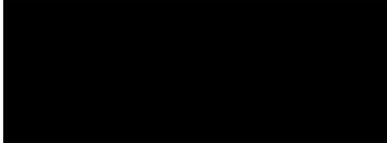


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



PUBLIC COPY



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Date: **MAY 03 2011** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



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 visa petition the petitioner stated that it performs health care recruitment for hospitals. It also provided consolidated financial statements showing that it and its subsidiaries “bring[] foreign-educated nurses to its client hospitals via employment-based visas issued by the United States government.”

The petitioner filed this visa petition for H-1B classification of the beneficiary as a specialty occupation worker 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 he may work in what the petitioner designates as a Registered Nurse – Pediatric Specialty (RN-PS) position. The petitioner stated that the beneficiary would work at the Children’s Medical Center in Dallas (CMCD).

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

The AAO bases its decision upon its review of the entire record of 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 provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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

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

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. 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.

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

In support of this approach, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, 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 the 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 evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

With the petition, counsel submitted a letter, dated March 20, 2009, in which she cited a memorandum, dated November 27, 2002, 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 (hereinafter referred to as the Williams Memo) as indicating that the proffered position requires a minimum of a bachelor’s degree or the equivalent in a specific

specialty and therefore qualifies as a position in a specialty occupation. Counsel noted that the Williams memo acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical staff nurse position. As will be discussed below, however, the evidence of record does not establish that performance of the proffered position would require a bachelor of science degree in nursing (BSN).

Counsel further asserted that patients in pediatric intensive care units (PICU) require close monitoring and that such units have high nurse to patient ratios. She did not assert or submit any evidence, however, that the beneficiary would be placed in a PICU.

Counsel stated that CMCD requires that each PICU be staffed with nurses with bachelor's degrees, but did not state her basis for that assertion. She conceded that PICUs also have nurses with only associate's degrees.

Counsel provided a document from CMCD that contains the following description of the duties of the proffered position:

- A. Provides competent care for families based on practice patterns which reflect new levels of awareness of suffering, patient/family psychosocial needs, and complexity of clinical judgment.
 - 1. Assesses and collects data in a comprehensive manner identifying underlying family needs to implement an individualized plan of care.
 - 2. Demonstrates competence in the delivery of nursing care.
 - 3. Evaluates and revises plan of care based on evolving needs.
 - 4. Utilizes problem-solving approaches which compare one situation with another.
 - 5. Provides comprehensive, individualized teaching based on identified learning needs of families.
 - 6. Recognizes impact of personal involvement in therapeutic relationship.

- B. Demonstrates effective use of communications skills.
 - 1. Communicates in an accurate, objective manner.
 - 2. Recognizes and accesses multidisciplinary team members in meeting identified patient/family needs.
 - 3. Responds to verbal and nonverbal communication.
 - 4. Identifies problems and reports these to appropriate personnel.

- C. Participates in the development of professional and educational activities.
 - 1. Assists in identifying learning needs of staff nurses and other health care workers.
 - 2. Assists in developing strategies to meet identified learning needs.

3. Supports and/or maintains membership in a professional organization.
 4. Shares pertinent information gained from professional seminars, conferences, books, or journals.
- D. Demonstrates competence in professional practice.
1. Seeks evaluation of self from peers and clinically advanced professionals to improve professional practice.
 2. Incorporates unit based goals into nursing process.
 3. Is a member of a unit based committee/project/task force.
 4. Utilizes standards to develop plans of care for primary patients.
 5. Preceptor for novice/beginners.
- E. Applies nursing research to clinical practice.
1. Reads and evaluates current nursing research that has implications for clinical practice.
 2. Modifies own practice based on nursing research and quality improvement findings.
 3. Evaluates clinical practice to identify problems for potential study.
 4. Participates in research and/or quality improvement activities.

That document also states that a successful applicant must be a "Graduate of an accredited school of nursing." It does not indicate that the position requires a bachelor's degree, rather than a lesser nursing degree.

Counsel also provided a copy of the beneficiary's January 27, 2009 employment contract, which states that the hospital at which the beneficiary would work would supervise the beneficiary's performance. The term of that agreement is 30 months. An addendum to that agreement indicates that the beneficiary would be assigned to CMCD. It does not state the term of that assignment or any number of hours of work the beneficiary is guaranteed per week.

Because the evidence did not demonstrate that the visa petition is approvable, the service center, on March 26, 2009, issued an RFE. In the RFE, the service center requested that the petitioner explain why a registered nurse (RN) without a bachelor's degree or the equivalent in nursing or a related field could not perform the duties of the proffered position. In response, counsel submitted a letter dated April 22, 2009 in which he asserted that the Williams memo indicates that RN-PS positions qualify as specialty occupation positions. He also stated, "[CMCD] is a specialized hospital which is focused entirely on pediatric care. As such, the facility requires Specialty Nurses with a specialty in pediatrics."

The service center also requested, *inter alia*, evidence that the proffered position qualifies as a position in a specialty occupation. It stated that the evidence submitted must include a statement of the minimum education necessary to perform in the position and a more detailed job description. It

stated that the job description must state the percentage of time spent on each duty. In response, counsel submitted another copy of the same job description previously provided. No percentages were accorded to the various job duties.

Counsel also submitted (1) an August 9, 2006 letter from CMCDs Workforce Center Director; (2) an undated letter from CMCD's director of acute care surgical services; (3) a letter, dated April 14, 2009, from CMCD's vice president and chief nursing officer, and (4) an evaluation from an associate professor at the Wegmans School of Nursing in Rochester, New York.

The August 9, 2006 letter from CMCDs Workforce Center Director confirms a favorable review of the beneficiary's credentials and indicates that he is eligible to be assigned to CMCD. It does not state the term of any such assignment. The undated letter from CMCD's director of acute care surgical services states: "[CMCD] prefer[s] to hire Bachelor's prepared nurses for our Pediatric environment."

The April 14, 2009 letter from CMCD's vice president and chief nursing officer states, "Of [CMCD's] 1,200 registered nurses, 70% are [bachelor's degree] prepared." The January 29, 2009 evaluation states that RN-PS positions require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The director denied the visa petition on May 5, 2009 finding, as was noted above, that the petitioner had failed to demonstrate that it would employ the beneficiary in a specialty occupation. On appeal, counsel asserted that the decision of denial directly conflicts with [REDACTED]. Counsel stated that, as a matter of USCIS policy since 2002, a RN-PS position qualifies as a position in a specialty occupation.

Counsel misinterprets the [REDACTED], which indicates that specialty nursing positions other than APN positions do not categorically qualify as specialty occupations. Also, counsel did not provide evidence identifying the specific duties of the proffered position that a registered nurse without a BSN or the equivalent would be unable to perform.

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

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

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

specialists, nurse anesthetists, nurse-midwives, and nurse practitioners—need a master’s degree.

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

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

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

* * *

All nursing education programs include classroom instruction and supervised clinical experience in hospitals and other healthcare facilities. Students take courses in anatomy, physiology, microbiology, chemistry, nutrition, psychology and other behavioral sciences, and nursing. Coursework also includes the liberal arts for ADN and BSN students.

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

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

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

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

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

The *Handbook* indicates that the proffered "RN-PS" position would fall within the population of RNs serving as pediatric nurses, which the *Handbook* describes as RNs who specialize in treating children and adolescents. The *Handbook* further indicates that a BSN or BSN equivalency is *not* normally a requirement for serving in either the pediatric nursing specialty or most other nursing specialties in which RNs engage. The *Handbook's* chapter on registered nurses lists RN-PS positions as positions that do not categorically require a bachelor's degree, along with the following other 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 proposition that an RN-PS position as an occupational category or the particular RN-PS position proffered in this petition normally requires at least a BSN.

CMCD is the client hospital to which the beneficiary would be assigned and which would directly supervise the beneficiary and determine his specific duties. The April 14, 2009 CMCD letter does not establish that a BSN or equivalent is a prerequisite for employment as a registered nurse. According to the letter, "Of the [petitioner's] 1,200 [RNs], 70% are BSN prepared."

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 [redacted] recognizes to be a specialty occupation.³ Rather, the proffered position fits within the range of RN specialty positions described at section E of the Memo as those for which qualification as a specialty occupation would depend upon the extent and weight of the evidence presented in the petition. Thus, while the [redacted] 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 AAO finds no probative value in the associate professor's evaluation, which concludes that the position of RN-PS requires at least a BSN, or the equivalent. The evaluation lists various duties of a RN-PS and abstractly states, "Skills in these areas can be acquired only through Bachelor's-level classes in those areas." The associate professor did not indicate which of the listed duties could not be performed by a registered nurse who did not have a minimum of a bachelor's degree or the equivalent in nursing or a related discipline. The associate professor further stated, "The skills for

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

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

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

³ The four types of RN positions that [redacted] 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.

the position are developed in the junior and senior years of an undergraduate program, as well as in a graduate program in Nursing, or a related field,” but did not indicate which skills are not taught in, for instance, an ADN program at an accredited nursing school.

The associate professor also stated, “Companies seeking to employ a Specialty Nurse 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 associate professor did not indicate whether she was asserting that as a universal requirement, as common in the industry, or merely as a requirement of some companies, and, in any event, provided no support for that conclusory statement.

Further, the associate professor’s evaluation has not taken into account either the *Handbook’s* statistics-based information to the effect that pediatric nursing RN positions do not normally require a BSN or higher degree in nursing, the clear indication in the April 14, 2009 letter from CMCD’s vice president and chief nursing officer that the proffered position does not require a BSN or higher degree, or the description of the proffered position that indicates that a BSN is not required.

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

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

The AAO further emphasizes that the evaluator’s conclusion is fatally undercut by the *Handbook’s* contrary information reviewed earlier in this decision and by CMCD’s acknowledgment that it employs in the exact type of position proffered in this petition RNs holding less than a BSN or

⁴ Two examples are the following duties that the associate professor ascribes to the position that she is evaluating: “Adhere to the general hospital standards to promote a cooperative work environment by utilizing communication skills, interpersonal communication skills, and team building,” and “Provide age/developmentally appropriate care in accordance with age-specific care guidelines for the age group served.”

equivalent and by the position description that indicates that CMCD does not require a minimum of a bachelor's degree or the equivalent in nursing for such positions.

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

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

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

The *Handbook* indicates that RN-PS positions do not require a minimum of a bachelor's degree or the equivalent in a specific specialty. No reliable evidence suggests that they do. The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the RN-PS positions and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO will next consider the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that 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 organizations.

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)).

As was noted above, the *Handbook* offers no support for the proposition that RN-PS positions in the petitioner's industry, or any other, categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty. The service center, in the March 26, 2009 RFE, requested evidence pertinent to any professional association of nurses that requires a bachelor's degree as a condition of entry, but counsel submitted no such evidence. Counsel submitted no letters or affidavits from others in the petitioner's industry stating that they only employ RN-PSs with a minimum of a bachelor's degree.

In short, the record contains no evidence that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel RN-PS positions among similar organizations, and has not, therefore, demonstrated that the proffered position meets the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which would be satisfied if the petitioner demonstrated that, notwithstanding that other RN-PS positions might not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the proffered position is so complex or unique that it can be performed only by an individual with such a degree.

The description of the proffered position, however, indicates that an applicant must be a graduate of a nursing school, not that a successful applicant must have a bachelor's degree in nursing. Further, the April 14, 2009 letter from CMCD's vice president and chief nursing officer indicates that only 70% of CMCD's nurses have bachelor's degrees. That evidence indicates that a minimum of a bachelor's degree is not a requirement of the particular position proffered. As such, it cannot be said to be unique or sufficiently complex to require a bachelor's degree.

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) would be satisfied if the petitioner demonstrated that CMCD normally requires a degree or its equivalent for the position. However, as was noted above, only 70% of CMCDs RN-PS workers have bachelor's degrees. The undated letter from CMCD's director of acute care surgical services states that CMCD prefers to hire nurses with bachelor's degrees, but not that it is a minimum requirement. The description of the proffered position indicates that CMCD requires a nursing degree, but not that it requires a bachelor's degree.

The record contains no evidence that CMCD has a history of recruiting and hiring only candidates with bachelor's degrees to fill its RN-PS positions. In fact, the record demonstrates that it has no such history, as a considerable percentage of its RS-PS positions are filled with nurses without such a degree. The petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that the nature of the specific duties of the proffered position is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The description of the proffered position provided by CMCD is the only evidence pertinent to the specific duties of the proffered position. That description is so abstractly phrased, however, that one cannot determine whether they would require a degree.

“Assess[ing] and collect[ing] data,” “Evaluat[ing] and revis[ing] plan of care,” “Communicat[ing] in an accurate, objective manner,” etc. contain no indication that they require a minimum of a bachelor’s degree or the equivalent in a specific specialty, nor do any of the other duties described.

The petitioner has not demonstrated that 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. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director did not err in her determination that the record before her 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. The appeal will be dismissed and the petition will be denied on this basis.

The record suggests an additional issue that was not discussed in the decision of denial. In his March 20, 2009 letter counsel stated,

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

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

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

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

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

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

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

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

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) allows a “United States agent” to file a petition “in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf.”

In order to demonstrate that it has standing to file the instant visa petition for the beneficiary, then, the petitioner must demonstrate that it qualifies as either (a) a U.S. employer as 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 notes, initially, that the record contains no evidence that RN-PSs are traditionally self-employed, no evidence that they use agents to arrange short-term employment on their behalf with multiple employers, and no evidence that the petitioner is acting on behalf of a foreign employer. The petitioner has not claimed and the AAO finds that the petitioner has not established that it qualifies as an agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F). The remaining question, in analyzing whether the petitioner has standing to file the instant visa petition, is whether the petitioner qualifies as the beneficiary’s employer within the meaning of section 101(a)(15)(H)(i)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Under the test of *Nationwide Mutual Ins. Co. v. Darden (Darden)*, 503 U.S. 318, 322-323 (1992) (hereinafter “*Darden*”), the United States Supreme Court has 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.” *Darden*, 503 U.S. 318 at 322-323 (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)).⁵

⁵ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply

Therefore, in considering whether or not one is an “employee” in an “employer-employee relationship” with a “United States employer” for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of “control.” *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii)(2) (defining a “United States employer” as one who “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” (emphasis added)).

Factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer’s regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

Further, the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

CMCD is in business as a hospital, and nursing is a regular part of that business. The record demonstrates that the beneficiary would work at CMCD, rather than at the petitioner’s own location, and CMCD, rather than the petitioner, would apparently provide the implements necessary to practice nursing. The record contains no allegation that the petitioner, rather than an employee of the CMCD, would designate the beneficiary’s shifts, assign duties to the beneficiary and control or supervise the beneficiary’s work. In fact, the record contains an Employment Agreement, dated January 19, 2009, between the petitioner and the beneficiary, that states, “. . . [CMCD] will provide supervision at the work site.” For all of these reasons, the petitioner has not demonstrated that it

to the terms “employee,” “employer-employee relationship,” “employed,” and “employment” as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term “employer” than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to “unaffiliated employers” supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

would have an employer/employee relationship with the beneficiary pursuant to the test enunciated in *Darden* and *Clackamas*.

The AAO finds that the petitioner would not, in fact, be the beneficiary's employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A). Further, 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). The petitioner is not, therefore, permitted to file an H-1B visa petition for the beneficiary. The appeal will be dismissed and the petition denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.