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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  
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Services**

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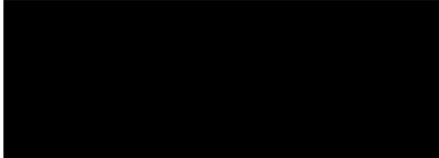


Date: **JAN 06 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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,

*for Michael T. Keely*

Perry Rhew  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition the petitioner stated that it is a nurse staffing and placement firm. To employ the beneficiary in what it designates as a senior dialysis nurse manager position, the petitioner endeavors 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 failed to establish that it would employ the beneficiary in a specialty occupation position. In the brief filed on appeal, counsel contended that the petitioner satisfied all evidentiary requirements. Counsel also submitted additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

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

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

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which 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 a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the visa petition, counsel submitted (1) a letter, dated April 1, 2009, from the petitioner’s president; (2) vacancy announcements placed by entities other than the petitioner; and (3) a staffing agreement executed by the petitioner and [REDACTED]

At the outset, the AAO will here identify a particular aspect of the petition that precludes the AAO from sustaining this appeal, namely, the petitioner's failure to establish that the petitioner had actually secured work for the beneficiary in the position specified in the petition. As a result, at the time that the petition was filed, the petitioner had secured for the beneficiary, for the period sought in the petition, definite work that would require at least a Bachelor of Nursing degree (BSN). This is a fatal evidentiary deficiency, as it results in an insufficient factual foundation for determining what services the beneficiary would perform during the period specified in the petition.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where, as here, the work is to be performed for entities other than the petitioner, persuasive evidence of the client companies' job requirements is critical. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. As will be evident in discussions about the evidence of record, later in this decision, the record of proceeding lacks such substantive evidence from any end-user entity that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. This lack of evidence essential for a reasonable determination regarding what the beneficiary would actually do, what the actual performance requirements would be as determined by the client entity to which she would be assigned, and the nature and educational level of knowledge that would be required to meet those performance requirements precludes the AAO from determining that the proffered position is a specialty occupation.

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's 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.

Further, the appeal must be dismissed and the petition denied also because of the absence of evidence of definite, non-speculative work for the beneficiary secured for her at the time of petition filing for the period sought in the petition. A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition's filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set

of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner's president's April 1, 2009 letter states that the duties of the proffered position would include:

1. Directing the performance of technical aspects of dialysis procedures;
2. Evaluating patients' response to dialysis therapy and making appropriate adjustments and modifications to the treatment plan as prescribed by the Physician;
3. Assessing patient pre, interim, and post dialysis and document findings;
4. Assessing educational needs of patient and educating the patient and family regarding end stage renal disease, dialysis therapy, diet and medications;
5. Monitoring quality, service and utilization standards;
6. Overseeing the appropriate recording of diagnoses, medications, physician's instructions, and treatment;
7. Planning and implementing appropriate coding indexes on patients, diseases, and other categories per the facility requirements;
8. Maintaining a therapeutic, safe and aesthetically acceptable physical environment;
9. Ensuring that all incidents are reported in an accurate and timely manner;
10. Supervising all aspects of the patient care process and participating in direct patient care as needed;
11. Initiating lifesaving correcting measures, including those necessary in treating shock;
12. Overseeing patient care planning and follow-up.

The petitioner's president also stated that the proffered position requires "a Bachelor's Degree or equivalent in nursing or similar health care related field." The AAO notes, however, that, while the record of proceeding indicates that the beneficiary would perform his services on assignment to client entities, the record of proceeding lacks evidence establishing not only any such assignment, but also documentation from any client that establishes that entity's acceptance of the beneficiary to perform as a senior dialysis nurse manager, the terms and conditions under which the beneficiary would work, the actual duties that the petitioner would perform, the level of responsibility at which the beneficiary would perform, and, for that matter, even that receiving entity's perception of the education requirements for the position. Likewise, the petitioner failed to present, from any entity where the beneficiary would be assigned, any document endorsing the petitioner's statements regarding the duties that the beneficiary would perform and the education required to perform them. Furthermore, there is no documentation in the record of proceeding that reflects a request from any entity for, let alone a contractual obligation to accept the assignment of, a medical and health services manager.

Next, the AAO observes that, in addition to the vacancy announcements submitted with the visa petition, the petitioner submitted some vacancy announcements in response to the RFE and on appeal. The AAO will now describe all of the vacancy announcements submitted in the instant case.

Before doing so, however, the AAO will note that the petitioner has not provided, from any entity to which the beneficiary would be assigned, documentation regarding its recruiting and hiring practices for the type of position to which the beneficiary would be assigned.

One of the vacancy announcements submitted was placed by an otherwise unidentified 160-bed non-profit medical center in San Diego, California seeking a Dialysis Manager. That announcement states that the position requires a bachelor's degree in nursing (BSN).

placed one of the announcements for a Hospital Dialysis RN/Manager to work in San Diego, California. Only the first page of that announcement was submitted. It specifies that the position is for a registered nurse (RN) and states that the position requires a Bachelor of Science degree. The AAO notes that an RN with a bachelor's degree may or may not have a BSN, and may or may not have a bachelor's degree in a similar health care related field.

Another announcement was placed by for a Nurse Clinical Specialty Coordinator – Dialysis. It states that the position requires a BSN.

Another announcement is for an M/S ICU, CSU, Dialysis Nurse Manager to work at . It states that the position requires a BSN.

placed a vacancy announcement for an RN Manager – Dialysis to work in Red Bank, New Jersey. That announcement states that the position requires a BSN.

The final vacancy announcement was placed by Granada Hills, California. It is for a Dialysis Nurse Manager/Charge Nurse to work in Granada Hills, California and states that it is a position for an RN. In an overview, it states: "Required Education: 4[-]Year Degree." The AAO notes, once again, that an RN with a four-year degree may not have a BSN or a bachelor's degree in a similar health care related field.

The aforementioned petitioner/ staffing agreement, which is dated February 18, 2009, contains details of the conditions pursuant to which the petitioner may provide RNs to , a Lexington, Massachusetts company, to work in its dialysis centers on an as-needed basis. The agreement states that information pertinent to the dialysis centers, possibly including their locations, is specified in Exhibit A. Exhibit A was not provided, however, and the location(s) of the work to be performed pursuant to that agreement was not specified. The agreement also states that the duties of the nurses provided by the petitioner are set forth in Exhibit B, which was also not provided. It states, further:

With respect to all work, duties, and obligations hereunder, it is mutually understood that (a) all Provider Staff are performing Services as independent contractors and not as employees, agents, borrowed servants, joint ventures, or partners of or with

That staffing agreement does not indicate that was then seeking a Senior Dialysis Nurse Manager, nor does it specify what duties would be involved if it sought to fill such a position. The

agreement also does not state the locations of any work that would be performed pursuant to it. The AAO notes that the agreement states that it will remain in effect for two years, beginning on February 2, 2009. The AAO observes, however, that the petitioner has requested to employ the beneficiary through September 27, 2012.

In her own letter, dated April 1, 2009, counsel stated, “The [proffered position] is an upper-level administrative nursing position akin to a medical and health services manager whose emphasis is in supervising a clinical department or specialty unit.” Although the petitioner is a staffing agency, counsel did not indicate - and the evidence in the record of proceeding does not establish - either where the beneficiary would perform the duties of the proffered position or the entity to which the beneficiary would be assigned. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel cited the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for the proposition that such a position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup> Counsel's assertions pertinent to the *Handbook* will be addressed in detail below.

Because the evidence did not demonstrate that the petitioner would employ the beneficiary in a specialty occupation position, the service center, on June 18, 2009, issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center also made the following specific request:

Submit evidence that the “client” medical facility requires the services of an advanced practice registered nurse or specialty nurse, and what the educational and training requirements are for the position.

In response, counsel submitted (1) a letter, dated July 28, 2009, from the petitioner's president; (2) an evaluation, dated July 29, 2009, by an associate professor at the University of California, Fresno, College of Health and Human Services, Department of Nursing (hereinafter referred to as the UCF associate professor) which opines on the educational requirements of the proffered position as

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

described by the petitioner; (3) some of the vacancy announcements described above; and (4) documents printed from web content.

The petitioner's president's July 28, 2009 letter states, "We are aware that [a requirement of a bachelor's degree or the equivalent in nursing or a similar health care-related field] is the standard for analogous positions in similar companies in the industry and we have always required such [a] degree for nurse manager positions." Whether either of those assertions has been demonstrated will depend, of course, on the evidence submitted to corroborate it. That letter also refers to an "enclosed expert advisory opinion [, that is, the UCF associate professor's evaluation,] and articles from industry-related professional associations" as evidence that nurse manager positions require a bachelor's degree.

No evidence that [REDACTED] had approved the beneficiary for employment in any position was provided. Likewise, no evidence of duties and educational requirements specified by [REDACTED] was provided.

The UCF associate professor's evaluation opines, in part, "Companies seeking to employ a Senior Dialysis Nurse Manager require prospective candidates to possess at least a Bachelor's degree in the area of Nursing, or a related field . . . ." The evaluator reiterated the list of duties from the petitioner's president's April 1, 2009 letter with only minor editorial revision, and stated, "The skills listed above are acquired through completion of a baccalaureate degree in nursing . . . ." She also stated, "The skills required for the position are developed in the Junior and Senior years of an undergraduate program in Nursing or a related field." She did not indicate which of those duties could not be performed by, for instance, a registered nurse with an associate's degree.

The first Internet document presented on appeal is an article from a website maintained by the American Association of Colleges of Nursing (AACN). These Internet pages indicate that the document is an "AACN Position Statement," first approved by the AACN Board of Director's in 1996 and updated in 2000. The Statement asserts, in part, that, because of "rapidly expanding clinical knowledge" and "mounting complexities in health care," ". . . registered nurses at the entry-level of professional practice should possess, at a minimum, the educational preparation provided by a [BSN]." The AAO finds that, as a document advocating an elevation in educational requirements to the BSN level, the Position Statement is not persuasive evidence that a BSN or higher degree has been recognized as a basic requirement for the proffered position by the healthcare industry. The AAO also finds that even the relevance of the Position Statement is reduced by the fact that it was originally published in 1996 and updated approximately 11 years ago.

The AAO also notes that in its Internet site, the AACN describes itself as "the national voice for America's baccalaureate- and higher-degree nursing education programs." It makes no secret of its predilection in favor of four-year bachelor's degree programs in nursing as opposed to the two and three-year alternatives. Although the web content remains relevant evidence, the AAO must also consider the organization's obvious bias in favor of increasing educational requirements.

One of the documents to which the petitioner's president referred is actually a one-page excerpt from an article. The page was printed from <http://www.mynursingdegree.com/rn-to-bsn-online/career-overview.asp>.<sup>2</sup> This document acknowledges that "70% of nurses have [associate's] degrees or [hospital] diploma level degrees," but states, "Management-level nursing requires an advanced degree such as a BSN." Immediately after that assertion, the article references and offers a summary of the *Handbook's* information on the advancement opportunities for persons with an advanced degree. The organization that maintains that website is not identified, but the website page bears the heading "Qualified Nurses are in demand. Start training online today!" Apparently, then, the organization publishing the website offers on-line classes leading to a BSN.

The AAO finds that this "Qualified nurses are in demand" document, which appears to be basically an advertisement for online courses, bears little weight: the document does not establish the author as an authority in the area of the educational requirements upon which he speaks, and it does not provide any empirical basis for his pronouncement.

Another document appears to have been published by the University of Phoenix and is available at <http://nursinglink.monster.com/education/articles/3842-where-are-we-on-this-issue-adn-vs-bsn>.<sup>3</sup> It concedes that two-thirds of nurses complete their training with an associate's degree. It further concedes, "There are no substantial pay differentials [between nurses with associate's degrees and nurses with BSNs] and nurses holding either degree have the same opportunities to become a charge nurse or director of a department." That article provides no support for the petitioner's positions that supervisory and administrative nursing positions are not typically open to nurses who do not have a BSN and, in fact, directly contradicts it.

The fourth and final Internet-retrieved document provided was published by Jacksonville University in Florida, which offers both bachelor's degrees and master's degrees in nursing. It states that demand for nurses with BSN degrees is expected to grow, and that they are "highly sought after" for various positions, including charge nurse, clinical nurse manager, and chief nursing officer. The document does not state that a BSN is a prerequisite for any of those positions, and it offers no support for that proposition.

The director denied the petition on September 23, 2009, finding, as was noted above, that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. In that decision, the director analyzed the proffered position as a position for a registered nurse.

On appeal, counsel provided (1) a letter, dated October 23, 2009, from the petitioner's president; (2) an additional vacancy announcement; (3) a letter, dated October 6, 2009, from the [REDACTED] and (4) a brief.

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<sup>2</sup> Last accessed December 28, 2011.

<sup>3</sup> Last accessed December 28, 2011.

In his October 23, 2009 letter, the petitioner's president reiterated various claims previously made.

The body of the October 23, 2009 letter from [REDACTED] states, in its entirety:

[REDACTED] has engaged the services of [the petitioner] to recruit and staff healthcare professionals for service operations. We continue to utilize their services, and have been pleased with the results.

Our contract with [the petitioner] covers a wide range of healthcare professional licensed as Registered Nurses. In addition to providing direct patient care, professionals holding an RN license may perform a variety of specialized roles, including management, depending on their qualifications and our needs.

We cannot comment on the acceptance or staffing of a particular healthcare professional, as they are employees of [the petitioner] while staffed with us.

In the appeal brief, counsel asserted that ample evidence in the record establishes that the proffered position is a position in a specialty occupation. Counsel again asserted that the proffered position is analogous to a medical and health services manager position as described in the *Handbook*.

The AAO finds no error in the director's analysis of the proffered position as a registered nurse position, and no error in the director's conclusion that the petitioner has not demonstrated that such a position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. However, in the interest of addressing counsel's main point on appeal, the AAO will assume, *arguendo*, that the proffered position is a medical and health services manager position as described in the *Handbook*.

The AAO will now address the alternative requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first address the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner establishes that the proffered position is one for which the normal minimum requirement for entry is a bachelor's degree, or its equivalent, in a specific specialty.

In the chapter entitled Medical and Health Services Managers, the *Handbook* describes the educational requirements of such positions as follows:

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 referenced section of the U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos014.htm> (last accessed December 28, 2011).

Health services administration, long-term care administration, health sciences, public health, public administration, and business administration do not delineate a specific academic specialty. Far from suggesting that medical health and health services manager positions require a minimum of a bachelor's degree or the equivalent in a specific specialty, that *Handbook* chapter indicates that a degree in any of a wide range of subjects would suffice to qualify one for such a position, and further indicates that some facilities do not rely on formal education at all in their hiring practices. Thus, the *Handbook* does not support the proposition that medical health and health services manager positions categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty. Accordingly, even if the proffered position were properly included within the Medical Health and Health Services Manager occupational classification, that would not by itself establish the proffered position as a specialty occupation position.

The April 1, 2009 evaluation of the proffered position asserts that senior dialysis nurse manager positions require a minimum of a bachelor's degree or the equivalent in nursing or a related field. That opinion, however, is not probative.

First, despite her self-endorsement as "qualified to comment on the position of Senior Dialysis Nurse Manager," neither the professor's letter nor any other evidence of record substantiates that she is qualified as an expert on recruiting and hiring practices of dialysis centers seeking Senior Dialysis Nurse Managers. The record contains no evidence of expertise in the area, such as scholarly research conducted by the professor on the specific area upon which she is opining; books, articles, or treatises authored by her in the area of claimed expertise; or recognition by professional organizations as an authority on dialysis centers' employment practices regarding senior dialysis nurse managers. As the professor has not established her credentials as an expert on industry hiring standards, her opinion in this area merits no special weight and is not persuasive.

Second, and most critically, the record does not indicate that the evaluator has adequate knowledge of the particular position at issue here. The description of the duties of the proffered position, provided by the petitioner's president, rather than by the end-user of the beneficiary's services, and reiterated by the evaluator, is exclusively general and generic and reveals little about the actual work that the beneficiary would actually perform or its complexity; and the professor does not demonstrate knowledge of the petitioner's particular business operations. She does not relate any personal observations of those operations or of the work that the beneficiary would perform. In short, the record reveals no factual foundation for the assertion that the duties of the proffered position require a minimum of a bachelor's degree or the equivalent in nursing or a related field.

Third, the evaluator's opinions are conclusory: She does not cite studies, treatises, surveys, or any other basis for them, other than her asserted personal knowledge, which has not been corroborated in any way.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Although the article at *mynursingdegree.com* states that "Management-level nursing requires an advanced degree such as a BSN," an article posted by the University of Phoenix states that BSN educated nurses have no advantage in seeking promotion to charge nurse or department director. Yet another article states that all management level nursing positions require, or perhaps should require, a BSN. The final article states that nurses with bachelor's degrees are highly sought after for some administrative and supervisory positions, but not that a BSN is a prerequisite for any such positions.

Each of the organizations that published those articles has, as was noted above, a prejudice in favor of BSN degrees, either because they offer such degrees, or because they represent institutions that do.

Even with that predilection in favor of BSN degrees, however, those articles are very inconsistent in their assertions. Whether even one of those articles meant to assert that a BSN is currently a prerequisite for supervisory and administrative nursing positions is unclear, and one clearly asserts that it is not.

In any event, the AAO hereby incorporates its earlier discussions of those Internet documents, and for the reasons stated in those discussions, concludes that these documents are not probative evidence that the proffered position is a specialty occupation position.

Neither the *Handbook*, nor the evaluation, nor the articles submitted, nor any evidence in the record supports the proposition that the proffered position, however classified, (e.g. as supervisory or administrative nurse position, or medical and health services manager, or senior dialysis nurse manager) is a position that normally requires a minimum of a bachelor's degree, or the equivalent, in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit

only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was observed above, the *Handbook* section upon which counsel chose to rely provides no support for the proposition that the petitioner’s industry, or any other, requires senior dialysis nurse managers or medical health services managers to possess a minimum of a bachelor’s degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association that requires a minimum of a bachelor’s degree or the equivalent in a specific specialty as a condition of entry.<sup>4</sup> The only letter from another company in health care is the letter from FMCNA, which expressed no opinion pertinent to the educational requirements of the proffered position.

Counsel provided the vacancy announcements described above. Four clearly state that the positions announced require a BSN. Two do not. Further, even if all of the positions described were demonstrated to be for parallel positions in the petitioner’s industry with organizations similar to the petitioner and unequivocally required a minimum of a bachelor’s degree or the equivalent in a specific specialty, the submission of the six announcements is statistically insufficient to demonstrate an industry-wide requirement. The record contains no independent evidence that the announcements are representative of common recruiting and hiring practices for the proffered position in the healthcare industry in general or in the dialysis industry in particular.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor’s degree in a specific specialty or the equivalent is common to the petitioner’s industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 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 demonstrates that, notwithstanding that other medical and health care services manager positions in the healthcare industry or senior dialysis nurse manager positions in the dialysis industry may not require a minimum of a bachelor’s degree or the equivalent in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such a degree.

The description of the duties of the proffered position is the only evidence that might have distinguished the educational requirements of the proffered position from those applicable to typical medical and health services manager positions. Nothing about those duties, however, makes clear that the position requires a bachelor’s degree.

Whether directing the performance of technical aspects of dialysis requires a bachelor’s degree level of education is unclear, absent evidence pertinent to the complexity of directing those procedures.

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<sup>4</sup> None of the organizations that maintain the websites from which the articles relied upon were taken appears to be such an organization.

Whether evaluating patients' responses to dialysis, assessing patients, assessing educational needs, and providing necessary education requires a bachelor's degree is similarly unclear, absent any evidence pertinent to the complexity of those evaluations and assessments and the complexity of the education to be provided.

The petitioner has failed to demonstrate that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is satisfied if the petitioner demonstrates that it normally requires a bachelor's degree or its equivalent in a specific specialty for the position.

The petitioner's president stated that the petitioner has always required a minimum of a bachelor's degree or the equivalent in nursing or a similar health care related field for its nurse manager positions, but, submitted no evidence to corroborate that assertion. The petitioner's president's assertion is insufficient to sustain the burden of proof in this matter. The record contains no corroborating evidence of a previous history of recruiting and hiring to fill the proffered position, and the petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).<sup>5</sup>

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, or its equivalent.

As was noted above, the description of the proffered position's duties that has been provided and reiterated is insufficiently concrete to permit a finding that those duties require a minimum of a bachelor's degree or the equivalent in a specific specialty.

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<sup>5</sup> To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Monitoring quality, overseeing record keeping, maintaining a safe environment for dialysis operations, supervising patient care, etc., may or may not be associated with attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty, depending of the complexity of those duties, which has been insufficiently explained.

The petitioner has not demonstrated that 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 minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Further, as recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

The petitioner has stated [REDACTED] would be the end-user of the beneficiary's services. [REDACTED] however, has provided no description of the duties of the proffered position, and has not indicated what education it requires of applicants for the proffered position. Although the educational and performance requirements imposed on the proffered position by [REDACTED] are the salient requirements for determining whether the proffered position is a position in a specialty occupation, the evidence does not demonstrate that [REDACTED] has imposed any educational requirements on the proffered position or provided any description of its duties. In fact, [REDACTED] has not indicated that it has a senior dialysis nurse manager position available to which the beneficiary might be assigned, either in [REDACTED] or anywhere else.

Again, 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's 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.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment.

The contract between the petitioner and [REDACTED] does not state that the petitioner would provide the beneficiary to [REDACTED]. The record contains no indication that [REDACTED] has approved assignment of the beneficiary to any of its facilities.

Further still, the staffing agreement between the petitioner and [REDACTED] is for provision of workers "as needed." Yet further, by its terms, that agreement was to expire during February of 2011. It provides no indication that the petitioner has full-time work, or any work, to which to assign the beneficiary from October 1, 2009 through September 27, 2012, which is the period of requested employment. Even if the petitioner had demonstrated that the petitioner would perform some work for [REDACTED] pursuant to the agreement between the petitioner and [REDACTED] the visa petition could not be approved absent evidence that the petitioner has full-time work to which it could assign the beneficiary throughout the period of requested employment.

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

The record suggests an additional issue that was not addressed in the decision of denial. Although the petitioner stated on the LCA that the beneficiary would work full-time in Thousand Oaks, California for the entire three-year period of requested employment, the only evidence it provided to corroborate that assertion is an agreement with [REDACTED] that does not corroborate that [REDACTED] has a senior dialysis nurse supervisor position open; does not corroborate that, if it does have such a position, the position is in Thousand Oaks, California; does not corroborate that, if it has such a position to fill in Thousand Oaks, California, that position will be full-time and continue for three years; and does not indicate that, if it had such a position in such a location for such a period, it would assign the beneficiary to work in it.

Under these circumstances, the petitioner has not demonstrated that the beneficiary would work in Thousand Oaks, California at any time, let alone for the entire three-year period of requested employment. The petitioner has not demonstrated, therefore, that the LCA submitted in this case is valid for all of the locations where the beneficiary would work and corresponds, therefore, with the visa petition.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine 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]

Based upon the evidence and the regulatory analysis discussed above, the AAO finds that the LCA cannot be used to support the instant petition as it has not been demonstrated to be valid for the geographical area which is the beneficiary's actual place of employment. For this additional reason, the appeal will be dismissed and the petition will be denied.

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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

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