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



U.S. Citizenship
and Immigration
Services

D2



Date: **FEB 02 2012**

Office: CALIFORNIA SERVICE CENTER

File: 

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 November 3, 2009. The petitioner indicated that it is a for-profit, provider of hospice care services with 103 employees and a gross annual income of approximately \$12 million.

Seeking to employ the beneficiary in what it designates as a hospice regional nurse manager 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 January 6, 2010, 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; and (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 appeal will be dismissed, and the petition will be denied.

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.

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 indicates on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a hospice regional nurse manager. The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 9, 2009. Specifically, the director requested additional information from the petitioner to demonstrate that the proffered position of hospice regional nurse manager 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 evidence, including the following documents:

- Opinion letter from [REDACTED] (which had been previously provided);
- Three job postings (which had been previously provided);
- Letter from [REDACTED];
- General information regarding the petitioner;
- A list of employees who, according to the petitioner, "held or currently hold positions similar to the proffered position" along with copies of their educational credentials.

Additionally, the petitioner provided a letter of support dated December 16, 2009 in response to the RFE, which included the job duties for the proffered position. The job duties that the petitioner submitted in this letter are almost identical to the list of responsibilities it provided with the Form I-129, although, a few generic sentences regarding the proposed job duties were added along with some supplementary information regarding the field of palliative care. The job duties are listed below (with the new information italicized):

- Manage palliative patient care applying knowledge in bedside care, symptom management, crisis intervention and family intervention *in the assigned region. Palliative care is one that focuses on reducing the severity of the illness or disease rather than striving to halt, delay, or reverse its progression. It is an approach that improves the quality of life of patients and their families facing the problems associated with life-threatening illness.*

- Oversee the administration of hospice care plans needed by the patient in accordance with current standards and regulations so that the highest degree of quality care can be maintained at all times. *This entails implantation of the structure for hospice care through the use of measurable objectives and timelines.*
- Oversee operations including performance improvement, clinical outcomes, human resources and fiscal management, and providing supervision within multi-disciplinary team. *This includes identification of problems, setting care plan goals and designation of roles of each team member.*
- Plan, coordinate, and provide documentation of care for terminally ill patients from day of admission through day of discharge.
- Infuse strategic organizational goals and objectives in hospice services and programs. *This task ensures that the individualized program of care for people in the last phases of a life-time illness, emphasizes on control of pain and other symptoms and is reflective of the spirit and idea of caring that emphasizes comfort and dignity for the dying, making it possible for them to remain independent for as long as possible, and in familiar surroundings.*

[Italics added]. (The petitioner indicated that the beneficiary will spend 85% of her time performing the above duties.)

- Participate in orientation and evaluation of qualified health care staff involved in hospice services.
- Develop and implement strategies for effective delivery of hospice services and resource allocation.
- Report to administrator and confer with other health care staff to discuss and resolve hospice care issues and coordinate programs.

(The petitioner stated that the beneficiary will spend 15% of her time on the three duties listed above.)

The petitioner did not provide any further breakdown regarding any of the duties.

The petitioner and counsel claim that the duties of the proffered position are advanced, complex, specialized and unique, requiring a high level of responsibility. In the December 16, 2009 letter of support, the petitioner stated the following regarding the proffered position:

It is an upper-level administrative position that entails a high level of responsibility since it involves managerial functions and supervision of health care and administrative staff. [The position] has highly complex and advanced

duties The Hospice Regional Nurse Manager must have an advanced level of comprehension in utilization management, performance improvement and patient care management principles. The Hospice Regional Nurse Manager should possess outstanding analytical and organizational skills in order to effectively administer and manage the delivery of palliative care and hospice care plans for the designated region. Lastly, the Hospice Regional Nurse Manager should have excellent leadership, strategic planning and resource allocation skills as they relate to effective nursing and hospice care management. The advanced skills and knowledge required to perform the complex duties entailed in the position with the complex nature of our healthcare system clearly justifies the baccalaureate degree requirement for the position.

The AAO acknowledges the petitioner's description of the proffered position, but it is not persuaded by the evidence in the record of proceeding that the position or its constituent duties possess a level of specialization, complexity and/or uniqueness sufficient to require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as required by the statutory and regulatory definitions of specialty occupation at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii), quoted earlier in this decision. In this regard, the AAO finds that the generalized and generic nature of the description of the proposed duties submitted by the petitioner fails to establish the substantive requirements for the day-to-day duties and actual work that the beneficiary would perform. The AAO further finds that the petitioner's claims are questionable when reviewed in connection with the Labor Condition Application (LCA) that the petitioner submitted with the Form I-129 petition. In this regard, the AAO notes that the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Medical and Health Services Managers" at a Level 1 (i.e., entry level) wage.

Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.¹ Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.² The DOL emphasizes that these guidelines should not be

¹ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

² A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or

implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels.³ A Level 1 wage rate is described by DOL as follows:

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 1 wage should be considered.

The petitioner claims that the proffered position is an upper-level administrative position that entails a high level of responsibility and involves managerial functions and the supervision of health care and administrative staff. The petitioner and counsel further stated that the duties of the proffered position are highly complex, advanced, unique and specialized. However, these claims conflict with the wage-rate element of the LCA, which, as reflected in the discussion immediately above, is indicative of a comparatively low, entry-level position relative to others within the occupation. The wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment, that she would be closely supervised, that her work would be closely monitored and reviewed for accuracy, and that she would receive specific instructions on required tasks and expected results.

The AAO finds that the claimed level of complexity, independent judgment and understanding is materially inconsistent with the LCA's certification for a Level 1 entry-level position, and that this conflict undermines the overall credibility of the petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to

below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

³ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO further finds that the LCA, because of its wage rate and the associated implications of a lower-level and lower required wage-rate than consistent with the position described elsewhere in the petition's documentation, does not correspond with the petition.

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:

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, it appears that the petitioner has failed to submit a certified LCA that corresponds to the claimed duties of the proffered position.

The director denied the petition, finding that the petitioner had not satisfied the 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 February 8, 2010, counsel for the petitioner submitted an appeal. Counsel claims that the director's basis for denial was erroneous, and contends that the petitioner satisfied all evidentiary requirements. In support of these assertions, counsel submitted a brief and copies of previously submitted documents.

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 a hospice regional nurse manager. 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.

The description of the duties of the proffered position indicates generally that the beneficiary will be primarily involved in overseeing the delivery of palliative care and the administration of hospice care plans for an assigned region. In this case, the AAO notes that the description of the duties of the proffered position is broad and generic and does not convey either the substantive nature of the specific matters upon which the beneficiary would focus or the practical and theoretical level of knowledge that the beneficiary would have to apply to those matters. The petitioner claims that the position is an upper-level position; however, the duties relate generic functions for which the particular level of knowledge to be applied in this case is not self-evident. Furthermore, the evidence of record contains discrepancies regarding the level of complexity and specialization of the duties of the proffered position.

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 routinely reviews 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 In this case, the director indicated that the position as described by the petitioner reflects the duties performed under the occupational classification of "Administrative Services Managers" in the *Handbook*. The petitioner claims the proffered position falls under the occupational classification "Medical and Health Services Managers" as described in the *Handbook*.

In reviewing the *Handbook*, the AAO looked at the description of "Administrative Services Managers" and "Medical and Health Services Managers" as well as other positions depicted in the *Handbook*.⁵ However, because the petitioner provided only generalized descriptions of the proposed duties, it is impossible to determine the actual duties and responsibilities of the position. The description of the proposed duties submitted by the petitioner fails to adequately establish the day-to-day duties and actual work that the beneficiary would perform.

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 these chapters, see Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Administrative Services Managers, on the Internet at <http://www.bls.gov/oco/ocos002.htm> (visited January 18, 2012) and Medical and Health Services Managers at <http://www.bls.gov/oco/ocos014.htm> (also visited January 18, 2012).

The AAO finds that the discussions in the *Handbook* of both "Administrative Services Managers" and "Medical and Health Services Managers" encompass aspects of the proposed duties as so generally described in the record of proceeding. However, as will now be discussed, it must be noted that neither occupation comprises an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The section regarding the "Training, Other Qualifications, and Advancement" of the *Handbook's* chapter on "Administrative Services Managers" states the following:

Education and experience requirements for these managers vary widely, depending on the size and complexity of the organization. In small organizations, experience may be the only requirement. In large organizations, however, administrative services managers may need a bachelor's degree and appropriate experience.

Education and training. Specific education and training requirements vary by job responsibility. Office managers in smaller operations or lower-level administrative services managers with fewer responsibilities may only need a high school diploma combined with appropriate experience, but an associate degree is increasingly preferred.

In larger companies with multiple locations, equipment, and technologies to coordinate, higher-level administrative services managers need at least a bachelor's degree. Managers of highly complex services, such as contract, insurance, and regulatory compliance, generally need at least a bachelor's degree in business administration, human resources, accounting, or finance. Lower-level managers may also need a bachelor's degree, but related postsecondary technical training may also be substituted for managers of printing, security, communications, or information technology. Those involved in building management should take a drafting class. Regardless of major, courses in office technology, accounting, computer applications, human resources, and business law are highly recommended.

* * *

Whatever the educational background, it must be accompanied by related work experience reflecting managerial and leadership abilities. Many administrative services managers obtained their experience by specializing in one area at first, then augmenting their qualifications by acquiring work experience in other specialties before assuming managerial duties.

The *Handbook's* information on the educational requirements for the occupational classification "Administrative Services Managers" indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement. Rather, the

occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

Despite counsel's assumption to the contrary, "Medical and Health Services Managers" also do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. Thus, even if the general descriptions that comprise the information about the proffered position and its duties were sufficient to demonstrate that the position falls under the occupational classification of medical and health services managers (which they do not), the *Handbook* does not indicate that entry into positions in the occupation normally requires at least a bachelor's degree, or its equivalent, in a specific specialty.

Regarding the educational requirements for entry in to the occupation of "Medical and Health Services Managers," the *Handbook* states the following:

Medical and health services managers must be familiar with management principles and practices. A master's degree in health services administration, long-term care administration, health sciences, public health, public administration, or business administration is the standard credential for most generalist positions in this field. However, a bachelor's degree is adequate for some entry-level positions in smaller facilities, at the departmental level within healthcare organizations, and in health information management. Physicians' offices and some other facilities hire those with on-the-job experience instead of formal education.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for medical and health services managers. According to the *Handbook*, some employers hire individuals with on-the-job experience instead of formal education. Furthermore, the AAO notes that when discussing that a bachelor's degree may be an adequate educational credential to work in some facilities, the *Handbook* does not state that such degree must be in a specific specialty. Moreover, although the *Handbook* indicates that a master's degree is the standard requirement for most generalist positions, it also states that a degree in one of a number of fields is acceptable.

Again, 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. According to the *Handbook*, degrees in a wide variety of fields, such as health services administration, long-term care administration, health sciences, public health, public administration, or business administration, are acceptable. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Therefore, even if the proffered position were deemed to be that of an administrative services manager or a medical and health services manager, it would not qualify as a specialty occupation by virtue of its occupational classification alone.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. To make this determination, the AAO turns to the record for information regarding the duties and the nature of the petitioner's business operations.

The petitioner in this matter provided a general overview of the beneficiary's proposed duties. The petitioner's job descriptions for the proffered position provide a list of generalized functions without providing substantive details of the actual work that the beneficiary would perform, and without relating how the performance of such work would correlate to a need for at least a bachelor's degree in a specific specialty. The petitioner has failed to provide sufficient documentation to establish that the beneficiary's day-to-day duties and responsibilities necessitate the need for an individual with a bachelor's degree in a specific specialty. Thus, the evidence of record on the particular position here does not demonstrate a requirement for the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

The AAO again notes that the job duties of the proffered position are described in terms of general functions, which, the AAO finds, do not convey either the substantive nature of the specific matters upon which the beneficiary would focus or 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 credible evidence in the record of proceeding substantiating the nature and educational level of knowledge that would be required for the actual performance of the beneficiary's work.

The petitioner has not established that the position falls under an occupational category for which the *Handbook* indicates 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 103 employees and a gross annual income of approximately \$12 million. 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. Furthermore, the petitioner has not provided any documentation to indicate that the industry's professional association has made a degree a minimum entry requirement.

The petitioner and counsel claim a degree requirement is common to the industry in parallel positions among similar organizations. In support of this conclusion, the petitioner provided a letter from the administrator of [REDACTED] ("a hospice care company"). The administrator indicates that the company employs over 70 people and that it is the company's "normal practice to employ persons to manage, oversee and coordinate the delivery of our hospice care programs and services. Such persons should possess a bachelor's degree or equivalent experience in nursing, health services administration or closely related field." No further information or supporting documentation was provided by [REDACTED] administrator.

The statement of the [REDACTED] administrator lacks sufficient information to reasonably conclude whether or not she is referring to parallel positions. The administrator failed to provide basic information regarding the positions, including the job titles and tasks. She did not indicate the knowledge and skills required for the positions, or provide any information regarding the complexity of the job duties, independent judgment required, or the amount of supervision received. Moreover, she states that such persons "should" possess a degree or the equivalent but does not provide any further clarification. Thus, the administrator's intended meaning for the term "should" is not clear from the letter.⁶ Furthermore, the letter is devoid of sufficient information regarding the organization itself (such as the size, non-profit/for-profit status, level of revenue, scope, scale of operations, and business efforts/expenditures), thereby rendering it impossible to conduct a legitimate comparison of the business operations. The administrator failed to provide sufficient information to demonstrate that the degree requirement asserted by the petitioner for the

⁶ The word "should" is defined as "1. Used to express duty or obligation <You should write a thank you note.> 2. Used to express probability or expectation <They should arrive here soon.>" *Webster's New Collegiate College Dictionary* 1046 (Third Edition, Hough Mifflin Harcourt 2008).

proffered position is commonly imposed in recruiting and hiring for positions parallel to the proffered position by organizations similar to the petitioner in its industry.

The petitioner also provided an opinion letter dated September 3, 2009 from [REDACTED]. The professor stated that she is "qualified to comment on the position of [REDACTED] Manager in the field of Nursing because of the positions I hold, and have held at [REDACTED]." She indicated that she serves as [REDACTED] at the college. A review of the professor's resume indicates that she has held this position since January 2009.

The professor's resume includes information regarding her professional experience, background and accomplishments. However, in the opinion letter the professor indicated that her qualifications for providing the opinion letter in this matter are entirely based upon her experience [REDACTED]. Thus, based upon her experience at [REDACTED] College, it is not clear that the professor is an authority in the area in which she pronounces her opinions, namely, the hiring requirements for hospice regional nurse managers. The AAO notes that the professor provides a brief overview of a company (not the petitioner) and claims that "companies seeking to employ a Hospice Regional Nurse Manager require prospective candidates to possess at least a Bachelor's degree in the area of Nursing, or a related field." However, she does not provide sufficient information to establish that the degree requirement is common to the industry among *organizations that are similar to the petitioner*.

The professor may, in fact, be a recognized authority on various topics in the field of nursing; however, she has failed to provide sufficient information regarding the basis of her expertise on this particular issue. Without further clarification, it is unclear how her education, training, skills or experience would translate to expertise or specialized knowledge regarding the *hiring requirements* for hospice regional nurse managers (or parallel positions) with for-profit providers of hospice care services similarly situated to the petitioner.

A review of the opinion letter indicates that the professor did not identify the specific elements of her knowledge and experience that she may have utilized to reach her conclusions. Furthermore, it must be noted that the professor's conclusions are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. She does not provide any evidence in support of her opinion regarding the educational requirements for the position (e.g. cite studies, surveys, empirical evidence). There is an inadequate factual foundation to support the opinion and the AAO finds that the opinion is not in accord with other information in the record. The conclusions reached by the professor lack the requisite specificity and detail. For example, the opinion letter contains no evidence that it was based on scholarly research conducted by the professor in the specific area upon which she is opining. There is no evidence that she has visited the petitioner's business, observed the petitioner's hospice regional nurse managers, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. It is unclear whether or not she has published any work pertinent to the industry's *educational requirements* for hospice regional nurse managers (or parallel positions) to work in organizations similar to the petitioner, or been recognized by professional organizations as an authority on those requirements. As the professor has not established her

credentials as a recognized authority on the hiring standards for this occupation, her opinion in this area merits no special weight. Upon review, the opinion letter rendered by the professor is not probative.

Further, the AAO notes that the opinion letter was prepared for a different employer than the petitioner. The professor includes a generic and generalized description of the duties, which, the AAO finds, does not distinguish the position from those jobs that do not require the application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The professor fails to give sufficient details about the complexity of the duties to substantiate her conclusions. Moreover, the very fact that the professor attributes a degree requirement to such a generalized treatment of the position undermines the credibility of her opinion. She has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. The professor does not provide a substantive, analytical basis for her opinion. She has not provided a sufficient factual basis by which one may reasonably conclude that her opinion is well founded and reliable.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the professor's opinion as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner also provided three job announcements.⁷ However, upon review of the documents, the AAO finds that the petitioner failed 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] Hospital Medical Center for a Program Manager (Nurse) - Palliative Care. (The petitioner provided page 1 of 2.) The employer is a 411 licensed bed facility with 2,000+ employees, and 850 medical staff members. The advertisement is for a dissimilar business (hospital), whose size and number of employees far exceeds the petitioner's.
- A job posting was also provided from [REDACTED] for an RN Hospice Branch Manager. (The petitioner provided page 1 of 2.) The duties of the position are not provided. The advertisement indicates that the employer is a recruiter whose client is a community hospice and palliative care organization with over 30 branch offices. Without the job duties, there is insufficient information to determine whether the

⁷ Based upon the page numbers of the printouts, the petitioner did not provide the complete printouts for all of the advertisements. The AAO's analysis is based upon the information provided.

advertisement is for a parallel position. Additionally, there is inadequate information regarding the employer to determine whether the organization is similar to the petitioner. The advertisement is devoid of information regarding the business operations of the organization (such as the size, number of personnel, level of revenue, scope, scale of operations, business efforts/expenditures), thereby rendering it impossible to conduct a legitimate comparison.

- An advertisement from [REDACTED] Healthcare for a Clinical Nurse Manager. The employer is a non-profit, 400 bed hospital with 2,540 employees, and 819 physicians and 668 volunteer medical staff members. According to the advertisement, its hospice center is a 24 bed, intensive care, state-of-the-art facility. The advertisement is for a dissimilar business (non-profit hospital), whose size and number of employees far exceeds the petitioner's.

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.⁸

⁸ According to the *Handbook's* detailed statistics on administrative services managers, there were approximately 34,300 persons employed in the industry of health care and social assistance in 2008. *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos002.htm> (last accessed January 18, 2012). According to the *Handbook's* detailed statistics on medical and health services managers, there were approximately 212,600 persons employed in the industry of health care and social assistance in 2008. *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos014.htm> (last accessed January 18, 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 hospice regional nurse manager (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.

The documents provided do not establish that a degree in nursing is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. 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.

The petitioner and counsel claim that the duties of the proffered position are complex, unique and specialized and they indicate that the petitioner has provided sufficient documentation to satisfy this prong through the evidence submitted. 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.

The AAO here incorporates by reference and reiterates its earlier comments regarding the generalized and generic nature of the description of the proposed duties provided by the petitioner. As reflected in these comments and evident in the descriptions themselves, the petitioner has not established for this position the level of complexity or uniqueness required to satisfy this criterion.

Furthermore, as mentioned earlier, the LCA indicates the 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. Likewise, the wage rate indicates that the beneficiary would perform routine tasks requiring limited, if any, exercise of independent judgment, that the beneficiary's work would be closely supervised and monitored, that she would receive specific instructions on required tasks and expected results, and that her work would be closely monitored.

The petitioner provided a generic description of the tasks of the proffered position with the Form I-129 petition. The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the duties can be performed only by an individual with a bachelor's degree in a specific specialty.

The petitioner claims that the "delivery of hospice services is a complex and specialized field" because of the regulatory environment, reimbursement and health care insurance matters, staff integration and meeting the various special needs of its patients and their families (during the final stages of the patient's illness, death and bereavement). In support of its assertion, the petitioner provided printouts from its website, a copy of its brochure and its operations plan.

The AAO finds, however, that neither the above-described documents nor any other evidence in the record of proceeding establishes that the proffered position is comprised of duties that render

it so complex or unique that it would exceed the capabilities of, for instance, persons equipped with an associate's degree in nursing or in another specialty related to health care. The petitioner makes a general claim but fails to provide sufficient details and evidence to establish its assertion. The petitioner failed to adequately convey the substantive nature and the specific matters upon which the beneficiary would focus that would require that she possess a baccalaureate degree, in a specific specialty, to perform the duties of the position.

Even though counsel 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. For instance, 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 in nursing 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. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, 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.

Therefore, the evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of educational backgrounds that is suitable for entry into such positions. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique as to require at least a baccalaureate degree in a specific specialty or its equivalent for entry, 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. In the instant matter, the petitioner claims that it has always required a bachelor's degree in nursing or a related field for similar or related positions.

The petitioner did not submit any evidence of its past recruitment practices, claiming that it does not post job announcements for vacancies but instead relies on referrals.

As proof of its employment practices, the petitioner provided a list of five employees who, according to the petitioner, "held or currently hold positions similar to the proffered position" along with copies of their educational credentials. None of the employees listed have served in the position of hospice regional nurse manager.

The job titles of the employees are [REDACTED]

[REDACTED]. (It appears that [REDACTED]
[REDACTED] The position of [REDACTED] was filled by [REDACTED] from 07/15/2008 to 12/23/2008. However, the petitioner did not provide any information regarding the educational credentials of the person (or persons) who have served in this position since 12/23/2008.

The petitioner failed to provide the job duties and day-to-day responsibilities of any of the positions that it claims are similar to the proffered position. The petitioner did not indicate the knowledge and skills required for the positions, or provide any information regarding the complexity of the job duties, independent judgment required or the amount of supervision received. As a result, it is impossible to determine if the positions are similar or related to the proffered position. 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).

As the evidence 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 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.

Counsel claims that the duties of the hospice regional nurse manager 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, in nursing or a related field.

The AAO incorporates by reference and reiterates its earlier discussion that the generalized and generic nature of the description of the proposed duties submitted by the petitioner fails to adequately establish the actual work that the beneficiary would perform, let alone the relative specialization and complexity of any specific duties that would be involved. Also, as previously discussed, the wage level of the LCA submitted by the petitioner indicates that the proffered position is a low-level, entry position relative to others within the occupation. Thus, 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 requires a higher degree of knowledge and skill than would normally be required of employees who engage in some administrative nursing duties and employ some administrative nursing 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 meet 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 proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Without a comprehensive description of the beneficiary's actual duties in connection with the petitioner's business, or other evidence to support the petitioner's claim that the proffered position is a specialty occupation, the AAO is precluded from determining that the proffered position is a specialty occupation. The petitioner has failed to provide sufficient substantive evidence that the duties of the actual position require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline that relates to the proffered position. Accordingly, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

For all of the reasons related above, 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).

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 appeal is dismissed, and the petition is denied.

ORDER: The appeal is dismissed. The petition is denied.