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

U.S. Citizenship and Immigration Services

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[redacted]

Date: FEB 02 2012 Office: CALIFORNIA SERVICE CENTER File: [redacted]

IN RE: Petitioner: Beneficiary: [redacted]

PETITION: [redacted]

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,

Michael T. Kelly

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on September 9, 2009. The petitioner indicated that it is a for-profit, provider of hospice care services with 139 employees and a gross annual income of approximately $3 million and a net annual income of approximately $104,700.

Seeking to employ the beneficiary in what it designates as an RN (Registered Nurse) health information analyst position, the petitioner filed this H-1B petition in an endeavor 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 November 18, 2009, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; (5) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO concurs with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. Accordingly, the director's decision will be affirmed, and the petition will be denied.

Later in this decision, the AAO will also address two additional, independent grounds for denial of the petition, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to offer the beneficiary an adequate wage for the proffered position under the applicable regulations, and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, for these reasons as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.[1]

The primary issue before the AAO is whether the position qualifies 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.

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

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

> (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 the following:

> 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. 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.

The petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as an RN health information analyst. The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 22, 2009. Specifically, the director requested additional information from the petitioner to demonstrate that the proffered position of RN health information analyst is a specialty occupation. The petitioner was asked to provide additional evidence, including a more detailed description of the work to be performed by the beneficiary for the entire period requested, specifying the specific job duties, the percentage of time to be spent on each job duty, the level of responsibility and the hours per week of work. The director also asked the petitioner to explain why the work to be performed requires the services of a person who has a college degree or the equivalent in the occupational field.

In response to the RFE, the petitioner provided additional information regarding the proffered position. The director reviewed the documentation and denied the petition, finding that the petitioner had not satisfied any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualified for classification as a specialty occupation.

On December 21, 2009, counsel for the petitioner submitted an appeal. Counsel claims that the director's basis for denial was erroneous, and contends that the petitioner satisfied the evidentiary requirements.[2] In support of these assertions, counsel submits a brief and additional

[2] In the appeal, counsel asserts that the director "erroneously believes that in order for an H-1B petition to be approved by USCIS, the petition must satisfy all of the four criteria." However, based upon its review of the entire record of proceeding, the AAO is not persuaded that counsel's view is correct. In this regard,

documents.

The two-page "Job Description" document submitted as part of the petitioner's response to the RFE, addresses the proffered position in two sections, separately entitled "Duty and Responsibility" and "Description." These sections read as follows:

Duty and Responsibility:

- Coordinate with the IT Manager in the design and implementation of nursing information systems and nursing clinical electronic patient documentation systems. Design test and evaluate the company's computer network. Research and recommend necessary hardware and software as necessary. (15% [of time])

- Work with other departments, physicians, nurses and staff at all levels and vendors throughout the implementation phases of new systems. Train nursing staff on the use of health information systems while providing nursing care to patients. Maintain documentation and ensure that department reporting procedures comply with facility's policies and procedures. Implement and manage the facility's electronic medical records as well as physician order entries and other related clinical IT projects. (85% [of time])

Description:

- Immediately upon hire by the company, the [redacted] will regularly meet and work with [the petitioner's] group IT Manager to test and evaluate the entire [petitioner] group's computer network to determine and select the appropriate health information system that will facilitate the work flow of the nursing and medical staff and the delivery of care to company's patients;

- Assist with the development of testing plans. Perform functional/unit, system, parallel, volume, and simulation testing as directed by test plans;

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the AAO notes in particular (1) that, in the RFE, the director outlined the standards for a specialty occupation position (as specified in 8 C.F.R. § 214.2(h)(4)(iii)(A)) and stated that the petitioner must meet one or more of the criteria; (2) that the director's decision explicitly stated (at the bottom of page 3), that "[when attempting to establish whether the position is a specialty occupation the petitioner must show that the position meets one of four criteria," and that those criteria are found at 8 C.F.R. § 214.2(h)(4)(iii)(A); and (3) and that the director's decision summarized the basis of for denying the petition as follows: "The petitioner has failed to establish that any of the four factors enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) are present in this proceeding." In any event, the AAO's decision to dismiss the appeal is based upon its own independent analysis of the record of proceeding, which resulted in its determination to dismiss the appeal because the petitioner has failed to satisfy at least one criterion specified in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

- Create and maintain program level documentation that is understandable to other staff needing to test;

- While working the floor as an RN, and in collaboration with the nursing director and other nursing staff, evaluate the work flow and recommend re-engineering of processes around the utilization of computerized applications to maximize efficiency and effectiveness in the nursing process and delivery of health care to patients;

- Conduct research using the internet and other methods to survey other companies and nursing facilities, and contact vendors to recommend appropriate hardware and software;

- Prepare and submit to management the request for proposals including analysis of return on investment;

- Provide proactive user support of the health information management system including training and education;

- Respond appropriately to requests and concerns from nurse users and others affected by the health information management system;

- Assist in evaluation and development of training and in-service programs. Participate in in-service and computer training of current and incoming nursing staff;

- Assist in developing and updating user reference materials and reference material and training guides;

- Participate in system analysis and research related to the health information management system;

- Maintain an up-to-date knowledge of current trends and issues in health care, nursing practice, healthcare informatics, and [redacted] standards;

- Provide ongoing evaluation of system to ensure compliance with [redacted] and other regulatory agency requirements related to clinical data integrity, documentation standards and quality of care indicators;

- Collect data to monitor quality and effectiveness of health informational management system. Analyze quality data to identify opportunities for improving the health information management system.

The AAO notes that the wording of many of the tasks for the proffered position is the same (verbatim) as the description of duties as indicated on the job announcements for positions with other employers (which were provided by the petitioner in response to the RFE).

As a finding applicable to, and hereby incorporated into each discussion of a particular alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO notes that, even considered in the aggregate and in the context of the information provided by the petitioner about its business operations, the proposed duties as described in the record of proceeding convey generalized functions that the beneficiary would perform, but do not convey substantive details regarding work that the beneficiary would actually perform, and, consequently, as so generally described, (1) are not themselves indicative of at least a bachelor's degree level of a body of highly specialized knowledge in nursing, computer science, or any other specific specialty, that must be practically and theoretically applied to perform the proffered position, (2) do not show the proffered position as so complex or unique as to necessitate a person with at least a bachelor's degree, or the equivalent, in a specific specialty, and (3) do not develop the proposed duties with sufficient specificity to establish them as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree, or the equivalent, in a specific specialty.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The petitioner indicated that the beneficiary would be employed as an RN health information analyst. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered 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 alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 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.

In its letter of support dated August 28, 2009, the petitioner stated that the following education and experience requirements are necessary for the performance of the proffered RN health information analyst position:

> We require a bachelor's degree in computer science or related field, plus formal training in the field of nursing or equivalent nursing experience. We require a

> California RN license, or at least a passing score in the US NCLEX-RN exam. We do not require prior nursing informatics experience as this position will be directly supervised by an IT Manager and Administrator.

The petitioner did not provide alternative requirements for the proffered position with its initial Form I-129 petition.[3]

The AAO will now address the evidentiary impact of key documents upon which the petitioner relies as establishing that the proffered position is a specialty occupation. These are (1) the chapter on registered nurses in the U.S. Department of Labor's *Occupational Outlook Handbook* (OOH); (2) documentation from the website of the American Nurses Credentialing Center (ANCC); and (3) documentation referred to by counsel as "career summaries posted by nursing schools."

As the following comments will demonstrate, the listed submissions (a) do not support the proposition for which they were submitted, namely, that the proffered position is a specialty occupation, and (b) in fact indicate that the petition must be denied for its failure to include

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[3] In response to the RFE, the petitioner claimed that "[s]ome employers require a BS Nursing degree plus several years of experience in information technology. Others require a BS degree in Computer science plus several years [of] experience in nursing or healthcare field. It has been difficult to find an applicant who meets these minimum requirements." This suggests that the petitioner would accept an applicant for the proffered position who possessed either a "BS degree in computer science" with several years of experience in nursing or healthcare or a "BS Nursing degree" with several years of experience in information technology (IT).

However, the AAO observes that, as noted previously, the petitioner stated in the initial petition that a bachelor's degree in computer science or a related field, **plus** formal training in the field of nursing or the equivalent nursing experience along with a California RN license (or a passing score in the US NCLEX-RN exam) are required for the proffered position. (Emphasis added.) The petitioner did not indicate a baccalaureate or higher degree, or the equivalent, in nursing with IT several years of experience was alternatively acceptable for the proffered RN health information analyst position. (It must be further noted that the petitioner indicated that the beneficiary possesses two bachelor's degrees; however, it does not appear that she possesses "several years of experience in information technology" or "several years [of] experience in nursing or the healthcare field.")

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original requirements of the position, but rather denoted new job requirements for the proffered position. 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'r 1998). Therefore, the AAO's analysis will be based on the job requirements submitted by the petitioner with the initial petition.

substantive evidence that actual performance of the proffered position would require the practical and theoretical application of at least a bachelor's degree level of highly specialized knowledge.

When determining whether the record of proceeding establishes that a particular position meets the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), the AAO will routinely review the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[4] Based upon a review of the record of proceeding, the chapter of the *Handbook* most relevant to this proceeding is the chapter "Registered Nurses."[5] It is noted that that in the appeal, counsel concurred that the proffered position falls under this occupational category.

The Registered Nurse occupational category typically includes persons with one of three types of educational credentials. These are (1) a bachelor's of science degree in nursing (BSN), (2) an associate degree in nursing (ADN), and (3) a diploma granted by certain hospitals.

As indicated in the following excerpt from the "Training, Other Qualifications, and Advancement" section of the *Handbook's* "Registered Nurses" chapter, a BSN is neither required for licensure as a Registered Nurse nor normally required for the general range of RN jobs, regardless of their specialty. In pertinent part, this section reads:

> The three typical educational paths to registered nursing are a bachelor's degree, an associate degree, and a diploma from an approved nursing program. Nurses most commonly enter the occupation by completing an associate degree or bachelor's degree program. Individuals then must complete a national licensing examination in order to obtain a nursing license. Advanced practice nurses—clinical nurse specialists, nurse anesthetists, nurse-midwives, and nurse practitioners—need a master's degree.
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> ***Education and training***. There are three typical educational paths to registered nursing—a bachelor's of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. BSN programs, offered by colleges and universities, take about 4 years to complete. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. Diploma programs, administered in hospitals, last about 3 years. Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as a staff nurse. There are hundreds of registered nursing programs that result in an ADN or BSN; however, there are relatively few diploma programs.

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[4] All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site *http://www.bls.gov/OCO/*.

[5] For this chapter, *see* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Registered Nurses, on the Internet at *http://www.bls.gov/oco/ocos083.htm* (visited January 11, 2012).

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

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

There are education programs available for people interested in switching to a career in nursing as well. Individuals who already hold a bachelor's degree in another field may enroll in an accelerated BSN program. Accelerated BSN programs last 12 to 18 months and provide the fastest route to a BSN for individuals who already hold a degree. MSN programs also are available for individuals who hold a bachelor's or higher degree in another field; master's degree programs usually last 2 years.

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

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

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

> ***Other qualifications.*** Nurses should be caring, sympathetic, responsible, and detail oriented. They must be able to direct or supervise others, correctly assess patients' conditions, and determine when consultation is required. They need emotional stability to cope with human suffering, emergencies, and other stresses.
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> RNs should enjoy learning because continuing education credits are required by some States and/or employers at regular intervals. Career-long learning is a distinct reality for RNs.
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> Some nurses may become credentialed in specialties such as ambulatory care, gerontology, informatics, pediatrics, and many others. Credentialing for RNs is available from the American Nursing Credentialing Center, the National League for Nursing, and many others. Although credentialing is usually voluntary, it demonstrates adherence to a higher standard and some employers may require it.

The *Handbook* indicates that a BSN or BSN equivalency is *not* normally a requirement for serving in most nursing specialties in which RNs engage, including the following that the *Handbook's* chapter on registered nurses lists as distinct nursing specialties: diabetes management; dermatology; geriatrics; pediatric oncology; ambulatory care; critical care; emergency or trauma; transport; holistic; home health care; hospice and palliative care; infusion; long-term care; medical-surgical; occupational health; perianesthesia; psychiatric-mental health; radiology; rehabilitation; transplant; addictions; intellectual and developmental disabilities; diabetes management; genetics; HIV/AIDS; oncology; wound, ostomy, and continence; cardiovasucular; gastroenterology; gynecology; nephrology; neuroscience; ophthalmic; orthopedic; otorhinolaryngology; respiratory; urology; neonatology; and gerontology or geriatrics.

Drawing no education-requirement distinction between nurse informaticists and other RN specialties not normally requiring at least a bachelor's degree in a specific specialty, the *Handbook* states that nurse informaticists "manage and communicate nursing data and information to improve decision making by consumers, patients, nurses, and other healthcare providers." In the appeal, counsel asserts that the proffered position falls under the category of nurse informaticists in the *Handbook.* However, despite counsel's assumption to the contrary, the *Handbook* does not indicate that at least a bachelor's degree, or the equivalent, in a specific specialty is normally required for nurse informaticists in the United States.

Specifically, the *Handbook* states that "[s]ome nurses [including nurse informaticists] have jobs that require little or no direct patient care, but still require an active RN license." While the *Handbook* indicates that an RN license may be required for nurse informaticist positions, the *Handbook* does not state that a baccalaureate or higher degree, or its equivalent, is required for this position. More specifically, there is no indication that a bachelor's degree in *nursing and/or computer science* is required for entry into the occupation of nurse informaticists in the United States.

The *Handbook* also indicates that some nurses may become credentialed in specialties, including informatics. The *Handbook* states that credentialing is usually voluntary, although some employers require it.

In the appeal, counsel claims that "the nursing informatics position is an advanced practice nursing specialty for which a bachelor's degree is one of the minimum requirements in order for the to issue a certificate." Counsel further states that "the proffered position in fact is considered to be an advance practice nursing specialty by the American Nurses Credentialing Center." In support of this claim, the petitioner provided a printout from

It must first be noted that counsel's characterization of the proffered position as an "advanced practice nursing" position is in conflict with the *Handbook*, the governing California State Code, and the website.

The AAO will first address the *Handbook's* information on advanced practice nurses. The *Handbook* states that there are four types of advanced practice nurses. They are clinical nurse specialists, nurse anesthetists, nurse-midwives, and nurse practitioners. According to the *Handbook*, at least a master's degree is required for these occupations. Specifically, the *Handbook* 's pertinent section on advanced practice nurses states the following:

> Some RNs choose to become advanced practice nurses, who work independently or in collaboration with physicians, and may focus on providing primary care services. There are four types of advanced practice nurses: clinical nurse specialists, nurse anesthetists, nurse-midwives, and nurse practitioners. 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, such as airway management. Nurse-midwives provide primary care to women, including gynecological exams, family planning advice, prenatal care, assistance in labor and delivery, and neonatal care. Nurse practitioners serve as primary and specialty care providers, providing a blend of nursing and healthcare services to patients and families.
>
> All four types of advanced practice nurses require at least a master's degree. In addition, all States specifically define requirements for registered nurses in advanced practice roles. Advanced practice nurses may prescribe medicine, but the authority to prescribe varies by State. Contact your State's board of nursing for specific regulations regarding advanced practice nurses.

Thus, the *Handbook* does not support counsel's claim that the proffered position, and the duties it encompasses, is considered to be an advance practice nursing specialty.

The AAO will next address the California State Code regarding the term "advanced practice registered nurse." The activities comprising the practice of nursing are outlined in California's Nursing Practice Act, Business and Professions Code. The Nursing Practice Act § 2725.5 reserves the term "advanced practice registered nurse" – and the legal right to use the term – to persons who have been licensed by California to serve in four nursing specialties only, namely, as (1) nurse midwives; (2) nurse anesthetists; (3) nurse practitioners; and (4) clinical nurse specialists. Thus, informatics nursing positions do not fall within the legal term "advanced practice registered nurse" as defined by the California Nursing Practice Act. Thus, counsel's claim that the proffered position is an advanced practice nursing specialty is not supported by the California State Code governing the practice of nursing in the state.

Moreover, the AAO reviewed a printout from the regarding informatics nursing that was provided with the appeal by the petitioner. Upon review of the documentation submitted by the petitioner, the AAO finds that the printout from the ANCC website contradicts counsel's claim that the proffered position is an "advanced practice nursing" position. Specifically, the second page of the excerpt from the website contains two columns of nursing occupations. The first column lists three nursing-practice groups, which are, in the following order: "Nurse Practitioners," "Clinical Nurse Specialists" and "Other Advanced-Level." The second column lists a "Specialties" group. Informatics Nursing appears in the second column under the "Specialties" group (along with a number of other types of nursing practice, including "General Nursing Practice"). Thus, by the terms of the documentation provided by the petitioner from the website – and conflicting with counsel's claim – "Informatics Nursing" is not identified as an advanced practice nursing specialty.

Further, the AAO reviewed . The website specifically states that the certification credential for informatics is a specialty **(non-advanced practice)** nursing credential. The ANCC awards the credential of Registered Nurse – Board Certified for those who pass the informatics exam. The website indicates that "[a]fter meeting the eligibility requirements to take the appropriate specialty (non-advanced practice) certification examination and successfully passing the exam, you are awarded the Registered Nurse – Board Certified (RN-BC) credential."[6] Thus, the website also does not support counsel's assertion.

Upon a complete review of the record, the AAO finds that there is no documentation that supports counsel's claim that the occupation of informatics nursing or the proffered position is considered to be an "advance practice nursing specialty." In fact, the evidence overwhelmingly contradicts counsel's claim. The very fact that counsel makes this claim and states that "the proffered position in fact is considered to be an advance practice nursing specialty by the American Nurses Credentialing Center" undermines her brief – as the documentation does not support her assertion.

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[6] *See* the American Nurses Credentialing Center website at *http://www.nursecredentialing.org/Certification/CertificationPolicies/CredentialsList.aspx* (visited January 11, 2012).

In the appeal, counsel also asserts that the petitioner's proffered position of RN health information analyst is a specialty occupation because "in order to be certified [by the ANCC] in this field, at a minimum the applicant must have a bachelor's degree in Nursing."[7] However, the documentation in the record of proceeding does not support counsel claim.

As previously stated, the petitioner provided a printout from the ANCC website regarding informatics nursing. It must first be noted that the printout from the ANCC website does not describe the minimum requirements for *entry* to the occupation of informatics nursing. The documentation provided by the petitioner from the ANCC website describes the process for voluntary informatics-nursing *certification*.

The first page of the printout provides a list of requirements that must be completed prior to applying for the exam for informatics nursing certification. The AAO observes that the requirements for registering for the exam include "practiced [a] minimum of 2,000 hours in informatics nursing within the last three years." Thus, it is clear that certification is not needed in order to serve as an informatics nurse.[8]

The information from the printout supports the *Handbook's* statement that certification is generally voluntary. Moreover, the does not claim that its certification requirement – for a bachelor's degree in nursing or a related field – is necessary for informatics nursing positions. Further, upon review of the website printout, the AAO also finds that the does *not* assert or indicate that a bachelor's degree in nursing or a related field (or any other field) is necessary for serving as an informatics nurse. Accordingly, the printouts do not support the assertion that at least a bachelor's degree, or the equivalent, in a specific specialty is normally the minimum requirement for entry into the occupation of informatics nurses.

The petitioner also provided documentation referred to by counsel as "career summaries posted by nursing schools." Counsel claims that the documentation "show[s] that a bachelor's degree is routinely required for a nursing informatics career." However, upon a complete review of the

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[7] As previously discussed, the AAO notes that the petitioner stated in its letter of support dated August 28, 2009, that it requires a "bachelor's degree in computer science or related field, plus formal training in the field of nursing or equivalent nursing experience" along with a "California RN license, or at least a passing score in the US NCLEX-RN exam. We do not require prior nursing informatics experience as this position will be directly supervised by an IT Manager and Administrator." The petitioner did *not* state that a bachelor's degree in nursing would be acceptable for serving in the proffered position.

Thus, even if the documentation supported counsel's claim that the proffered position is a specialty occupation because "in order to be certified [by the ANCC] in this field, at a minimum the applicant must have a bachelor's degree in Nursing" (which it does not), the petitioner has failed to establish how this would be relevant to its requirement of a bachelor's degree in *computer scien*ce for the proffered position.

[8] The petitioner expressly stated in its letter dated December 10, 2009 that it does not require the beneficiary be certified by ANCC to serve in the proffered position and that it wishes "to hire an entry-level RN Health Information Analyst." As noted above, the petitioner also specifically stated that prior nursing informatics experience is not required for the proffered position.

information provided, the AAO observes that the documentation does not support counsel's assertion.

Specifically, most of the printouts are abstracts of articles that do not provide any information on the entry requirements for informatics nursing positions. Of the remaining printouts, one of the abstracts states that "[e]ducation for nursing informaticians includes preparation from the baccalaureate level through the doctorate level and national board certification." This statement is vague and does not indicate that at least a bachelor's degree, in a specific specialty, is necessary for entry to the occupation. Another printout provided by the petitioner entitled "DegreeDirectory" states that health informatics is a growing field and that a "Health Informatics degree at the associate's, bachelor's or graduate level can help you launch your career or position you for advancement." In another section of the same printout, it states that a bachelor's degree in computer science is recommended. Thus, the printouts do not support the claim that at least a bachelor's degree, in a specific specialty, is normally the minimum requirement for entry into the occupation. These printouts provided by the petitioner indicate that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

The record of proceeding fails to establish that the duties to be performed by the beneficiary would require the practical and theoretical application of a body of highly specialized knowledge attained by at least a bachelor's degree, or the equivalent, in a specific specialty, as required by the Act and its implementing regulations regarding a position's qualification as an H-1B specialty occupation. There is a lack of evidence in the record of proceeding substantiating the petitioner's claim regarding the nature and educational level of knowledge that would be required for the performance of the beneficiary's work.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." 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)).

The petitioner has not established that the position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, the duties of the proffered position as described in the record of proceeding do not indicate that position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong 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.

As previously mentioned, the petitioner stated that it is a for-profit, provider of hospice care services with 139 employees and a gross annual income of approximately $3 million and a net annual income of approximately $104,700. The petitioner operates "like a home health agency" and services are provided in the patient's home or place of residence (such as a care center or nursing facility). The petitioner does not operate a residential care facility or run an in-patient facility.

In determining whether there is 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. at 1102).

Here and as already discussed, the petitioner has not established that its proffered position falls under an occupational classification for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent.

The AAO incorporates by reference and reiterates it earlier discussion regarding the documentation provided by the petitioner from the Internet, including the ANCC website. The petitioner has not provided any documentation to indicate that the industry's professional association has made a degree a minimum entry requirement for the occupation.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided three job announcements. However, upon review of the documents, the petitioner fails to establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions.

A review of the documentation indicates the following deficiencies in the job postings:

- The petitioner provided an advertisement posted by [redacted] for a Business Application Analyst, Associate. It must first be noted that the announcement is from October 2005. The AAO finds it questionable that the petitioner is providing an advertisement that was created approximately four years prior to the filing of the Form I-129 petition to establish current hiring requirements. Moreover, according to its website, the employer is a not-for-profit integrated health care provider with locations in more than 90 communities, including 15 hospitals, more than 155 clinics and over 80 community pharmacies. The website further states that more than 3,400 physicians are affiliated with [redacted] The advertisement is for a dissimilar business, whose size and number of employees far exceeds the

petitioner's. It is noted that the petitioner adopted a few of the duties of the proffered position directly (verbatim) from the duties from the advertisement. However, without further information, it does not appear that the advertised position is a parallel position to the proffered position. The job duties of the advertised position appear to be focused on IT business application analysis rather than "combin[ing] the integral relationship of informatics to nursing science (as the petitioner described the proffered position).

- A job posting was also provided from the American Medical Informatics Association website for the Center for Computer Information Technology for a Clinical Systems Analyst. No other information regarding the employer was provided. As a result, there is inadequate information regarding the employer to determine whether the organization is similar to the petitioner. The job posting indicates that a bachelor's degree and formal education as a registered nurse is required. It further states that an applicant must demonstrate knowledge of nursing practices and principles typically gained through graduating from an accredited school of nursing. Thus, the job posting indicates that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. The AAO again notes that the petitioner adopted some of the duties for the description of the proffered position directly (verbatim) from the duties from the advertisement.

- A job posting was also provided from the American Medical Informatics Association website from an unnamed employer for a Clinical Information Systems Associate. The advertisement is devoid of information regarding the employer and its business operations, thereby rendering it impossible to conduct a legitimate comparison between the employer and the petitioner. Thus, it cannot be determined whether or not the employer is a similar organization to the petitioner. The job posting indicates that a B.S.N. is required. Thus, the job posting indicates that a bachelor's degree in nursing is required (but not a degree in computer science or a related field, as the petitioner requires for the proffered position). Once more, the AAO notes that the petitioner adopted some of the duties of the proffered position directly (verbatim) from the duties from the job posting.

The job announcements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions. As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

It must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be

drawn from three advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.[9]

The documents provided do not establish that a degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner.[10] For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

In the RFE, the director requested the petitioner provide a clear explanation of what differentiates the proffered position from other "non-specialty occupation" positions and to compare and contrast those duties to be performed that are more discretionary, demanding, complex, highly advanced, specialized or sophisticated to such a level that they exceed industry or normal position standards.

In response, the petitioner asserted that "nursing informatics positions are 'specialty occupation' positions because they require bachelor's degrees in either Nursing or Computer Science – there is no equivalent 'non-specialty' occupation position." In the appeal, counsel asserts "the job

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[9] According to the *Handbook*'s detailed statistics on registered nurses, there were approximately 2,211,000 persons employed in the industry of health care and social assistance in 2008. *Handbook*, 2010-11 ed., available at *http://www.bls.gov/oco/ocos083.htm* (last accessed January 11, 2012). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just three job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that a degree requirement in a specific specialty was common to the industry for the position of RN health information analyst (or parallel positions) among organizations similar to the petitioner, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

[10] Furthermore, the documents do not establish that that a degree in computer science (as the petitioner requires for the proffered position) is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner.

duties of the proffered position are extremely detailed and by their nature, are highly complex and specialized."

The petitioner and counsel claim that the duties of the proffered position are complex, unique and specialized. However, a review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty. Additionally, the AAO incorporates by reference and reiterates it earlier discussion that the petitioner and counsel have not established that the proffered position involves advanced nursing practices.

The petitioner provided a description of the duties of the proffered position in response to the RFE. The description of the proposed duties provided by the petitioner fails to adequately establish the complexity or uniqueness of any specific duties of the actual work that the beneficiary would perform. The petitioner did not adequately convey the substantive nature and the specific matters upon which the beneficiary would focus that would require that she possess at least a baccalaureate degree, in a specific specialty, to perform the duties of the position. That is, even though the petitioner claims that the duties of the proffered position are so complex or unique that a bachelor's degree is required, the record does not sufficiently demonstrate how the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

As previously noted, in the initial petition, the petitioner claimed that a bachelor's degree in computer science or a related field is required to perform the duties of the proffered position. However, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few courses relating computer science may be beneficial in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree or its equivalent are required to perform the duties of the particular position here. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Upon review of the record of proceeding, the duties, as described by the petitioner, do not elevate the proffered position above that for which less than a bachelor's degree would be adequate. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. In fact, the record of proceeding fails to adequately establish that the job duties described relate any dimensions of complexity and uniqueness such that a bachelor's degree in a specific specialty would be required.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that 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 performance requirements of the position.[11]

In the instant matter, the petitioner stated that the RN health information analyst position is a new position. The petitioner did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position. Furthermore, no evidence regarding any current or past recruitment efforts for this position, or any similar positions, was submitted. Thus, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty

The AAO notes that the petitioner claims repeatedly that the duties of the proffered position can only be employed by a degreed individual. While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree

[11] 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 384. 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 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 proffered 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.

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 384. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In the instant case, no evidence was submitted regarding the petitioner's past recruiting and hiring practices. As a result, the record of proceeding does not establish that the petitioner normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific 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.

The AAO incorporates by reference and reiterates it earlier discussion that the petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that performance would require knowledge at a level associated with at least a bachelor's degree, or the equivalent, in a specific specialty. Insufficient evidence was provided to demonstrate that the proffered position reflects a higher degree of knowledge and skill than would normally be required of employees who engage in some informatics nursing duties and principles, but not at a level requiring the application of theoretical and practical knowledge that is usually associated with at least a bachelor's degree in specific specialty or its equivalent.

As previously noted, simply going on record without providing adequate supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The petitioner failed to meets its burden of proof to establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the AAO will enter two additional grounds for denial of the petition. Specifically, the petitioner (1) failed to offer the beneficiary an adequate wage for the proffered position under the applicable regulations; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, for these reasons as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.

It must be noted that the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

While the U.S. Department of Labor (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:

> 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.

[Italics added]. 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. Here, the petitioner has failed to submit an LCA that corresponds to this petition, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations.

In this case, the petitioner provided an LCA in support of the petition that indicates the occupational classification for the position is "Registered Nurse" at a Level 2 wage of $33.85 per hour. The place of employment is listed as Downey, California. A prevailing wage determination (PWD) issued by the State of California, Employment Development Department was also submitted to USCIS by the petitioner. The PWD states that the prevailing wage for the

petitioner's position of RN health information analyst is $33.85 per hour. The source is listed as OES [Occupational Employment Statistics] All Industries Database.[12]

The LCA was certified on August 27, 2009 and signed by the petitioner on September 1, 2009. On the LCA, the petitioner stated that the rate of pay would be $33.85 per hour. On the Form I-129 petition (pages 3 and 13), the petitioner stated that salary for the proffered position would be $63,367.20 per year. The petitioner also reported on the Form I-129 petition that the petitioner intends to employ the beneficiary on a full-time basis. The director sent an RFE to the petitioner, which specifically requested the petitioner provide the hours per week of work that the beneficiary would be employed. The petitioner responded, stating "Hours to be Worked Per Week: 40."

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n) of the Act, 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.

Thus, the petitioner's offered wage to the beneficiary of $63,367.20 per hour is below the prevailing wage level for the occupational classification in the area of intended employment. The prevailing wage for the occupation "Registered Nurse" for the area of intended employment is $33.85 per hour/$70,408 per year.[13] As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. Further, the petitioner has failed to file with the Form I-129 petition an LCA that corresponds to it. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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[12] The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at *http://www.bls.gov/oes/* (visited January 11, 2012). The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at *http://www.flcdatacenter.com/*.

[13] See the All Industries Database for 7/2009 - 6/2010, for Registered Nurses at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at *http://www.flcdatacenter.com/OesQuickResults.aspx?area=31084&code=29-1111&year=10&source=1* (visited January 11, 2012).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the petition will be denied.

ORDER: The appeal will be dismissed. The petition will be denied.