U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

[redacted]

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Date: OCT 03 2011 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked approval of the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition is revoked.

On the Form I-129 visa petition the petitioner stated that it is a long-term nursing care firm with 140 employees. To employ the beneficiary in what it designates as a nursing instructor/adult education position, the petitioner endeavors to classify him 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 revoked approval of the petition, finding that the petitioner failed to establish that it was employing the beneficiary in a specialty occupation position. On appeal, counsel asserts that the director's basis for revocation was erroneous, and contends that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submits 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 all of the supporting documentation filed with it, from the filing of the petition through its approval; (2) the director's notice of intent to revoke approval of the petition (NOIR); (3) the response to the NOIR; (4) the director's revocation letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

The regulation at 8 C.F.R. § 214.2(h)(10)(iii), which governs revocations that must be preceded by notice, states:

> (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
>
> *(1)* The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
>
> *(2)* The statement of facts contained in the petition was not true and correct; or
>
> *(3)* The petitioner violated terms and conditions of the approved petition; or
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> *(4)* The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
>
> *(5)* The approval of the petition violated paragraph (h) of this section or involved gross error.
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> (B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the

> petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

Upon review of the entire record of proceeding, including all of the petitioner's submissions on appeal, the AAO finds that the NOIR clearly indicated that the director was contemplating revocation of approval of the petition on the basis that the evidence in the record of proceeding upon which the petition had been approved failed to establish the proffered position as a specialty occupation, and that the NOIR thereby provided adequate notice to the petitioner that revocation was being contemplated on the basis of the revocation-on-notice provision at 8 C.F.R. § 214.2(h)(10)(iii)(A)(5), namely, that the approval violated the specialty occupation provisions at section 8 C.F.R. § 214.2(h) or constituted gross error. The AAO further finds that the petitioner's submissions in response to the NOIR did not overcome the grounds for revocation cited in the NOIR and that the submissions on appeal do not remedy this failure. Accordingly, the appeal will be dismissed, and the approval of the petition will be revoked.

To merit the approval of the petition in question, the petitioner would have had to establish that its Nursing Instructor/Adult Education position qualified as a specialty occupation under the following statutory and regulatory framework.

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

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

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to,

architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 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 submitted a letter, dated March 5, 2008, on the petitioner's letterhead, signed by the petitioner's administrator. In that letter, the petitioner's administrator gave the following description of the duties of the proffered position:

> [The beneficiary] will prepare all required educational and training material, including lesson plans and study guides, for the facilities, provide in-house orientation and on the job training and arrange seminars, group studies, one-on-one consulting, and instruction to the nursing staff and prepare the nursing staff to meet the continuing nursing education requirements for licensing and renewal. The facilities must meet all State of Florida credential requirements[,] and [the] beneficiary] will ensure that the healthcare staff is in compliance with credential requirements and is up to date on required, new and innovative nursing techniques and patient care. Instruction will include the areas of medical/nursing ethics, professionalism, medical record confidentiality, patient Bill of Rights and medical/nursing malpractice avoidance. [The beneficiary] will coordinate additional instructions through local universities.

The petitioner's administrator further stated, "The minimum requirements for this position is [sic] a Bachelor's degree in health science and teaching experience." The petitioner's administrator did not make clear whether she was referring to a bachelor's degree in a curriculum entitled "health science" or to a bachelor's degree in any health-science related subject, to include nursing. In any event, the visa petition was approved on May 22, 2008.

On March 12, 2009, however, the director issued a notice of intent to revoke (NOIR) in this matter. The director noted that a bachelor's degree is not required for entry into a nursing position, and that the evidence in the record did not establish that the proffered position in the instant case is sufficiently complex, beyond the duties of a more generic nursing position, to require such a degree.

The director requested that the petitioner submit additional evidence to demonstrate that the proffered position requires the services of someone with a minimum of a bachelor's degree or the equivalent in a specific specialty, notwithstanding that nursing positions in general do not.

In response, counsel submitted a letter, dated April 8, 2009, in which he asserted that the proffered position is not a position for an ordinary registered nurse, but a position for a nursing instructor/adult education teacher. With that letter, counsel submitted copies of (1) a description of the proffered position, in a two-page "Job Description" document; (2) an organizational chart and a list of employees and their respective positions; (3) an "Expert Opinion Evaluation," from an assistant professor at the Wegman's School of Nursing of St. John Fisher College, in Rochester, New York, regarding the duties and requirements of the proffered position; (4) a two-page brochure; (5) a three-page document entitled "General Facility Orientation Manual," which appears to be a table of

contents for the referenced manual; (6) a 22-page document produced by the Florida Agency for Health Care Administration, entitled "Long Term Care Review: Florida Nursing Homes Regulation, Quality, Ownership, and Reimbursement;" (7) from Part 483 – Requirements for States and Long Term Care Facilities – of Title 42 of the Code of Federal Regulations (CFR), regulations dealing with (*a*) competency evaluation of nurse aides, (*b*) the basis and scope of regulations for long-term facilities participating in Medicare, and (*c*) the "Quality of care" regulation for long-term care facilities participating in Medicare; (8) also from Part 483 of Title 42 of the CFR, the "Nursing services" regulation for long term care facilities participating in Medicare; (9) two types of documents, namely, (*a*) several issues of "CNA Up-to-Date," a monthly educational module for long-term care nursing assistants; and (*b*) a variety of training materials dealing with Medicare documentation, including document samples; (10) a very general abstract of an article, from *The Journal of Continuing Education in Nursing*, which concludes that "continuing education should be implemented to improve the accuracy of nurses' diagnoses"; (11) an article entitled "Nursing Career Overview," from the Mayo Clinic's Internet site; (12) an Internet article entitled "The BSN: A Higher Degree of Nursing Care"; (13) the *O*NET Online* Summary Report for the occupational classification Training and Development Managers; and (14) a "Hotjobs" Internet job vacancy announcement for the position "RN – Nurse Educator – Adult ICU at St. John's Hospital and Medical Center in Phoenix, Arizona."

Upon review of all of documents submitted in response to the NOIR, the AAO finds no material evidence in any them for the proposition that the subject of this petition is a specialty occupation position as that term is defined by section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii).

In particular, the AAO notes only three (3) NOIR-response submissions that directly address educational requirements for the type of position here offered.

The first of the three documents relating educational requirements is the two-page document that counsel presented as the job description of the position in question. That document states that the position requires "a minimum of Bachelor of Science in Health Care or Education field," in order to perform the following duties:

> Adult Education Teacher is responsible for the training and development of company's nursing staff. This may be done through seminars, training classes, group study, or one by one counseling. Some of the training will focus on remedial studies for those preparing for the board exams. While some of the other training or classes may be for improving professionalism to transfer from on [sic] specialty nursing assignment to another such as from ICU to Emergency Room professional. When state requirement are met when required [sic], Certifications could be granted. Must be able to communicate and relate well with students and enjoy working with them as well as be able to motivate them to learn. Must be patient and understanding as well as supportive to make the students comfortable, develop trust and help them better understanding concepts. [sic]

The AAO observes not only that this document does not explain the basis for the stated educational requirement, but also that the need for a minimum of a particular level of educational, or educational equivalency, attainment in any specific field is not evident in the duties as described.

The AAO also notes that the scope of training cited in this document appears inconsistent with the petitioner's organization and operations, to the extent that the scope includes preparation for transfer "from on[e] specialty nursing assignment to another such as from ICU to Emergency Room professional," as there is no indication in the record of proceeding that the petitioner operates either an ICU or an emergency room. In this regard, the petitioner should realize that this resort to service requirements that are not supported by the record of proceeding developed a material inconsistency that undermines the credibility of the petition as a whole. 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).

The AAO also notes that education fields include, but are nor limited to, early childhood education, elementary education, secondary education, higher education, special education, agricultural education, art education, music education, physical education, etc., as well as adult education and nursing education. Likewise, health care fields include, but are not limited to, medical doctor, dentist, dental hygienist, dental assistant, dietician, occupational therapist, physical therapist, audiologist, medical technician, ultrasound technician, dental technician, respiratory therapist, psychiatric aide, optometrist, nuclear medicine technologist, psychologist, pharmacist, and pharmacy technician, in addition to nursing. This broad range of degree majors that would satisfy the petitioner's desire for a degree is not indicative of a specialty occupation position, that is, one that requires at least a bachelor's degree level of a particular body of highly specialized knowledge in a specific specialty to be theoretically and practically applied. If, as the job description indicates, any bachelor's degree in health care or education would be an acceptable educational credential for entry into the proffered position, then the position clearly does not require a minimum of a bachelor's degree or the equivalent *in a specific specialty*, and is clearly not a position in a specialty occupation. That is sufficient reason, in itself, to deny the visa petition. The AAO will nonetheless continue its analysis, in order to highlight other evidentiary deficiencies in the record of proceeding.

The second of the three education-related documents submitted in response to the NOIR is the "Expert Opinion Evaluation," which provided the following description of the duties of the proffered position:

- Prepare all required educational and training material, including lessons plans [sic] and study guides;
- Provide in-house orientation and on-the-job training;
- Arrange seminars, group studies, on-on-one consulting and instruction in nursing staff;

- Prepare nursing staff to meet the continuing nursing education requirements for licensing and renewal;
- Ensure the facilities and healthcare staff is in compliance with State of Florida credential requirements, and is up-to-date on required, new and innovative nursing techniques and patient care;
- Provide instruction in areas of medical/nursing ethics, professionalism, medical record confidentiality, patient Bill of Rights and medical/nursing malpractice avoidance.

In pertinent part, the professor/evaluator further stated:

> Companies seeking to employ a Nursing Instructor and Adult Educator require prospective candidates to possess at least a Bachelor's degree in the area of Nursing, or a related field . . . . The skills, knowledge, and analytical thinking acquired through the acquisition of a Bachelor's degree or its equivalent, with a concentration in Nursing, or a related field, is [sic] considered necessary by people in the industry seeking to hire a nursing Instructor and Adult Educator in the field of Nursing, and thus the degree is considered an industry standard requirement for the position.

The evaluator's statements indicate no more than the evaluator's opinion that there are companies and "people in the industry" that require prospective candidates to possess at least a Bachelor's degree, or the equivalent, in the area of Nursing, or a related field, when hiring "a Nursing Instructor and Adult Educator." As such, even if the AAO were to accept this opinion at face value, it would not be probative of this particular proffered position as a specialty occupation, for the literal reading of the opinion is only that some employers impose the referenced educational or educational equivalency requirement. Further, this opinion is not a sufficient premise for the evaluator's concluding opinion above, that is, that "the degree is considered an industry standard requirement for the position."

More importantly, the AAO finds that neither the body of the "Expert Opinion Evaluation" nor its attached resume establishes that the evaluator is an expert in the area in which she presents herself as such. Neither these two documents nor any other evidence in the record of proceeding establishes that the evaluator has in any way attained such knowledge about the actual performance requirements of positions such as the one proffered here that her opinion should be accorded any deference by USCIS.

Moreover, the AAO find that the "Expert Opinion Evaluation" is conclusory, and for this additional reason also, does not merit significant evidentiary weight. The evaluator cites no studies, reports, statistics, other authoritative references, or any substantive basis for her conclusions.

For all of the above reasons, the AAO accords no probative weight to the "Expert Opinion Evaluation." 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).

Finally, the AAO finds that the third education-related document submitted in response to the NOIR – the *O*NET Online* Summary Report for the occupational classification Training and Development Managers – neither addresses the proffered position in particular nor indicates that Training and Development Managers constitute an occupational classification with a minimum entry requirement of at least a bachelor's degree, or the equivalent, in a specific specialty.

The director revoked approval of the visa petition on May 6, 2009 finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation.

On appeal, counsel submits various letters, a vacancy announcement, documents previously submitted into the record and a brief. On appeal, counsel states, in part, that a revocation of an approved visa petition must be based on a finding of gross error, and that there was no such error.

Many of the letters submitted are essentially employment references or character references pertinent to the beneficiary, and have no direct bearing on whether the proffered position qualifies as a specialty occupation. Those letters will not be addressed further.

Next, the AAO notes that it will not consider duties that the appeal attributes to the beneficiary for the first time. A letter from the petitioner's administrator states that, in addition to working as an adult educator/staff developer, the beneficiary is in charge of the petitioner's wound care program, and also works occasionally as an RN supervisor on weekends. A letter from the petitioner's director of nursing states that the beneficiary fills "a supervisory role" and is in charge of the petitioner's wound care program. The AAO observes that the petitioner never previously asserted that the beneficiary was or would be in charge of the petitioner's wound care program, or that he would be a supervisor. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the additional or amended duties asserted on appeal will not be considered.

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.[1]

The *Handbook's* chapter "Registered Nurses" describes the requisite education for registered nurse positions as follows:

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[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 available online.

> 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.

The AAO finds that counsel is incorrect to the extent that he argues on appeal that the proffered position does not comport with the nursing occupation. In pertinent part, the *Handbook's* chapter on registered nurses addresses the category of Nurse Educators as follows:

> *Nurse educators* plan, develop, implement, and evaluate educational programs and curricula for the professional development of student nurses and RNs.[2]

That chapter makes clear that entry into a registered nurse specialty – other than the four advanced practice specialties outlined in the *Handbook* (*clinical nurse specialist, nurse anesthetist, nurse midwife,* and n*urse practitioner*) do not normally require a bachelor's degree, or the equivalent, in a specific specialty. The AAO notes that the *Handbook* also states, "A bachelor's or higher degree is often necessary for administrative positions, research, consulting, and teaching." While this indicates that many registered nurse positions that involve teaching require a bachelor's degree, it also indicates not only that such a requirement is not universal but also that the actual educational requirements of a particular position would depend upon the specific performance requirements of that particular position.[3]

The AAO will now consider the various alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Again, it is important that the petitioner understand that, as earlier explained, in conformity with the statutory and regulatory definitions of the term "specialty occupation," the "degree" references in these criteria are to a bachelor's degree or higher in a specific specialty directly and closely related to the performance requirements of the position in question.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty-occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

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[2] In fact, upon review of the *Handbook* chapter "Human Resources, Training, and Labor Relations Managers and Specialists," on the Internet at *http://data.bls.gov/cgi-bin/print.pl/oco/ocos021.htm*, which encompasses the type of position claimed by counsel on appeal, the AAO finds that the Registered Nurse occupation, and the Nurse Educator subset in particular, more closely comports with the proffered position as described in the record of proceeding.

[3] Further, the *Handbook* does not make clear that those registered nurse teaching positions that require a bachelor's degree require that such a degree be in any specific specialty.

The AAO here incorporates and applies its earlier analysis with regard to the "Expert Opinion Evaluation" and here restates its finding that that document merits no deference and is not probative evidence that the proffered position merits recognition as a specialty occupation position.

As reflected in this decision's previous comments regarding relevant information in the *Handbook*, the *Handbook* does not support the proposition that the proffered position requires at least a bachelor's degree, or the equivalent, in a specific specialty. The petitioner has provided no evidence that positions teaching continuing education classes to nurses categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty. While the *Handbook* allows for the possibility that a particular position may require such a degree, it leaves it as incumbent on the petitioner to provide sufficient evidence that the specific performance requirements of its particular position require such a degree or degree equivalency. This the petitioner has not done.

To the extent that they are described in this record of proceeding and supplemented by the documentary evidence regarding the subjects that may be pertinent to practice as an RN or RN nurse aide for this particular petitioner, which is a long-term care facility and not a hospital, the proffered position and the duties comprising it do not establish the proffered position as one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. Accordingly the petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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 reflected in this decision's earlier comments with regard to the relevant information in the *Handbook*, that resource does not indicate that the petitioner's industry requires at least a bachelor's degree in a specific specialty for the particular type of position for which this petition was filed.

For the reasons already discussed, the AAO accords no probative weight to the "Expert Opinion Evaluation" and, in particular, finds an insufficient factual foundation for the evaluator's comments regarding a standard hiring practice in the industry.

Further, the AAO notes that the record of proceeding does not contain submissions from a relevant professional association or from firms or individuals in the industry attesting to the recruiting and

employment practices common to the petitioner's industry for positions that are both parallel to the one proffered here and also within organizations similar to the petitioner.

The only other evidence in the record pertinent to the recruitment and hiring practices of other organizations is the single vacancy announcement provided. That vacancy announcement submitted was placed by the St. Joseph's Hospital and Medical Center in Phoenix, Arizona for an RN - Nurse Educator - Adult ICU.

That announcement states that applicants for the position at St. Joseph's must have bachelor's degrees and be registered nurses. The AAO notes, again, that a person might obtain a registered nursing license based on, for instance, an associate's degree in nursing, and have a bachelor's degree in some other subject. That announcement does not state that the position requires a bachelor's degree in nursing or in any other specific specialty.

Further, even if that vacancy announcement were placed by an organization in the petitioner's industry and otherwise similar to the petitioner for a position parallel to the proffered position, and even if the announcement unambiguously stated that the position required a bachelor's degree in nursing, a single vacancy announcement would be insufficient to demonstrate an industry-wide requirement of a minimum of a bachelor's degree or the equivalent in nursing or any other specific specialty for such positions.

The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

As noted earlier in this decision, the proposed duties as described in this record of proceeding generally comport with those of a nurse educator as described in the *Handbook*, and the *Handbook's* chapter on registered nurses does not indicate that a bachelor's degree, or the equivalent, in a specific specialty is normally required to work as a nurse educator. Further, the mere assertion by the petitioner and counsel that the proposed duties require a minimum of a bachelor's degree or the equivalent in nursing, or any other specific specialty, absent corroborating evidence or analysis, is insufficient. Such elements are lacking in this record of proceeding. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The only other evidence in the record pertinent to the relationship between the described duties and a bachelor's degree in nursing is the "Expert Opinion Evaluation.". The AAO will further comment on that document below, but here again the AAO incorporates by reference and applies its previous comments and conclusions regarding that document's lack of probative weight.

Also, the professor/evaluator did not attempt to reconcile her statement that the proffered position requires a bachelor's degree in nursing or a related field with the aforementioned statement in the job description document that suggested that a bachelor's degree in any health care field or educational field would suffice. She did not attempt to reconcile it with the petitioner's administrator's assertion that the proffered position requires a bachelor's degree in health science. Further, the professor/evaluator stated that the skills, knowledge, and analytical thinking acquired through obtaining of a bachelor's degree in nursing are considered necessary to the performance of the listed duties, but did not further describe the requisite skills, knowledge, and analytical thinking taught to nursing students in a bachelor's degree program or describe any more concretely how they related to any of the described duties.

No necessary linkage has been demonstrated between a bachelor's degree in nursing and the ability to prepare educational material, prepare in-house orientation and on-the-job training, arrange seminars and instruction, etc. The evaluation asserts its conclusion that a bachelor's degree is essential to those duties, but does not support or explain that conclusion. It does not adequately explain why those duties could not be performed by, for instance, a person with a bachelor's degree in some other subject, or by a person with an associate's degree in nursing, or by a person with no degree at all.

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 record contains no evidence pertinent to anyone that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore provided evidence upon which to apply the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Accordingly, that criterion has not been satisfied.

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 them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO finds that the record of proceeding contains no evidence establishing the relative complexity and specialization of the proposed duties; and there is no indication that those duties are so complex and specialized that their performance would require knowledge associated with at least a bachelor's degree in nursing or some other specialized, rather than knowledge associated with less

educational attainment, to include, for instance, an associate's degree in nursing that has led to the award of RN status.

As the petitioner has not demonstrated that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

Because the petitioner has not demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), the visa petition should not have been approved. The AAO finds that the director was correct in his determination that approval of the petition should be revoked, in that revocation is compelled by the revocation-on-notice provision at 8 C.F.R. § 214.2(h)(10)(iii)(A)(5).

For all of the reasons discussed above, the approval violated the requirements set forth at 8 C.F.R. § 214.2(h) for establishing a specialty occupation. Further, the AAO finds that the approval constituted gross error, for proper application of the relevant regulations at 8 C.F.R. § 214.2(h) precludes approval of the petition. However, the AAO also finds that the erroneous approval also constitutes gross error and that this also is a sufficient basis for revocation.

The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. *See Black's Law Dictionary* 562, 710 (7th Ed. 1999)(defining the types of legal "error" and legal terms using "gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "gross negligence." *Webster's II New College Dictionary* 491 (2001).

As the term "gross error" was created by regulation, it is most instructive to examine the comments that accompanied the publication of the rule in the Federal Register. The term "gross error" was first used in the regulations relating to the revocation of a nonimmigrant intracompany transferee (L-1) petition. In the 1986 proposed rule, an L-1 revocation would be permitted if the approval had been "improvidently granted." 51 Fed. Reg. 18591, 18598 (May 21, 1986)(Proposed Rule). After receiving comments that expressed concern that the phrase "improvidently granted" might be given a broader interpretation than intended, the agency changed the final rule to use the phrase "gross error." 52 Fed. Reg. 5738, 5749 (Feb. 26, 1987)(Final Rule). As an example of gross error in the L-1 context, the drafter of the regulation stated:

> This provision was intended to correct situations where there was gross error in approval of the petition. For example, after a petition has been approved, it may later be determined that a qualifying relationship did not exist between the United States and the foreign entity which employed the beneficiary abroad.

Id. In the context of the L-1 nonimmigrant classification, the phrase "qualifying relationship" is a fundamental requirement for visa eligibility and is defined by the regulation. *See* 8 C.F.R.

§ 214.2(l)(1)(ii)(G). However, this element of eligibility is not a simple determination or one where there is always a clear answer. To determine whether a qualifying relationship exists between the United States and foreign entities, USCIS must examine the elements of "ownership and control" by reviewing corporate stock certificates, a stock certificate registry or ledger, corporate bylaws, the minutes of relevant annual shareholder meetings, proxy agreements, and other documentation. *See Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). As authorized by Congress, USCIS is charged with the authority to make this determination based on the implementing regulations. *See generally,* section 214 of the Act, 8 U.S.C. § 1184.

Accordingly, upon review of the regulatory history and the common usage of the term, the AAO interprets the term "gross error" to be an unmitigated or absolute error, such as an approval that was granted contrary to the requirements stated in the statute or regulations. Regardless of whether there can be debate as to the legal determination of eligibility or whether there is a "clear answer," any approval that USCIS determines to have been granted contrary to law is an unmitigated error. This view of "gross error" is consistent with the example provided in the Federal Register and with the controlling H-1B regulation, which specifically puts a violation of the regulations on par with "gross error." Again, the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) specifically states: "The approval of the petition violated paragraph (h) of this section ***or*** involved gross error." (Emphasis added.)

Stepping back from the minutiae of the regulatory requirements, it warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a minimum qualification, a baccalaureate or higher degree in the specialty. 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, 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, and which fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

As discussed at length in this decision, the petitioner has not established that the particular position that is the subject of this petition requires the type of knowledge that would normally be attained only by at least a baccalaureate degree, or the equivalent, in a specific specialty. Therefore, the approval that was revoked by the director was grossly erroneous and contrary to the intent of Congress.

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 approval of the petition will be revoked.

ORDER: The appeal is dismissed. Approval of the petition is revoked.