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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

[Redacted]

Date: **FEB 07 2012** Office: CALIFORNIA SERVICE CENTER File: [Redacted]

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

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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

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

Thank you,

for 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 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 services coordinator 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, 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.

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 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.

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 in a position that it designates as a "hospice services coordinator." 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 services coordinator 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, including specific job duties, the percentage of time to be spent on each job duty, level of responsibility and 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);
- 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. The job duties are listed below (with the new information italicized):

- Develop, implement and coordinate the delivery of hospice care programs provided by our company and make sure that our activities comply with state and federal regulations and company guidelines. *This includes coordination of the interdisciplinary team to develop an overall plan of hospice care that*

emphasizes on (sic) supportive services, which includes, but is not limited to home care and pain control.

- Incorporate strategic company goals and objectives with 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.*
- Meet and confer with patient, families and other health care staff to discuss patients' care options with patient, family and health care staff.
- Ensure efficient implementation and administration of palliative care plans and activities. *This entails implementation of the structure for hospice care through the use of measurable objectives and timelines.*
- Prepare and oversee the preparation of individualized care plans.
- Evaluate hospice service operations and activities to improve service utilization.
- Identify strategies for effective delivery of hospice services and resource allocation.

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

- Participate in the preparation of work schedules and direction of staff assignments.
- Ensure proper resource allocation and participate in budget planning.
- Work under the direction of the administrator and confer with other health care staff to discuss and resolve care issues and coordinate programs.

(The petitioner stated that the beneficiary will spend 15% of her time on the three duties listed immediately above.) The petitioner did not provide any further breakdown regarding any of the duties.

At the outset, the AAO will highlight an aspect of the petition that undermines the petition's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect is the discrepancy between what the petitioner claims about the level of responsibility inherent in the proffered position, on the one hand, and, on the other, the contrary

level of responsibility conveyed by the wage level indicated by the Labor Condition Application (LCA) submitted in support of petition.

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 Therefore, to be able to perform the duties of a Hospice Services Coordinator, the incumbent should possess thorough knowledge of nursing standards and regulatory requirements and techniques of nursing care management and administration. The Hospice Services Coordinator must have an advanced level of comprehension in utilization management, performance improvement and patient care management principles. The Hospice Services Coordinator should possess outstanding analytical and organizational skills in order to effectively administer and coordinate hospice services and activities. Lastly, the Hospice Services Coordinator should have excellent leadership, strategic planning and resource allocation skills as they relate to effective nursing and hospice care coordination. The advanced skills and knowledge required to perform the complex duties entailed in the position with the complex nature of our health care service clearly justifies the baccalaureate degree requirement for the position.

The AAO finds that the petitioner's above comments describe the proffered position and its constituent duties in generalized terms of generic functions, and that, as such, they do not inform the AAO of the particular aspects of the proffered position, if any, that would require the theoretical and practical application of at least a bachelor's degree level of knowledge of a body of highly specialized knowledge in a specific specialty, as required for establishing a specialty occupation under the Act. In this regard, the AAO finds, in particular, that neither the above rendition of duties nor any other descriptions of them in this record of proceeding are in themselves indicative of a specialty occupation. The generalized and generic nature of 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. Consequently, the petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not supported by substantive evidence of specific levels of specialization, complexity and/or uniqueness inherent in the proffered position. 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)).

Further, as highlighted earlier in this decision, the petitioner's claims are questionable when reviewed in connection with the LCA submitted by the petitioner 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 (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 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 the 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 I wage should 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 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.

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, the AAO must question the level of complexity, independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position.

The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. This aspect of the petition undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands and level of responsibilities of the proffered position.

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

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). As part of the analysis of each criterion, the AAO hereby incorporates and adopts all of its earlier comments related to the deficiencies in the evidence of this record of proceeding.

The AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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 services coordinator. 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 developing, implementing and coordinating the delivery of hospice care programs for the petitioner. 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 either 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 only generic functions for which the particular level of knowledge to be applied is not self-evident. Furthermore, as this decision noted with regard to the LCA, 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 reviewing the *Handbook*, the AAO looked at the description of "Administrative Service Managers" and "Medical and Health Services Managers" as well as well as other positions depicted in the *Handbook*.⁵ However, because the petitioner provided an extremely vague and generalized description 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.

The AAO finds that the discussions in the *Handbook* of both "Administrative Service Managers" and "Medical and Health Services Managers" encompass the petitioner's vaguely described duties. 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 Service Managers" states the following:

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 Administrative Service 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).

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 Service 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 generic statements 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.

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 service manager or a medical and health services manager, it would not qualify as a specialty occupation by virtue of its occupational classification.

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. As previously noted, the petitioner's job descriptions for the proffered position state numerous generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which that would broad spectrum of duties would manifest themselves in their actual performance within the petitioner's day-to-day business operations. Thus, the record of proceeding does not establish a necessary correlation between performance of the proffered position and 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. The evidence of record on the particular position here does not demonstrate a requirement for the theoretical and practical application of a level of highly specialized knowledge. The duties for the proffered position are generic and vague and do not elevate the proffered position above that for which no particular educational requirements are demonstrated. Thus, the petitioner has not established that the beneficiary's actual duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

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 either 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. Furthermore, 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 nature and educational level of knowledge that would be required for the actual 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190.)

As noted above, the job description for the proffered position is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. A petitioner may not establish a position as a specialty occupation by repeating the general description of a particular occupation rather than providing specifics substantiated by the requirements of the petitioner. The petitioner has failed to provide substantive evidence regarding the actual work that the beneficiary would perform and sufficient details regarding the nature and scope of the beneficiary's employment. Moreover, without a comprehensive

description of the specific duties the beneficiary will perform for the petitioner, USCIS is unable to discern the nature of the position and the level of sophistication and complexity the job might entail.

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 is a for-profit, provider of hospice care services with 103 employees and a gross annual income of approximately \$12 million. The petitioner indicated that it operates "similar to a home health agency" and that 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].

The administrator's statement 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, 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 organizations similar to the petitioner routinely employ degreed professionals in parallel positions.

The petitioner also provided an opinion letter dated September 3, 2009 from [REDACTED]. The professor claimed that she is "qualified to comment on the position of Hospice Service Manager in the field of Nursing because of the positions I hold, and have held at St. John Fisher College." 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 at [REDACTED]. Thus, based upon her experience at [REDACTED] 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 services 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 Service 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 the particular issue for which her opinion has been submitted. 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 services coordinators (or parallel positions) with for-profit providers of hospice care services similarly situated to the petitioner.

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).

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). Thus, there is an inadequate factual foundation to support the opinion. Further, the professor does not provide a substantive explanation of the specific analytic process by which her conclusions were reached. 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 services coordinators, 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 services coordinators to work in organizations similar to the petitioner, or that she has 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.

The AAO notes that the opinion letter was prepared for a different position (hospice service manager rather than hospice services coordinator) and 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, reliable, and has a substantive bearing upon the particular position in question – which the professor's opinion does not address or evaluate.

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 four job announcements.⁷ However, upon review of the documents, the petitioner fails to establish that

⁷ Based upon the page numbers of the printouts, the petitioner did not provide the complete printouts for

similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions.

The following three job announcements are devoid of sufficient information regarding the organizations (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 of the business operations. Counsel claims that the positions require a bachelor's degree in nursing.⁸ However, a review of the documentation indicates that the following three employers require a four-year degree but the advertisements do not indicate that a specific field of study is required for entry into the positions. Thus, the job postings establish, at best, that a bachelor's degree is generally required by the organizations for the positions advertised, but not at least a bachelor's degree or the equivalent in a *specific specialty*.

- A job posting from [REDACTED] for a Hospice Patient Care Coordinator/Nursing Manager. (The petitioner provided page 1 of 3.) The advertisement indicates that the employer is a health care provider. The opening is for a Hospice PCC/Nursing Manager who is "responsible for coordinating the Interdisciplinary Team for the [REDACTED] (16 bed hospice house) and Home Hospice (5 counties)." There is inadequate information regarding the job duties to determine whether it is a parallel position to the proffered position. Furthermore, although insufficient information regarding the business operations of the employer is provided, it appears that the employer's size and scope far exceed the petitioner's.
- An advertisement from [REDACTED] for a General Manager (Hospice). (The petitioner provided page 1 of 2.) The advertisement states that the employer is a leading hospice provider operating 43 programs in 15 states. There is inadequate information regarding the job duties to determine whether it is a parallel position to the proffered position. Moreover, the advertisement provides insufficient information regarding the employer; however, it appears that the employer's size and scope far exceed the petitioner's.
- A job posting from [REDACTED] for a Patient Services Coordinator. (The petitioner provided page 2 of 3.) The advertisement indicates that the position is in the "Home Care Nursing" department. However, there is no indication that the position is in the field of hospice services. The job type is listed as customer service.

any of the advertisements. The AAO's analysis is based upon the information provided.

⁸ Counsel erroneously claims that the director indicated that all of the job postings require a bachelor's degree in nursing. A review of the decision indicates that the director stated that the advertised positions "require a bachelor's degree" but she did not indicate that a specific specialty (nursing) was listed in the advertisements.

The petitioner also provided an advertisement for an employer that is clearly dissimilar from the petitioner's organization. A review of the documentation indicates the following deficiencies in the job posting:

- An advertisement from Kaiser Permanente for a Manager, Hospice & Palliative Care. (The petitioner provided page 1 of 2.) The employer is the largest managed care organization in the United States. Kaiser Permanente has approximately 167,300 employees, 14,600 physicians, 35 medical centers, 431 medical offices and a reported net income of \$1.3 billion. The advertisement is for a dissimilar business (managed care organization), 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 four 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 at least a bachelor's degree in nursing or any specific specialty is the norm for entry into positions that are (1) parallel to the proffered

⁹ According to the *Handbook's* detailed statistics on administrative service 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 four job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally [REDACTED], *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 services coordinator (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.

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 contend 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 the duties the beneficiary will be responsible for or perform on a day-to-day constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Again, the AAO incorporates by reference and reiterates its earlier discussion that the generalized and generic nature of 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.

Furthermore, as mentioned before, the LCA indicates that 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. Moreover, that wage rate indicates that she will perform routine tasks that require limited, if any, exercise of independent judgment. The beneficiary's work will be closely supervised and monitored and she will receive specific instructions on required tasks and expected results. Her work will be closely monitored and reviewed for accuracy.

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

It must be noted that the petitioner has not presented evidence substantiating that its business operations and consequent performance requirements for its hospice services coordinator are more complex, unique and/or specialized than those of other such organizations in the healthcare industry. In this regard, the AAO repeats its finding that the petitioner failed to adequately convey the substantive nature and the specific matters upon which the beneficiary would focus

that would require that he 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).

Upon review of the record of proceeding, the duties for the proffered position are vague and generic and appear routine. The duties, as described by the petitioner, do not elevate the proffered position above that for which no particular educational requirements are demonstrated. 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 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 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 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.

The job titles of the employees are [REDACTED] (2 people), [REDACTED]

The petitioner did not indicate the total number of people who have served, or are currently serving, in the position of hospice service coordinator. The document indicates that [REDACTED] has held the position of hospice service coordinator since 11/23/2009. A review of [REDACTED] pay statement indicates that his wages are higher than the salary offered to the beneficiary. However, no information was provided regarding his job duties or responsibilities. Furthermore, no information was provided regarding any employees who may have held the position of hospice service coordinator prior to [REDACTED]

[REDACTED] presumably stands for [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 the same or 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, 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. Therefore, 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 services coordinator 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 degree.

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, and that the LCA submitted by the petitioner indicates that the proffered position is low-level, entry position relative to others within the occupation. Accordingly, the petitioner has failed to establish that the duties of the proffered position are so specialized and complex that their 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 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. 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 Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The 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 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 finds that the petition must also be denied because the LCA filed with it does not correspond to the petition, in that, as previously discussed in this decision, the wage level specified in the petition is indicative of a job involving materially less responsibility and the application of knowledge materially less than claimed by the petitioner in its statements about the proffered position.

As previously discussed, the wage level specified in the LCA indicates the proffered position is actually a low-level, entry position relative to others within the occupation. Based upon this wage rate, the beneficiary is only required to have a basic understanding of the occupation. She will be expected to perform routine tasks that require limited, if any, exercise of judgment. The beneficiary will be closely supervised, her work will be closely monitored and reviewed for accuracy and she will receive specific instructions on required tasks and expected results. Thus, the LCA does not actually support the proffered position as described by the petitioner.

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 valid LCA that corresponds to the claimed duties of the proffered position, 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. For this reason also, the petition must be denied. In this regard, the petitioner

should note 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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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