

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



U.S. Citizenship
and Immigration
Services

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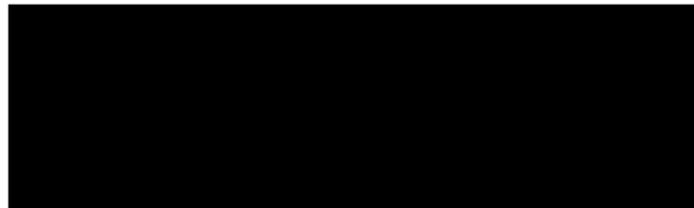


DATE: **DEC 21 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

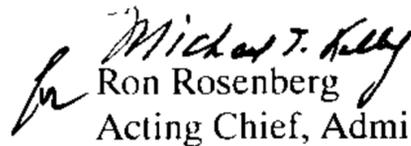
ON BEHALF OF PETITIONER:



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.

Thank you,


Ron Rosenberg
Acting 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 The director's decision will be withdrawn and the petition will be remanded for further consideration and action.

On the Form I-129 visa petition, the petitioner describes itself as a nursing facility established in 2004. In order to employ the beneficiary in what it designates as a director of nursing position, the petitioner seeks 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 on the basis of her determination that the petitioner had failed to demonstrate that the beneficiary qualifies to perform the duties of the proffered position.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding as presently constituted, the AAO finds that the evidence therein does not support a finding that the proffered position is other than that of a Registered Nurse (RN); and, therefore, the evidence of record does not support the director's finding that the beneficiary's educational credentials did not qualify him to serve in the proffered position. Therefore, the director's decision will be withdrawn.

However, the director's decision did not assess the proffered position as an RN position, did not specifically address the specialty occupation issue, and, in particular, did not determine whether, as a position within the Registered Nurses occupational, the particular position that is the subject of this petition qualifies as a specialty occupation position. Accordingly, the petition is also remanded for a new decision.

This new decision must address and determine this issue of whether the petitioner has established that the performance requirements of the duties, responsibilities, and/or other material aspects of the particular position here proffered qualify it as an RN position that is a specialty occupation.

In its adjudication of this matter the AAO will first address its finding that the proffered position is not a specialty occupation. Only then will it address the beneficiary's qualifications to perform its duties. The AAO believes addressing these issues in this order will greatly ease the reading of this decision.

In its April 5, 2011 letter the petitioner claimed that the beneficiary would perform the following tasks:

- Assuming ultimate responsibility for coordinating plans for the total care of each resident which comply with the orders of the resident's physician;
- Developing, maintaining, and upgrading nursing service objectives, standards for nursing practice, nursing procedure manuals, and written job descriptions for each level of nursing personnel;
- Assuming responsibility for the recruitment, selection, hiring, orientation, training, and dismissal of nursing personnel;
- Monitoring head nurses and supervisors in order to ensure compliance with policies and procedures;
- Ensuring that annual competency evaluations and performance reviews are completed in a timely manner;
- Participating in the facility's "Performance Improvement Program";
- Ensuring that a comprehensive orientation program is conducted for all new nursing staff;
- Providing written short- and long-term plans designed to implement and facilitate the achievement of department objectives;
- Ensuring that adequate nursing staff is available, based upon facility and census requirements;
- Developing and enforcing written departmental policies and procedures;
- Preparing a written plan of response by nurses in the case of internal or external disaster, and preparing that plan for implementation in case of necessity;
- Developing a nursing master staffing plan utilizing input from unit-level nursing personnel;
- Determining and communicating the resources needed for the nursing department to carry out its functions and submitting written reports as required;
- Estimating the need for facilities, supplies, and equipment;
- Preparing and administering the nursing department's budget;
- Maintaining an effective system of records and reports; and
- Monitoring the provision and implementation of educational programs for nurses.

The director did not question the proffered position's status as a specialty occupation in her April 26, 2011 decision denying the petition. Instead, as indicated above, after finding the duties of the proffered position analogous to those performed by Medical and Health Services Managers as described in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director found the beneficiary unqualified to perform the duties of such a position. *In this regard, the AAO notes that if the director's decision had been correct in determining that the petition was filed for a Medical and Health Services Manager position then the petition should have been denied because the Labor Condition Application (LCA) submitted to support the petition was not certified for, and therefore does not correspond to, such a position. The LCA was certified for a Registered Nurse position - not a Medical and Health Services Manager position.*

As indicated above, the AAO finds that the record of proceeding as currently constituted does not establish that the proffered position qualifies for classification as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(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 and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical

element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The duties proposed for the beneficiary were set forth earlier in this decision. The AAO finds that, even when read in the aggregate and as supplemented by the supporting documents submitted into this record of proceeding, the descriptions of the proposed duties and the position to which they are ascribed, do not establish the proposed duties, or the position that they comprise, as so complex, specialized, or unique as to require the practical and theoretical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as required to establish a specialty occupation in accordance with the definitions at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). The extent to which those duties were described lacks substantive details of how those functions would be performed and also fails to show that performance of those functions would require the practical and theoretical application of any particular educational level of a body of knowledge in any specific specialty. For example, although the petitioner claimed that the beneficiary would spend ten percent of his time developing a "nursing master staffing plan," it did not provide a substantive, meaningful description of what the beneficiary would actually be doing while carrying out this job function. Nor did the petitioner explain with any degree of specificity what the beneficiary would actually be doing while maintaining "an effective system of records and reports" or precisely explain how he would "ensuring that adequate nursing staff" is available. Nor is the petitioner's job description sufficiently detailed so as to allow the AAO to discern what the petitioner actually means when it says that the beneficiary will provide written short- and long-term plans designed to implement and facilitate the achievement of department objectives. Nor does the petitioner expound upon its claim that the beneficiary will "[d]etermine and communicate" the resources needed for the nursing department to carry out its functions or provide a meaningful description of how the beneficiary will assume "ultimate responsibility for coordinating plans for the total care of each resident." Such generalized statements do not establish any necessary correlation between such knowledge and the attainment of at least a bachelor's degree, or the equivalent, in a specific specialty.

Having made this preliminary finding, the AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.¹

As explained briefly above, the AAO does not agree with the director's determination that the duties of the proffered position align with those of the Medical and Health Services Managers occupational classification as such duties are described in the *Handbook*. Instead, the AAO finds that the duties of the proffered position are similar to those of Registered Nurses, and notes, again, that the LCA submitted by the petitioner in support of the instant position indicates that the occupational classification for the position is "Registered Nurses," SOC (O*NET/OES) Code 29-1111.00.²

¹ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

² Even if it were determined that the duties of the proffered position were in fact analogous to those of Medical and Health Services Managers the petition would be denied over the petitioner's failure to submit an LCA that corresponds to the petition, as the LCA was not certified for a medical and health services manager. As noted, it was certified for a Registered Nurse.

The U.S. Department of Labor (DOL) has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA.

With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

The *Handbook's* discussion of the duties typically performed by registered nurses states, in pertinent part, the following:

Registered nurses (RNs) provide and coordinate patient care, educate patients and the public about various health conditions, and provide advice and emotional support to patients and their family members. . . .

Registered nurses typically do the following:

- Record patients' medical histories and symptoms
- Give patients medicines and treatments
- Set up plans for patients' care or contribute to existing plans
- Observe patients and record the observations

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. If it were determined that the duties of the proffered position were actually those of a medical and health services manager, then it would have to be found that the petitioner failed to submit an LCA that corresponds to the claimed duties of the proffered position, as the proposed duties as described in the record of proceeding would not comprise the type of position (Registered Nurses) designated in the LCA.

The appropriate wage level is determined only after selecting the most relevant O*NET occupational code classification. *See* Employment & Training Administration, U.S. Dept. of Labor, *Prevailing Wage Determination Policy Guidance*, November 2009, available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed November 8, 2012). The *Prevailing Wage Determination Policy Guidance* states further that “[t]he O*NET description that corresponds to the employer’s job offer shall be used to identify the appropriate occupational classification” for determining the prevailing wage for the LCA. This determination should be made by “consider[ing] the particulars of the employer’s job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected.” *See id.*

For all of these reasons, it is clear that if the duties of the proffered position were in fact analogous to those of Medical and Health Services Managers the petition should have been denied due to the petitioner’s failure to establish that the LCA actually corresponds to this petition.

- Consult with doctors and other healthcare professionals
- Operate and monitor medical equipment
- Help perform diagnostic tests and analyze results
- Teach patients and their families how to manage their illnesses or injuries
- Explain what to do at home after treatment
- Some registered nurses oversee licensed practical nurses, nursing aides, and home care aides. For more information, see the profiles on licensed practical and licensed vocational nurses; nursing aides, orderlies, and attendants; and home health and personal care aides.

Registered nurses sometimes work to promote general health by educating the public on warning signs and symptoms of disease. They might also run general health screenings or immunization clinics, blood drives, or other outreach programs.

Most registered nurses work as part of a team with physicians and other healthcare specialists.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

Registered nurses' duties and titles often depend on where they work and the patients they work with. They can focus on the following specialties:

- A specific health condition, such as a diabetes management nurse who helps patients with diabetes or an oncology nurse who helps cancer patients
- A specific part of the body, such as a dermatology nurse working with patients who have skin problems
- A specific group of people, such as a geriatric nurse who works with the elderly or a pediatric nurse who works with children and teens
- A specific workplace, such as an emergency or trauma nurse who works in a hospital or stand-alone emergency department or a school nurse working in

an elementary, middle, or high school rather than in a hospital or doctor's office.

Some registered nurses combine one or more of these specialties. For example, a pediatric oncology nurse works with children and teens who have cancer.

Many possibilities for specializing exist. The following list includes just a few other examples of ways that some registered nurses specialize:

Addiction nurses care for patients who need help to overcome addictions to alcohol, drugs, tobacco, and other substances.

Cardiovascular nurses treat patients with heart disease and people who have had heart surgery.

Critical care nurses work in intensive care units in hospitals, providing care to patients with serious, complex, and acute illnesses and injuries that need very close monitoring and treatment.

Genetics nurses provide screening, counseling, and treatment of patients with genetic disorders, such as cystic fibrosis and Huntington's disease.

Neonatology nurses take care of newborn babies.

Nephrology nurses treat patients who have kidney-related health issues that are attributable to diabetes, high blood pressure, substance abuse, or other causes.

Rehabilitation nurses care for patients with temporary or permanent disabilities.

Advanced practice registered nurses may provide primary and specialty care, and, in most states, they may prescribe medicines. All states specifically define requirements for registered nurses in these four advanced practice roles:

- **Clinical nurse specialists** provide direct patient care and expert consultations in one of many nursing specialties, such as psychiatric-mental health.
- **Nurse anesthetists** provide anesthesia and related care before and after surgical, therapeutic, diagnostic, and obstetrical procedures. They also provide pain management and emergency services.
- **Nurse-midwives** provide care to women, including gynecological exams, family planning advice, prenatal care, assistance in labor and delivery, and care of newborns.

- **Nurse practitioners** serve as primary and specialty care providers, providing a blend of nursing and primary care services to patients and families.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Registered Nurses," <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-2> (accessed November 8, 2012).

While the petitioner does not indicate that the beneficiary would provide direct patient care, the *Handbook's* discussion excerpted above accounts for supervisory positions such as the one proposed here.

The *Handbook* states the following with regard to the educational requirements for entrance into this field:

Registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. Registered nurses must also be licensed.

* * *

In all nursing education programs, students take courses in nursing, anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take four years to complete; ADN and diploma programs usually take two to three years to complete.

All programs also include supervised clinical experience in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in extended and long-term care facilities, public health departments, home health agencies, or ambulatory (walk-in) clinics.

Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse.

Many registered nurses with an ADN or diploma 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. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

* * *

In all states, the District of Columbia, and U.S. territories, registered nurses must have a nursing license.

To become licensed, nurses must graduate from an approved nursing program and pass the National Council Licensure Examination, or NCLEX-RN.

Other requirements for licensing vary by state. . . .

* * *

Most registered nurses begin as staff nurses in hospitals or community health settings. With experience, good performance, and continuous education they can move to other settings or be promoted to positions with more responsibility.

In management, nurses can advance from assistant unit manager or head nurse to more senior-level administrative roles, such as assistant director, director, vice president, or chief of nursing. Increasingly, management-level nursing positions require a graduate degree in nursing or health services administration. Administrative positions require leadership, communication and negotiation skills, and good judgment.

Id. at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4>.

At the outset of its analysis under this criterion, the AAO notes that the petitioner designated the proffered position as a Level I position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation, and it signifies that the beneficiary is only expected to possess a basic understanding of the occupation.³

³ The aforementioned *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage level indicates that the proffered position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally required for this occupational category. Rather, the *Handbook* states that there are three general paths for becoming a registered nurse, i.e., a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program. The *Handbook* states that associate's degrees and diploma programs for this occupation usually take two to three years to complete. The narrative of the *Handbook* indicates that generally, licensed graduates of any of the three types of educational programs (bachelor's, associate's, or diploma) qualify for entry-level positions. Nor does the *Handbook* state a minimum requirement for at least a bachelor's degree in nursing, or its equivalent for management positions; instead, it indicates only that graduate degrees are "increasingly required." An increasing preference for a graduate degree does not equate to a normal minimum hiring requirement for a graduate degree, or even a bachelor's degree, in a specific specialty or the equivalent. For all of these reasons, the *Handbook* does not indicate that the proffered position falls under an occupational group that categorically qualifies as a specialty occupation.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to

the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor does the record of proceeding contain any other evidence to establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in parallel positions among similar organizations.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Rather, the AAO finds, that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic nursing duties, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the proffered position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the

beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.⁴ In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position of only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

It should be noted that 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 assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To

⁴ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the occupation.

interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The record of proceeding contains no evidence regarding the petitioner's past recruitment and hiring practices for any of its prior directors of nursing. As the record of proceeding lacks any evidence for consideration under this criterion, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires it to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As noted earlier, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance (Revised November 2009)* describes the next higher wage-level as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level

It would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only “moderately complex tasks that require limited judgment.” The fact that this higher-than-here-assigned, Level II wage rate itself indicates performance of only “moderately complex tasks that require limited judgment,” is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer’s job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment’s procedures and expectations. They generally have management and/or supervisory responsibilities.

The AAO again incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the petitioner's designation of the proffered position on the LCA as a low-level, entry position relative to others within the occupation.

The AAO also finds further that, separate and apart from the petitioner's wage-level designation of Level I on the LCA, it has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). As evident in the earlier quoted duty descriptions from the petitioner's August 28, 2010 letter, the petitioner has not developed the proposed duties with sufficient detail and substantive information about what their performance would entail to establish the complexity and specialization required to satisfy this criterion.

In sum, as the record of proceeding as currently constituted has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot now be found that the proffered position is a specialty occupation. As the director did not address this issue, the matter will be remanded for further action.

The AAO will now address the director's determination that the beneficiary is not qualified to perform the duties of the proffered position. As stated above, the AAO does not agree with the director's determination that the duties of the proffered position align with those of Medical and Health Services Managers as such duties are described in the *Handbook*, and the beneficiary's qualifications to perform the duties of a Medical and Health Services Manager are consequently irrelevant. The AAO finds that the record of proceeding establishes that the beneficiary qualifies to perform the duties of the proffered position, which is that of a Registered Nurse, as he possesses both the equivalent of a bachelor's degree in nursing from an accredited United States college or university and the appropriate license to be immediately eligible to engage in the occupation.⁵

⁵ The AAO acknowledges the USCIS policy of provisionally approving H-1B petitions for a one-year period where the only impediment to required licensure is the overseas alien beneficiary's lack of a social security number, *see* Memorandum from [REDACTED] Acting Assistant Commissioner, INS Office of Adjudications, *Social Security Cards and the Adjudication of H-1B Petitions*, HQ 70/6.2.8 (Nov. 20, 2001) (hereinafter referred to as the Cook Memo). The Cook Memo's continuing applicability is acknowledged in the Memorandum from [REDACTED] Deputy Associate Director, Domestic Operations, *Adjudicator's Field Manual Update: Accepting and Adjudicating H-1B Petitions When a Required License Is Not Available Due to State Licensing Requirements Mandating Possession of a Valid Immigration Document as Evidence of Employment Authorization*, HQISD 70/6.2.8 (Mar. 21, 2008).

USCIS allows for provisional approval of a petition for a one-year period, in order to allow a beneficiary to travel to the United States to obtain licensure, in the very limited circumstances where the beneficiary has met all of the pertinent State's licensure requirements except possession of a social security number or

Accordingly, the director's sole ground for denying the petition is withdrawn. However, because the record of proceeding as presently constituted does not establish that the proffered position is a specialty occupation, the matter will be remanded to the director for further action on that issue.

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 been met in part. Accordingly, the director's decision will be withdrawn and the matter will be remanded for entry of a new decision.

Upon remand, the director may, of course, request such additional evidence, if any, as may be deemed necessary, in the director's sole exercise of discretion, to decide the merits of the petitioner's contention that the proffered position qualifies as a specialty occupation.

possession of a valid immigration document to establish his or her authorization to work in the United States. The Cook Memo states, in pertinent part, the following:

Certain states require that an H-1B nonimmigrant be issued a social security card before the state or local licensing authority will issue a professional license to the alien to work in that jurisdiction. According to the regulations of the Social Security Administration (SSA), an H-1B alien is not able to obtain a social security card unless they [sic] are physically present in the United States. Some H-1B petitions in these cases have been denied because the alien beneficiary has not yet received his or her license.

Most recently, this issue has arisen regarding the adjudication of H-1B petitions filed for certain public high school teachers. In the case of the teachers, the Immigration and Naturalization Service (INS) has been receiving H-1B petitions filed on behalf of public school teachers that are not supported by the required license. The teachers are unable to obtain licensure solely because they cannot obtain a social security card because they are not physically present in the United States.

In order to avoid this situation and accommodate the needs of H-1B petitioners, INS [now USCIS] officers involved in the adjudication of H-1B petitions are instructed to use the following guidance. An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period of 1-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the SSA. Petitions filed for these aliens must contain evidence from the state licensing board clearly stating that the only obstacle to the issuance of state licensure is the lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory requirements for the occupation have been met. At the time an extension application is filed by the alien, the adjudicator should determine that the required license was obtained. If it has not been obtained at that time the application should be denied.

The record contains a June 17, 2010 letter from the California State Board of Registered Nursing establishing that the beneficiary's lack of a social security number is his only impediment to obtaining a permanent California License as a Registered Nurse.



ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.