilization Review" require prospective candidates to possess a Bachelor's degree in the area of Nursing, or a related field, from an accredited institution of higher learning. 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 Director of Quality/Utilization Review in the field of Nursing, and thus the degree is considered an industry standard requirement for the position. . . .

The AAO accords no weight to this pronouncement. First, the evaluator provides no factual basis for it. The statement is provided without any documentary support, such as studies, treatises, surveys, or authoritative submissions from the industry. As such, the accuracy and reliability of the pronouncement has not been established and, so, deserves no deference. Second, the language itself, which only pronounces what unquantified "companies" and unquantified "people in the industry" consider necessary does not state an industry-wide practice. At most, the language is ambivalent and equivocal. Further, the evaluator provides no documentation in support.

Next, the AAO notes that the evaluation lists and bases its statements primarily upon the seven bullet-phrases, quoted earlier in this decision, which the petitioner used to describe the proffered position in its May 15, 2009 letter of support that it filed with the Form I-129. As already indicated in this decision's discussion of those duty descriptions, the AAO finds that they are too generalized to convey specific work that would entail and any particular educational level of nursing or nursing-related knowledge that would have to be applied in order to perform that work. Upon review of the associate professor's evaluation, the AAO finds that this document does not remedy this deficiency, but merely relates, in conclusory fashion and without explanation of how the conclusions was reached, that

The skills required to conduct [the activities listed in the seven bullet-phrases] are often taught in courses of Nursing, including Health Assessment, Nursing Research, Management and Leadership, Community Health Nursing, Contexts of Health Care, Adult and Home Nursing, and other related areas.

Without addressing whether such skills could also be obtained in courses leading to an associates degree in nursing or other closely related specialties, and without addressing how she derived the specific educational requirements from the generalized statements in the bullet-phrases, and without any indication of having visited the petitioner's facilities or discussing with the petitioner the particular requirements and specific duties of the actual work to be performed, the evaluator next pronounces, "This level of skill in the area of nursing requires at least a college-level degree of academic training, including knowledge that is acquired in classes offered at Bachelor's-level Nursing programs."

The evaluation document does not demonstrate familiarity with the particular position proffered in the petition or what the performance of that position's generally stated duties would actually entail in the context of the petitioner's day-to-day operations. Further, the associate professor provides no substantive analysis of why particular performance requirements of the proffered position, as it would actually be performed for the petitioner, would require the degree that she specifies. Consequently, the AAO finds that the associate professor's evaluation is cursory and superficial and that its findings, conclusions, and ultimate opinion are conclusory and lack factual and analytical foundations sufficient to accord them any deference or reliance.

For reasons stated above, the AAO accords no weight to the associate professor's evaluation for any purpose on appeal. 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, CIS 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 submitted copies of job postings in support of the contention that the degree requirement was standard in parallel positions among similar organizations in the industry, as well as tax documents and an organizational chart demonstrating the employment hierarchy of the petitioner's company. (As will be discussed later in this decision's analysis of the job postings under the first alternative prong of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the job postings are not probative evidence that the degree requirement specified by the petitioner is standard in the petitioner's industry for positions parallel to the one proffered in this petition.)

On October 7, 2009, the director denied the petition. Specifically, the director found that, based on a review of the stated duties of the position, the proffered position actually comprised the duties of two occupational categories: (1) a registered nurse and (2) a medical records and health information technician. Noting that neither profession was considered a specialty occupation, the director found that the petitioner has failed to satisfy the regulatory requirements. On appeal, counsel asserts that, in contrast to the director's findings, the proffered position is a specialty occupation based on the complex nature of the stated duties.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The petitioner has stated that the proffered position is that of director of quality/utilization review. The AAO notes that the *Handbook* has no listing of a position with this exact title, and notes that the director therefore reviewed the descriptions of related occupations in

¹ The AAO consulted the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

order to find one closest to the stated duties. The director found that the position appeared akin to both the position of a registered nurse as well as the position of a medical records and health information technician. Counsel, however, contends that, contrary to the director's findings, the proffered position is more complex than those occupations. It is noted, however, that counsel makes no reference to a particular occupational category discussed in the *Handbook* with regard to the proffered position.

While the director found that the proffered position includes tasks of both a registered nurse and a medical records and health information technician, the AAO disagrees in part with this finding. The petitioner's organizational chart provided in response to the RFE indicates that the beneficiary would be directly supervised by the Chief Operating Officer/Administrator, and indicates that she would oversee "QA/QI Reviewers." The AAO notes that four other departments exist within the petitioner's organizational structure. A Human Resources Coordinator oversees employees along with their orientation and education. A Chief Financial Officer oversees a finance department, comprised of an account, a biller, and a clerk. A nursing department is overseen by a Director of Patient Care/Director of Nursing, who supervises a clinical supervisor/case manager, who in turn supervises nurses, physical and occupational therapists, and additional related positions. Finally, an Office Manager directs the administrative functions of the petitioner by overseeing medical records, mail clerks, a receptionist, and other coordinators. Therefore, since there are other departments within the petitioner's company that perform administrative functions, the AAO finds that the proffered position does not encompass tasks of a medical records and health information technician as found by the director.

Rather, the AAO concurs with the director's finding that the proffered position is akin to that of a registered nurse, and finds that the duties to be performed by the beneficiary involve areas of quality assurance within the petitioner's business environment. A closer review of the petitioner's structure and the stated duties of the position indicate that these duties are essentially those performed by nurses (or other healthcare personnel) who have moved into the business side of healthcare. The *Handbook*, 2010-2011 edition, notes the following:

Some nurses move into the business side of healthcare. Their nursing expertise and experience on a healthcare team equip them to manage ambulatory, acute, home-based, and chronic care businesses. Employers-including hospitals, insurance companies, pharmaceutical manufacturers, and managed care organizations, among others-need RNs for health planning and development, marketing, consulting, policy development, and *quality assurance*. Other nurses work as college and university faculty or conduct research.

(Emphasis added.)

As the petitioner states that the proffered position entails responsibility for quality assurance of the petitioner's home healthcare services business, the AAO finds that the proffered position fits under the *Handbook's* section on Registered Nurses.

A review of the *Handbook's* section on Registered Nurses finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse. The *Handbook* does state, however, that:

[I]ndividuals 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. . . .

Even this section, which indicates that a bachelor's degree in nursing is "often necessary" for nursing administrative positions, neither states nor implies that the particular position proffered in this petition requires at least a bachelor's degree, or the equivalent, in nursing or a related specialty.

Review of the *Handbook*, therefore, finds no requirement of a bachelor's or higher degree in a specific specialty for employment in the proffered position. Experience and good performance can lead to promotion for a registered nurse to more responsible positions, such as assistant head nurse or head nurse/nurse supervisor. Likewise, good performance and experience can equip a nurse to perform the duties of a patient care coordinator or quality assurance coordinator/staff developer in the healthcare field. There is no requirement, however, that a nurse, or any other healthcare professional performing the duties of a quality assurance coordinator/staff developer, have a baccalaureate or higher degree or its equivalent in a specific specialty as a minimum requirement for entry into that position. Thus, the petitioner has not established the first criterion of 8 C.F.R. §214.2(h)(4)(iii)(A).

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 assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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 an attempt to establish its degree requirement as an industry norm, the petitioner has submitted sixteen advertisements from other companies which it claims are analogous to that of the proffered

position in this matter. The position titles include Director of Quality Assurance; Director of Quality Management (2); Director of Utilization Management (2); Utilization Review Coordinator (2); Utilization Review – RN; Utilization Manager (2); Director of Utilization Review (2); Director of Quality (2); Utilization Management Manager; and RN – Case Management. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry as none of the companies placing the ads are sufficiently similar to the petitioner. One of the companies, IASIS, is a large health system of 17 acute hospitals and one behavioral hospital with approximately 12,000 employees. Likewise, ██████████ Healthcare, based in Michigan, is a managed health care company with 50 urgent care sites, 50 hospitals, and over 275 employees. ██████████ Medical Services is a healthcare services provider for jails and prisons with over 6,000 physicians, nurses, and support staff. Several of the postings are posted by nurse recruitment firms for positions therein or for undisclosed employers, while an additional four postings are for psychiatric or behavioral hospitals or facilities. The remaining postings are for hospitals throughout the country, which, like the behavioral facilities, fail to provide details regarding their size and scope. Despite submitting sixteen postings, the petitioner has not submitted postings for home health care providers with a staff of approximately 25 persons. Further, even if the petitioner had submitted such postings, their evidentiary weight would be minimal absent independent documentation in the record of proceeding establishing that the sampling of advertisements reflects a common recruiting and hiring practice in the petitioner's industry, and that such a practice was generated by the actual performance requirements of the position. Therefore, the job postings are not probative for the purposes of these proceedings, and they do not establish that the degree specified by the petitioner is a common in the petitioner's industry in parallel positions among similar organizations, as required to satisfy the first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record of proceeding does not contain submissions from individuals or firms in the petitioner's industry attesting that the degree specified by the petitioner is a routine recruiting and hiring requirement for parallel positions among firms similar to the petitioner. Likewise, there are no submissions from a pertinent professional association. For the reasons already discussed, the associate professor's evaluation merits no weight. In this regard, for the purposes of this criterion it bears repeating (1) that evaluator's remarks about "companies seeking to employ a Director of Quality/Utilization Review" and "people in the industry seeking to hire a Director of Quality/Utilization Review in the field of nursing" does not state a common practice in the industry, for the evaluator – whether purposely or not – does not quantify either the "companies" or the "people," and (2) that the evaluator neither cites to nor provides any reports, studies, reviews, abstracts, or authoritative documentary evidence of any kind to support her findings and conclusions.

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

Next, the AAO also finds that 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 is not required in a specific specialty. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, 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 at least a bachelor's degree, or the equivalent, in nursing. Although counsel continually asserts that the proffered position is much more complex than that of a registered nurse, no documentation or independent evidence is submitted to support this finding. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

It is noted that, on appeal, counsel relies on *Young China Daily v Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), asserting that the director erroneously focused on the size of the petitioner in reaching the decision. Counsel argues that the director erroneously discounted the job postings discussed above, and unfairly determined that the duties of the proffered position lacked the necessary complexity based on the size of the petitioner's entity.

The AAO notes that the size of a petitioner is not a factor typically considered by USCIS. Rather, USCIS analyzes whether a job is a specialty occupation by looking at the duties of the position and the industry of the petitioner's operations. In this matter, the petitioner seeks to establish eligibility by equating the petitioner's business, a home health care services company with approximately 25 employees, with large healthcare systems, hospitals, and other healthcare facilities larger in scope or vastly different in nature to that of the petitioner. As discussed above, absent any independent documentary evidence to support a finding that the duties to be performed by the beneficiary in relation to the petitioner's claimed operations are sufficiently complex to require the services of a degreed individual, or that a degree requirement is common to the industry, the petitioner's reliance on *Young China Daily* is not persuasive. Regardless, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. 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.

The petitioner likewise has provided no evidence to demonstrate that it previously hired degreed individuals for the position of Director of Quality/Utilization Review. 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. 5 214.2(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 finds that the proffered duties, as described by the petitioner in support of the petition and in response to the RFE,

do not reflect a higher degree of knowledge and skill than would normally be required of registered nurses, with less than a bachelor's degree, working in the business side of healthcare. Also, as there indicated, the AAO here incorporates and adopts by reference its earlier comments and finding about the inadequacy of the evidence regarding the actual work that the petitioner would perform. In the particular context of this criterion, that evidentiary deficiency translates into a failure to develop relative specialization and complexity of the proposed duties as attributes requiring knowledge associated with any particular level of academic attainment beyond that minimum required for a registered nurse (which is less than a bachelor's degree.)

The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.