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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 01 2011

IN RE: Petitioner:
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 provides health care staffing. 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), so that the petitioner may assign him to a client hospital in a position that the petitioner designates as Critical Care Nurse - ER.

The petitioner never provided the name of the specific hospital where the beneficiary would be assigned, but states that the beneficiary will work at a U.S. Veteran's Administration (VA) facility pursuant to a federal contract with the petitioner. In the Form I-129, the petitioner indicates that the beneficiary will work at an address in Colchester, VT.

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.

As will be discussed below, the AAO finds that the director did not err in denying the petition for its failure to establish a specialty occupation. 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, (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.

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 be employing the beneficiary in a specialty occupation position.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 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 a March 27, 2009 letter appended to the petition, the petitioner described the occupation of Critical Care nurse as follows:

> The Beneficiary will be employed by [the petitioner] as a Critical Care Nurse in the Emergency Room (ER) at [a] U.S. Veteran's Administration (VA) facility in a full-time position. As a Critical Care Nurse in the Emergency Room (ER Nurse) of a Veterans Administration facility employed by [the petitioner], the Beneficiary will be responsible for professional nursing care to patients in the Emergency Room including assessment, analysis, nursing diagnosis, outcome identification, planning, and implementation of interventions. The Beneficiary will triage each patient to determine the priority of care based upon physical psychological and social needs. More specifically, the Emergency Room Nurse will be responsible for cardiovascular, neurological, pulmonary, orthopedic, gastrointestinal, renal and metabolic assessment and treatment. The Emergency Room Nurse will provide wound management and surgical care as well as care for trauma and shock patients.
>
> In light of the complexity of the duties and the facility's requirements (the Veterans Administration), the Emergency Room (ER) Nurse must have the specialized knowledge skills and experience associated with a Bachelor's degree or the equivalent to effectively perform in this potion. **It is important to note that the Petitioner does not require a Bachelor's degree for all Registered Nurse positions and the Petitioner appreciates that not all Registered Nurse positions are eligible for H-1B status. The Petitioner has filed a number of Immigrant Petitions for Alien Worker (Form I-140) on behalf of Registered Nurse candidates offered employment with other facilities who are not eligible for H-1B status.** However, the Critical Care Emergency Room (ER) Nurse for staffing of VA facilities is a specialty occupation requiring a higher degree of skill, education and training and, therefore, the Petitioner believes the position qualifies for H-1B status as a specialty occupation.

The petitioner submitted copies of the beneficiary's foreign degree and transcripts together with his license to practice as a Registered Nurse (RN) in Vermont, his CGFNS certification, and evidence that he passed the NCLEX exam. His degree has been found equivalent to a U.S. Bachelor of Science degree in Nursing.

On May 11, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, including information about other people the petitioner employs.

On July 24, 2009 the director denied 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.

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, a VA facility) 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, 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.*

As will be evident in this decision's discussion of the evidence in this proceeding, the documentation from the VA establishes that the petitioner's assertion of a bachelor's degree or the equivalent requirement is not supported by the evidence in the record of proceeding.

The AAO will now address the evidentiary impact of key documents upon which the petitioner relies as establishing that the proffered position is a specialty occupation. These are (1) the Department of Veteran's Affairs Federal Supply Service contract, which includes minimum qualifications of professionals (the contract); (2) the 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 (Nov. 27, 2002) (hereinafter referred to as the Williams Memo); and (3) documentation from the website of the American Association of Critical Care Nurses.

As the following comments will demonstrate, the listed 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 bachelor's degree level of highly specialized knowledge.

As 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, the petitioner's submission of its chapter on registered nurses is relevant and worthy of discussion.[1]

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 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—

[1] 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.*

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.

Although the petitioner refers to the proffered position as a critical care nurse who will work in the emergency room at a VA facility, the *Handbook* differentiates between critical care nurses, who "provide care to patients with serious, complex, and acute illnesses or injuries that require very close monitoring and extensive medication protocols and therapies" and emergency or trauma nurses, who work in emergency rooms providing initial assessments to patients and caring for patients with life-threatening conditions. The *Handbook* indicates that the proffered position would fall within the population of RNs serving as emergency or trauma nurses. Nevertheless, the *Handbook* indicates that a BSN or BSN equivalency is *not* normally a requirement for serving as an emergency or trauma nurse or most other 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; cardiovasucular; 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 the

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[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

proposition that emergency room or trauma nurse positions as an occupational category or the particular position proffered in this petition normally require at least a BSN.

The petitioner's contract with the VA – which oversees the client hospital to which the beneficiary would be assigned and which would presumably directly supervise the beneficiary and determine his specific duties since the petitioner did not provide evidence to the contrary - conclusively establishes that a BSN or equivalent is *not* a prerequisite for employment. According to the contract, a Registered Nurse – Emergency Room requires only an RN associate's degree or diploma. A BSN is listed only as being "preferred." As this document establishes that the VA does not require a BSN or BSN equivalency for the proffered position, the contract 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.

Moreover, in a letter dated June 24, 2009, the petitioner states as follows regarding its contract with the VA:

> [The petitioner] was awarded a staffing contract with the U.S. Veterans Administration to staff Registered Nurses in VA medical facilities throughout the United States. Pursuant to this supply contract, the nurses will be employees of [the petitioner] but will perform services at VA medical facilities. In addition to general registered nurse positions, the staffing contract also includes critical care positions within the ER and ICU units (Specialty – Emergency Room, Specialty – Intensive Care), and identified the normal preferred minimum requirements for those position[s] as a BSN. <u>With the extensive number of VA medical facilities, it would be virtually impossible to have a BSN as an absolute requirement in light of the current dire nursing shortage in the United States. However, the VA contract clearly states that the BSN is a preferred normal requirement for the nursing specialties of ER and ICU and therefore our organization has committed to fulfilling these positions with qualified candidates to ensure the appropriate standard of care for our nation's veterans.</u>

Therefore, the petitioner confirms that the VA only prefers a BSN, rather than listing it as a requirement for the proffered position.

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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.

On appeal, counsel argues that anything other than a mandatory requirement can only be a preference and, therefore, as 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) states only that an employer normally requires a bachelor's degree or the equivalent in a specific specialty, this means that the VA's statement that it prefers a BSN is the same as saying that it normally requires a BSN. The AAO does not agree with counsel's argument that the word "preference" is encompassed within the meaning of "normally requires." According to *Webster's New College Dictionary* 764 (3rd ed. 2008), normal means "[c]onforming, adhering to, or constituting a typical or usual standard, pattern, level, or type." Here, the petitioner has failed to demonstrate by corroborating evidence such a standard, pattern, level, or type. To the contrary, the written contract with the VA states that not only is a BSN only a preference, but also that RN associate degrees and diplomas are acceptable for the proffered position, which clearly establishes that the VA does not normally require at least a bachelor's degree or the equivalent in a specific specialty for the proffered position.

Further, on appeal counsel has submitted a report from the Department of Veterans' Affairs Veterans' Health Administration dated November 2001 and titled "A Call to Action – VA's Response to the National Nursing Shortage". On page four, the report states:

> In this evolving healthcare environment, nurses must possess clinical decision-making and critical thinking skills, and must have professional preparation in community health, patient education, and nursing management/leadership. Professional nurses use a breadth and depth of knowledge to care for veteran patients in multiple health care settings from the rapid patient assessments and complex care provided during critical stages of an acute illness through the compassionate attention to detail that enhances quality of life for veterans who are making the transition into a long-term care environment. Technological advances in health care treatment and equipment, evolving health care trends, modifications in delivery settings, and consumer expectations will require nurses to constantly adapt to change. Based on this intense and complex care environment, the National Advisory Council on Nursing Education and Practice (1996) has recommended that by the year 2010 two-thirds of all practicing nurses must possess a baccalaureate degree if optimal care is to be provided. Through the adoption of VA's Nurse Qualification Standards and with continued commitment to funding academic education for nurses, VA will be well positioned to attain this mix and provide optimal care to veterans.

However, this report is only advisory – no evidence was submitted that two thirds of the VA's nurses are currently required to have at least a bachelor's degree in a specific specialty as a matter of policy. Indeed, it appears that the VA did not follow the recommendations in the report as the contract submitted under which the beneficiary would allegedly work states that BSN degrees are preferred by the VA for emergency room RNs, but not required. Additionally, it is not clear whether the recommendation for two thirds of the VA's nurses to have bachelor's degrees also applies to nurses obtained through contractors or staffing agencies rather than direct hires. Even if the petitioner could demonstrate, which it did not do, that the VA requires two thirds of nurses working at its facilities to hold a bachelor's degree or the equivalent in a specific specialty, without differentiating these nursing positions from the remaining one third of nurses

who are not required to hold at least a bachelor's degree or the equivalent in a specific specialty, such a demonstration does not show that the VA *normally* requires its nurses in particular positions, such as the one proffered here, to hold at least a bachelor's degree or the equivalent in a specific specialty. Therefore, the report does not demonstrate that the proffered position is a specialty occupation.

The AAO does not disagree that there is a professional nursing shortage. The U.S. Department of Labor's own regulations recognize this shortage by virtue of its inclusion of professional nurses under Group I of Schedule A, which is essentially a blanket certification that an alien filling such a position will not adversely affect the U.S. labor force. *See* 20 C.F.R. § 656.15(c)(2). In other words, the labor shortage of professional nurses is recognized, and the law currently provides a means by which an employer may directly petition an alien to permanently fill a professional nursing position without the need to first demonstrate to the U.S. Department of Labor that no U.S. workers are able and/or willing to fill this position. *See id.* However, such a determination is irrelevant to the instant temporary H-1B nonimmigrant petition. First, the law does not require that a labor shortage be shown in order to establish eligibility for an H-1B visa. Second, the law does not provide for an exception, such as a labor shortage, to the statutory definition of specialty occupation that requires in part that "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) [is] a minimum for entry into the occupation in the United States." § 214(i)(1)(B) of the Act.

Even if the petitioner could demonstrate, which it did not do, that the nursing shortage is a definitive factor in the VA's decision to list the BSN only as a preference, not a minimum requirement, the VA's willingness to accept people who do not have BSNs to fill the proffered position means that the position is not a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), regardless of the current market conditions. Again, there is no exception carved out in either the Act or its implementing regulations for employers downgrading their minimum requirements in order to hire people in hard to fill positions.

Next, 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 indicates 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.

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,

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[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 Anesthesists; 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.

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 petitioner has not demonstrated 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 the VA - 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 contract conclusively establishes that the VA only prefers its RNs to hold a BSN, but that an associate's degree or diploma are also acceptable. 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, the VA contract affirmatively establishes that such complexity, uniqueness, or specialization do not characterize the proffered position. As discussed previously, although the petitioner and counsel refer to the proffered position as a critical care nurse, the contract with the VA, the entity that determines the duties and minimum requirements of the proffered position, does not indicate that the proffered position is a critical care nurse.

The AAO notes that there is a provision in the VA contract for the petitioner to supply the VA with critical care nurses which are titled as "Registered Nurse – Intensive Care" in the contract. However, nowhere does the petitioner indicate that the proffered position is for an RN – Intensive Care. Instead, the position offered to the beneficiary as described in the VA contract is that of an RN – Emergency Room. As discussed previously, the *Handbook* distinguishes between critical care nurses and emergency room nurses. Moreover, even for the RN – Intensive Care positions, according to the contract, the VA prefers, but does not require, a BSN. Additionally, although the petitioner was provided with an opportunity to submit a letter from the VA hospital where the beneficiary would allegedly work describing the position's duties in greater detail, the petitioner failed to submit this documentation in response to the RFE. Therefore, the petitioner has failed to demonstrate that the proffered position's duties are more complex, unique, or specialized than other emergency room or trauma nurses who are not required to have at least a bachelor's degree or the equivalent in a specific specialty. 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 did not err 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).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As discussed previously, the petitioner and the contract both state that the petitioner's provision of nurses to the VA is to be done on a nationwide basis. Although the petitioner stated in the Form I-129 that the beneficiary would work at an address in Colchester, VT, the petitioner failed to submit any corroborating evidence that the beneficiary would be assigned to that location or remain at that location for the duration of the petition. Further, although the petitioner states that the beneficiary will be an employee of the petitioner, the beneficiary will allegedly work at VA medical facilities and will more likely than not use the instrumentalities and tools of the VA, as opposed to those of the petitioner. The petitioner did not submit any evidence to establish that the beneficiary will be supervised by employees of the petitioner or that the petitioner would determine the location of employment, the nature of the beneficiary's duties, or the duration of the assignment.

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;[4] and

(3) Has an Internal Revenue Service Tax identification number.

Although counsel asserted that the petitioner would be the beneficiary's employer, there is insufficient evidence in the record of proceeding to find that the petitioner will have the requisite employer-employee relationship with the beneficiary. In fact, the nature of the arrangement counsel described suggests the opposite, i.e., the petitioner would not control his work. The AAO therefore finds that the petitioner has failed to establish that it is or will be a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). 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

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[4] It is noted that, the United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

AAO will not further dwell on its 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.