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



U.S. Citizenship
and Immigration
Services

[REDACTED]

D₂

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

IN RE: Petitioner: [REDACTED] Beneficiary: [REDACTED] OCT 03 2011

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

ON BEHALF OF PETITIONER:

[REDACTED]

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 states that it is a hospital. To employ the beneficiary in what it designates as an Assistant Nurse Manager (ANM) Post Cardio-Thoracic Surgery position, the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

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

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

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

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

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, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in 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.

With the petition, counsel provided a letter, dated March 11, 2009, from [REDACTED] whom that letter identifies as the petitioner's director of nurse recruitment, retention, and education. That letter states that the proffered position includes the following duties:

. . . functioning as an advanced practice nurse in the specific area of clinical nursing, providing expert consultation, education, and counseling to patients, families, and members of the health care team. The beneficiary will be collaborating with nursing leadership as a member of the management team, and to initiate and support clinical research and to serve as a change agent to promote and enhance quality patient care.

The record contains a letter from the petitioner offering the beneficiary temporary employment as an Assistant Nurse Manager (ANM) Post Cardio-Thoracic Surgery. That letter states, in pertinent part:

In this position your responsibilities will include functioning as an advanced practice nurse in a specific area of clinical nursing, providing expert consultation, education, and counseling to patients, families, and members of the health care team. Collaborating with nursing leadership as a member of the management team, and to initiate and support clinical research and to serve as a change agent to promote and enhance quality patient care.

On April 9, 2009, the service center issued a request for evidence in this matter. The service center requested, *inter alia*, that the petitioner explain in what way the proffered position is so much more complex than an ordinary registered nurse position that it requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

Counsel provided a chart that indicates that the proffered position is subordinate to the nurse manager and the clinical coordinator. As to the duties of the proffered position, it states:

The ANM assists the [clinical coordinator] in matters like staffing, overseeing 25 RN's in that unit, 2 ward clerks in one 12-bedded coronary care unit; oversee the patient assignments and nurses on that unit – provide educational guidance as needed to current staff. Responsible for the precepting and education of new hires, of which there could be anywhere from 3 – 7 in a given month. Educate patient and family members, and acts as the Clinical Coordinator in the absence of that person.

Counsel provided an April 21, 2009 letter that states that the proffered position “. . . entails collaborating with nurse leadership in a variety of capacities and to serve as a member of the management team.” It further states that, in the absence of the Nurse Manager, the beneficiary in the proffered position would act as the Nurse Manager. It further states that the beneficiary, in the proffered position, would train new hires and new graduates. That letter further describes the duties of the proffered position as follows:

More than 50% of her time will be dedicated to overseeing the patient/nurse staff assignments, monitoring and demonstrating proper clinical care and clinical technique, including reviewing the documentation of patient files of the nurses under her to ensure timeliness, efficacy of care plan and accuracy, and ensuring that all care and documentation is in keeping with both the Department of Health requirements and Hospital policy. Fifteen percent of the time will be spent on arranging staff assignments for the next shift. Fifteen percent of her time will be spent attending required committee meetings and leadership meetings. The balance of the time (20%) will be spent overseeing that the reports given of patients' files from one shift to another are complete and accurate, and performed in a timely manner, including overseeing that all patients have received required medication during that 12[-]hour shift period, nurse evaluations, etc. and then giving report to the person taking over for her on the day shift.

That letter, in addition to being signed by counsel, was signed by [REDACTED], whom it represented to be the petitioner's president. The AAO notes that [REDACTED] had previously represented herself to be the petitioner's director of nurse recruitment, retention, and education.¹

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel provided résumés of three of its current employees. Those résumés show that each of those employees has a minimum of a bachelor's degree in nursing. The letter from counsel and [REDACTED] states that those three are employed in "various leadership roles." Whether any are employed as ANMs is not stated. Whether any of the petitioner's ANMs, past or present, have ever had bachelor's degrees in nursing is unstated. The chart previously described indicates that [REDACTED] works for the petitioner as a clinical coordinator, a position to which the proffered position is directly subordinate. Whether the duties of that position are similar to the duties of the proffered position is not stated.

Counsel also provided three vacancy announcements for positions designated as ANM positions at other hospitals.

Subsequently, on April 29, 2009, the service center issued another request for evidence, requesting evidence not relevant to the issue upon which the decision of denial was ultimately based.

¹ It is further noted that the petitioner's website indicates that it is headed by an executive director, currently [REDACTED] not by a president.

On May 11, 2009 the director issued the decision of denial in this matter. The director found the evidence insufficient to show that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty, and insufficient, therefore, to establish that it qualifies as a position in a specialty occupation.

On appeal, counsel provided a printout of web content from a site maintained by the American Association of Colleges of Nursing (AACN). That printout states:

The Bachelor of Science degree in nursing is the critical first step for a career in professional nursing. The [AACN] and other leading nursing organizations recognize the BSN degree as the minimum educational requirement for professional nursing practice. While graduates can practice as an RN with an associate degree or hospital diploma, the BSN degree is essential for nurses seeking to perform at the case-manager or supervisory level or move across employment settings.

In its website, the AACN describes itself as "... the national voice for America's baccalaureate- and higher-degree nursing education programs." It makes no secret of its predilection in favor of four-year bachelor's degree programs in nursing as opposed to the two and three year alternatives. Although the web content remains relevant evidence, the AAO must consider AACN's obvious bias when assessing the credibility and weight of the assertions made by this organization.

In the brief on appeal, counsel asserted that the service center's issuance of the April 29, 2009 RFE, which did not address the specialty occupation issue, suggests that the director had decided that the proffered position qualifies as a specialty occupation. The AAO sees nothing in the RFE to support that conclusion. Counsel also noted several errors in the decision of denial, but provided no argument to suggest that those errors were of any substantive importance. Rather, counsel asserted that they demonstrate that the director may have confused the instant case with some other case. The AAO draws no such conclusion from the errors cited by counsel.

As to the perceived error in the service center's failure to issue an RFE, the AAO notes that there is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. Title 8 C.F.R. § 103.2(b)(8) clearly permits the director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director. Second, even if the director had erred as a procedural matter in not issuing an RFE or Notice of Intent to Deny relative to the petitioner's failure to establish the proffered position as a specialty occupation, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner yet another additional opportunity to supplement the record with new evidence. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of

occupations that it addresses.² The *Handbook* does not have a chapter devoted exclusively to ANM positions. In the chapter entitled Registered Nurses, the *Handbook* states the following about the duties of registered nurse positions:

Registered nurses (RNs), regardless of specialty or work setting, treat patients, educate patients and the public about various medical conditions, and provide advice and emotional support to patients' family members. RNs record patients' medical histories and symptoms, help perform diagnostic tests and analyze results, operate medical machinery, administer treatment and medications, and help with patient follow-up and rehabilitation.

RNs teach patients and their families how to manage their illnesses or injuries, explaining post-treatment home care needs; diet, nutrition, and exercise programs; and self-administration of medication and physical therapy. Some RNs may work to promote general health by educating the public on warning signs and symptoms of disease. RNs also might run general health screening or immunization clinics, blood drives, and public seminars on various conditions.

When caring for patients, RNs establish a care plan or contribute to an existing plan. Plans may include numerous activities, such as administering medication, including careful checking of dosages and avoiding interactions; starting, maintaining, and discontinuing intravenous (IV) lines for fluid, medication, blood, and blood products; administering therapies and treatments; observing the patient and recording those observations; and consulting with physicians and other healthcare clinicians. Some RNs provide direction to licensed practical nurses and nursing aides regarding patient care. (See the statements on licensed practical and licensed vocational nurses; nursing and psychiatric aides; and home health aides elsewhere in the *Handbook*). RNs with advanced educational preparation and training may perform diagnostic and therapeutic procedures and may have prescriptive authority.

That description of the duties of registered nurses does not accord perfectly with the duties of the proffered position as described by the April 21, 2009 letter from [REDACTED] and elsewhere. However, as to advancement in the field of nursing, the *Handbook* states:

Most RNs begin as staff nurses in hospitals and, with experience and good performance, often move to other settings or are promoted to positions with more responsibility. In management, nurses can advance from assistant unit manager or head nurse to more senior-level administrative roles of assistant director, director, vice president, or chief of nursing. Increasingly, management-level nursing positions

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

require a graduate or an advanced degree in nursing or health services administration. Administrative positions require leadership, communication and negotiation skills, and good judgment.

That additional paragraph indicates that assistant unit manager positions are included in the discussion of registered nurse positions. The name "assistant unit manager" and the brief description provided indicates that the duties of such positions are similar to the duties of the proffered position, that is, the first-line supervision of registered nurses. The AAO finds that the proffered position is included in the *Handbook's* discussion of registered nurse positions.

The AAO will now address the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). It will first address the supplemental, alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner demonstrates that the proffered ANM position normally requires at least a bachelor's degree in a specific specialty or its equivalent for entry into that particular position in the United States.

On appeal, counsel noted the importance of the duties of the proffered position, observing that, during the night shift, the ANM often supervises the nursing staff of a 25-bed hospital unit. The AAO recognizes that the proffered position is important, as are all positions in health care, but does not find counsel's argument persuasive for the proposition that the proffered position requires a minimum of a bachelor's degree in nursing or its equivalent for entry into that position.

As to the education required by registered nurse positions, the *Handbook* states:

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

The *Handbook* makes clear that registered nursing positions in general do not require a minimum of a bachelor's degree or the equivalent in a specific specialty. Rather, entry-level positions are clearly available to those with an associate's degree in nursing or a hospital diploma. Although it states that advancement opportunities may be limited for those without a BSN, it does not state that all positions above staff nurse require such a diploma.

The *Handbook* paragraph pertinent to advancement into management positions indicates that a bachelor's or higher degree is increasingly important for advancement into assistant director, director, vice president, or chief of nursing positions. Whether it is asserting that such a degree is increasingly important for assistant unit manager or head nurse positions, which are more similar to the proffered position, is unclear. However, even in those positions to which the *Handbook* indicates that such degrees are increasingly important, it does not suggest that they are a normal minimum entry requirement.

Although the printout of the content from the AACN website in the record states that a bachelor's degree is "essential for nurses seeking to perform at the case-manager or supervisory level," it also indicates in the same document that a bachelor's degree in nursing is simply "preferred," not required. Based on what is provided, it cannot be found that the AACN assertions are sufficient to establish that a bachelor's or higher degree in nursing is a minimum entry requirement for the proffered position, especially given that it fails to credibly refute the statistics-based conclusions in the *Handbook* that in general a bachelor's or higher degree in nursing is not required for entry into positions such as the job proffered by the petitioner in this matter.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position satisfies the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was observed above, the *Handbook* does not support the proposition that the petitioner's industry, or any other, requires ANMs, nursing supervisors, or registered nurses in general to possess a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association of registered nurses that requires a minimum of a

bachelor's degree or the equivalent in a specific specialty as a condition of entry.³ The record contains no letters or affidavits from others in the petitioner's industry.

The vacancy announcements provided are the only evidence in the record even arguably relevant to the determination of whether a bachelor's degree in a specific specialty is a common requirement for parallel positions within similar industries in the petitioner's industry. One of those announcements is for an ANM at a Kaiser ICU in Sacramento, California. The description of the duties of that position closely corresponds to the various descriptions of the duties of the proffered position in the instant case. The announcement states that applicants for that position must be registered nurses. As to the educational requirements of the job, the vacancy announcement states, "BSN or BA in health care related field preferred. Graduate of accredited school of nursing."

Graduation from a nursing school does not necessarily confer a bachelor's degree. That the employer would prefer an applicant with a bachelor's degree does not indicate that a bachelor's degree is a minimum requirement for the position. Further, even if the position required a bachelor's degree, a requirement of either a bachelor's degree in nursing or a bachelor's in some health care related field is not a requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty such as, for instance, nursing. As such, for all of those reasons, this vacancy announcement does not support the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in nursing or in any other specific specialty.

Another announcement is for an ANM position at the Green Key Resources facility in Riverdale, New York. Because that announcement has no description of the duties of the position, the extent to which they may be similar to the duties of the proffered position is unknown. That announcement also requires that applicants be registered nurses. As to the education requirements of the position, however, the announcement states that the position requires a bachelor's degree, but does not state that it must be in any specific specialty. That vacancy announcement also fails to support the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in nursing or in any other specific specialty.

The final announcement also describes duties similar to those of the proffered position. That announcement makes clear that the position requires a bachelor's degree in nursing. That announcement, therefore, supports the proposition that the particular employer hiring for that particular ANM position requires a minimum of a bachelor's degree or the equivalent in nursing. The requirement of a bachelor's degree in nursing for one single ANM at one single hospital, however, is insufficient to establish an industry standard, especially given that the two other vacancy announcements provided do not establish that a bachelor's or higher degree in nursing or its equivalent is required for their ANM positions and, more importantly, the statistics-based findings of the *Handbook* also do not support such a conclusion with regard to ANM positions.

The vacancy announcements provided, the only evidence relevant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), do not support the proposition that the

³ There is no evidence in the record that the AACN is such an organization.

petitioner's industry commonly requires a minimum of a bachelor's degree or the equivalent in a specific specialty for ANM positions. The petitioner has not demonstrated therefore that the proffered position meets the requirements of the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next address the criterion of the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree or the equivalent in a specific specialty.

The only evidence that might have distinguished the proffered position from other nominally similar positions are the descriptions of the duties of the proffered position. Those descriptions, however, provide no indication that the position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. Absent some additional evidence pertinent to the relative complexity of those duties as compared to other ANM positions that do not require at least a bachelor's or higher degree in Nursing or its equivalent, there is no indication that overseeing patient/nurse assignments, attending meetings, and reviewing patient files, for instance, cannot be accomplished by a person without such a 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 satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next address the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is satisfied if the petitioner demonstrates that it normally requires a degree or its equivalent for the position,

Although counsel provided résumés of some of the petitioner's employees, the record does not establish that they are ANMs. The evidence does not indicate that any of the petitioner's ANMs, past or present, have bachelor's degrees in nursing, let alone that most or all of them have such degrees. The record contains no evidence pertinent to anyone that the petitioner has ever hired to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position meets the requirements of the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).⁴

⁴ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of

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 is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, or its equivalent.

As was observed above, nothing about the duties of the proffered position demonstrates that they require a minimum of a bachelor's degree or the equivalent in a specific specialty. Without additional evidence on this point, the AAO cannot find that "functioning as an advanced practice nurse in the specific area of clinical nursing, providing expert consultation, education, and counseling to patients, families, and members of the health care team," etc., are so specialized and complex that they are usually associated with attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty.

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 in a specific specialty or its equivalent. The petitioner has not, therefore, demonstrated that the proffered position satisfies the criterion 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 petitioner has not demonstrated that the beneficiary would be employed in a specialty occupation position. The appeal will be dismissed and the petition denied on that basis.

The record suggests an additional issue that was not addressed in the decision of denial.

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), the total number of H-1B visas issued per fiscal year may not exceed 65,000. The petition was filed for an employment period to commence in March 2009. The 2009 fiscal year (FY09) extends from October 1, 2008 through September 30, 2009. The instant petition is therefore subject to the 2009 H-1B cap, unless exempt.

Further, on April 8, 2008, the USCIS issued a notice stating that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY09. The petitioner filed the instant visa petition on March 31, 2009. Unless this visa petition is exempt from the cap, therefore, it cannot be approved. At issue in this matter, therefore, is whether the beneficiary qualifies for an exemption from the FY09 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

On the visa petition, the petitioner asserted that it is exempt from the cap as a nonprofit organization or entity related to or affiliated with an institution of higher education as defined by the Higher Education Act of 1965, section 101(a), 20 U.S.C. § 1001(a).

In her March 11, 2009 letter, [REDACTED] asserted that the petitioner is a nonprofit hospital. Whether exemption from the cap is available to the petitioner, hinges first and foremost upon whether it has demonstrated that it is a nonprofit entity.

Other than the statement by [REDACTED] however, the record contains no evidence that the petitioner is a nonprofit entity, such as a letter from the Internal Revenue Service (IRS), to corroborate its claimed nonprofit status. As such, that statement alone is insufficient to show that the petitioner is a nonprofit entity, a prerequisite to qualifying for the exemption from the numerical cap. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Moreover, even if the petitioner had established that it is a nonprofit entity, the record contains insufficient evidence that the petitioner is related to or affiliated with an institution of higher learning.

Title 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the enactment of ACWIA, defines what is a related or affiliated nonprofit entity specifically for purposes of the H-1B fee exemption provisions of that act:

An affiliated or related nonprofit entity. A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

By including the phrase "related or affiliated nonprofit entity" in the language of AC21 without providing further definition or explanation, Congress likely intended for this phrase to be interpreted consistently with the only definition of the phrase that existed in the law at the time of the enactment of AC21: the definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B). As such, the AAO finds that USCIS reasonably and persuasively interpreted AC21 to apply the definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B), and it will defer to the Aytes Memo in making its determination on this issue. *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) ("... a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that "the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

The petitioner must, therefore, establish that it satisfies the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act in order for the beneficiary to be exempt from the FY09 H-1B cap. The AAO finds that the best reading of 8 C.F.R. § 214(h)(19)(iii)(B) allows the petitioner to demonstrate that it is an affiliated or related nonprofit entity if it establishes one or more of the following:

- (1) The petitioner is associated with an institution of higher education through shared ownership or control by the same board or federation;
- (2) The petitioner is operated by an institution of higher education; or
- (3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.⁵

Upon review of the submitted affiliation agreement between the petitioner and the Division of Nursing at New York University (NYU), it cannot be found that an agreement of such limited scope satisfies any of the above required elements. More specifically, the affiliation agreement fails to demonstrate (1) any shared ownership or control by the same board or federation, (2) that the petitioner is operated by NYU, or (3) that the petitioner is attached to NYU as a member, branch, cooperative, or subsidiary. As such, the visa petition must be denied for this additional reason. The appeal will be dismissed and the visa petition denied on this additional basis.

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.

⁵ This reading is consistent with the Department of Labor's regulation at 20 C.F.R. § 656.40(e)(ii), which is identical to 8 C.F.R. § 214.2(h)(19)(iii)(B) except for an additional comma between the words "federation" and "operated". The Department of Labor explained in the supplementary information to its ACWIA regulations that it consulted with the former INS on this definitional issue, which supports the conclusion that both regulations were intended to be identical. *See* 65 Fed. Reg. 80110, 80181 (Dec. 20, 2000).