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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: **JUL 03 2012**

Office: VERMONT SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Michael T. Rhew
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center 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 describes itself as a provider of healthcare professionals with 60 employees and gross income of \$2.3 million. In order to employ the beneficiary in what it designates as a charge nurse position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition, concluding that the petitioner has not established that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Petition for a Nonimmigrant Worker (Form I-129) and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Notice of Appeal or Motion (Form I-290B) and allied documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Although the director's denial was based on the petitioner's failure to establish the proffered position as a specialty occupation, a review of the record reveals an additional critical issue pertaining to the petitioner's eligibility to file an H-1B petition. Specifically, the AAO finds that the petition cannot be approved, because the petitioner has not established itself as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

First, the AAO will address why it finds that the petitioner has not established that it is a United States employer under 8 C.F.R. § 214.2(h)(4)(ii).

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;

- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the legacy Immigration and Naturalization Service ("INS") nor U.S. Citizenship and Immigration Services ("USCIS") defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the

provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.¹

¹ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. See, e.g., section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.²

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).³

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work

controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

² To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

³ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

In its support letter filed with the Form I-129 dated March 31, 2010, the petitioner indicates that the proffered position would require the beneficiary to perform the following duties:

- Assume primary responsibility for assessing, planning, implementing and evaluating our nursing care services
- Co-ordinate [sic] the overall clinical activities of our nursing care unit on a specific shift
- Determine nursing interventions based on assessment data
- Prioritize identified needs, implements nursing actions and evaluates patient outcomes
- Develop or revise the plan of care to address identified patient needs
- Collaborate with the nursing house supervisor on staffing for a particular shift
- Plan, implement and evaluate our clinical programs
- Evaluate the ability of the patient/family/significant others to understand and participate in decisions about their care
- Facilitate our patient education

- Maintain accurate clinical records
- Act as our clinical resource for staff on unit
- Communicate and consult with our other health care disciplines
- Act as a patient advocate
- Represent nursing at our multidisciplinary rounds
- Participate in the development of our standards, procedures and protocols
- Promote change in nursing practice
- Take a proactive role under the guidance of our Nursing Management/Nursing Education in training and education activities of nursing staff
- Promote a learning environment in our facility
- Identify opportunities for improvement at our facility
- Perform other professional duties as may be assigned within his scope and ability

The AAO notes that the description above implies that the petitioner is a medical facility and the beneficiary would provide services for the petitioner. However, the record of proceeding indicates that the petitioner is a provider of healthcare services and professionals, and does not appear to have its own patients or provide services on its premises.

The support letter further states that the minimum requirement for the position is a bachelor's degree in nursing or a related field. The petitioner submitted the beneficiary's Bachelor of Science degree in nursing and a transcript from West Negros College in Philippines as evidence of qualification. In addition, the petitioner submitted a copy of its staffing agreement with Bergen Regional Medical Center (BRMC), located in Paramus, New Jersey.

It is critical to note that the Labor Condition Application (LCA) was certified for a "charge nurse" under the title of Registered Nurse (SOC code 29-1111.00) to work on a full-time basis at [REDACTED] which is the address of [REDACTED]. The LCA indicated that the beneficiary's annual salary is \$63,003.00 at prevailing wage Level I.

On August 27, 2010, the director requested additional information from the petitioner to establish that the proffered position is a specialty occupation.

In response to the director's RFE, the petitioner submitted another letter dated October 6, 2010 providing additional description of the duties the beneficiary would perform at BRMC. The petitioner lists the duties as follows:

- Lead BRMC is [sic] assessment, care planning, intervention, evaluation, discharge planning and health teaching for improved patient care rendition
- Direct, coordinate and supervise [REDACTED] nursing staff
- Participate in daily activity needs of [REDACTED] patients
- Monitor & ensure that [REDACTED] standards of care and nursing process are fully and efficiently executed for patient care
- Ensure maintenance of safety standards for [REDACTED] nursing staff and patients
- Seek resolution for any identified patient care issues and problems

- Communicate patient concerns and needs to appropriate [REDACTED] medical personnel
- Serve as clinic resource person to concerned [REDACTED] medical personnel
- Assure timely processing and execution of [REDACTED] doctor's orders and instructions
- Act as liaison between patients with their families and [REDACTED] medical team
- Assess [REDACTED] overall unit activity and patient care rendition
- Make patient care assignments for shift rotation
- Participate in evaluation of [REDACTED] staff performance and orientation of new ones
- Maintain up to date knowledge in nursing care practice

The AAO finds that the record of proceeding does not establish that the petitioner meets the definition of a United States employer.

First, despite the petitioner's claim as the beneficiary's "direct and sole employer," the nature of the arrangement suggests that the petitioner would not be controlling or supervising the beneficiary's work. The petitioner states in its response to the RFE dated October 6, 2010 that the beneficiary's principal duty is "to faithfully execute the programs established by [REDACTED] in ensuring rendition of its medical services to resident patients in the highest professional standards as possible." In fact, the petitioner further states they are unable to provide a breakdown of percentage of time the beneficiary would spend on each duty since the beneficiary would be under [REDACTED] supervision and delegates such authority to [REDACTED]. Thus, the petitioner would not supervise the beneficiary on a day-to-day basis, and would not control the manner and means by which the service is provided. In fact, the petitioner appears to be no more than a "token" employer, to borrow language of the previous mentioned decision in *Defensor v. Meissner*, 201 F.3d 384. Further, it is not clear who would have hiring and firing authority.

Additionally, the documents do not establish the nature and scope of the beneficiary's employment. The Form I-129 and the LCA indicates that the place of employment is 230 East Ridgewood Avenue, Paramus, New Jersey, 07652, which is the address for [REDACTED]. Thus, the beneficiary is employed at a third-party location, and [REDACTED] would be the source of the instrumentalities and tools.

Counsel included a copy of the staffing agreement with [REDACTED] dated April 11, 2006, but it is a general agreement that does not identify any employees. In fact, the petitioner has not provided any documents from [REDACTED] that identify the beneficiary as a contracted employee. Thus, there is no evidence that the beneficiary would work at [REDACTED].

In addition, the staffing agreement states that it will be valid for "a term of two years from the date of execution and staffing can only be renewed with mutual written consent." Counsel submitted a letter printed on the petitioner's letterhead dated March 4, 2009, which states that the "agreement dated April 11, 2006 between [the petitioner] and [REDACTED] will remain in effect unless a 30 day written termination notice is given by either party with or without cause." While the letter is signed by both parties, it does not identify the person from [REDACTED] that signed the letter. More importantly, the letter does not specify the dates of validity. Without the dates of validity, the AAO is unable to determine if the contract would be valid for the dates of intended employment for the beneficiary.

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, it appears that the petitioner has an agreement with ██████ to provide healthcare employees, but the agreement does not have validity dates and does not identify the beneficiary as a contracted employee. Moreover, the petitioner does not have authority over the day-to-day responsibilities assigned to the beneficiary, and it is not clear who has hiring and firing authority.

While salary, tax, and other benefit are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors or sufficient corroborating evidence to support the petitioner's claims, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. Again, 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. The evidence of record did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.

Based on the tests outlined above, the petitioner has not established that it or any of its clients will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). For this reason also, the petition must be denied.

The AAO will now address the issue upon which the director denied the petition, namely, whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. The AAO finds that even if the petitioner had established that it was a qualifying U.S. employer, it failed to establish the proffered position as a specialty occupation.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation in accordance with the controlling statutory and regulatory provisions. Accordingly, the appeal will be dismissed, and the petition will be denied.

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

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

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

An occupation which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in

particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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.

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), 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 AAO recognizes the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴

The petitioner indicated that the beneficiary would be employed as a charge nurse. The director stated that the duties described are comparable to duties of a registered nurse. The director denied the petition, stating that a four-year degree is not required for entry into the position of a registered nurse. On appeal, counsel claimed that the duties of a charge nurse are different from a registered or staff nurse since charge nurses do not perform patient care.

Based on the description of duties provided, the AAO finds that the proffered position appears to resemble those of a medical and health services manager. However, for the reasons that follow, the AAO concludes that the proffered position is not a medical and health services manager.

According to the relevant *Handbook* chapter, medical and health services managers typically perform the following duties:⁵

⁴ All of the AAO’s references are to the 2012-2013 edition of the Handbook, which may be accessed at the Internet site <http://www.bls.gov/ooh/>.

⁵ U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 Edition*, Medical and Health Services Managers, on the Internet at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-2> (visited May 30, 2012).

- Work to improve efficiency and quality in delivering healthcare services
- Keep up to date on new laws and regulations so that the facility complies with them
- Supervise assistant administrators in facilities that are large enough to need them
- Manage finances of the facility, such as patient fees and billing
- Create work schedules
- Represent the facility at investor meetings or on governing boards
- Keep and organize records of the facility's services, such as the number of inpatient beds used
- Communicate with members of the medical staff and department heads

The AAO finds that, despite its view to the contrary, the petitioner has failed to provide evidence sufficient to establish that the beneficiary would be performing duties at BRMC at the relatively high hierarchical management level that the *Handbook's* duty list indicates medical and health services managers serve.

Aside from the fact that the record does not contain persuasive evidence that the proffered position is in fact a medical and health services manager, the AAO finds that the LCA filed to support this petition precludes approval of this petition for such a position. As previously noted, that LCA was certified for OES/SOC Code: 29-1111, Registered Nurses – not for Medical and Health Services Managers. Further, the AAO observes that the [REDACTED] staffing agreement submitted into the record does not reference either a [REDACTED] need for, or a contractual agreement to pay for, the assignment of a medical and health services manager.

Further, the AAO finds that even if the petitioner had established that the proffered position is a medical and health services manager, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for medical and health services managers. Regarding the educational requirements for entry into the occupation of "Medical and Health Services Managers," the *Handbook* states the following:⁶

Medical and health services managers typically need at least a bachelor's degree to enter the occupation. However, master's degrees in health services, long-term care administration, public health, public administration, or business administration are also common.

Although bachelor's and master's degrees are the most common educational pathways to work in this field, some facilities may hire those with on-the-job experience instead of formal education. For example, managers of physical therapy may be experienced physical therapists who have administrative experience.

⁶ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 Edition*, Medical and Health Services Managers, on the Internet at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-4> (visited June 5, 2012).

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 position, it also states that a degree in one of a number of fields is acceptable.

As reflected in this decision's introductory comments, 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, 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 a medical and health services manager, it would not qualify as a specialty occupation by virtue of its occupational classification.⁷

As discussed above, the petitioner has not established that the position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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.

⁷ Moreover, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of medical and health services managers have at least a bachelor's degree, it could be said that "most" medical and health services managers possess such a degree. It cannot be found, therefore, that a statement that "bachelor's and master's degrees [with no specification as to the field of study] are the most common educational pathways to work in this field" would equate to establishing that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum entry requirement for the occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not provided any documentation to indicate that the industry's professional association has made a degree a minimum entry requirement for the occupation. Moreover, the petitioner did not submit any letters or affidavits to meet this criterion of the regulations.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel for the petitioner submitted eight job advertisements.

However, upon review of the documents, the petitioner fails to establish that similar organizations to the petitioner routinely employ individuals with bachelor's degrees (or higher) in a specific specialty, in parallel positions.

It is not sufficient to assert that organizations are similar without providing documentation to substantiate those claims. The AAO notes that for the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered).

The record of proceeding is devoid of sufficient information regarding BRMC; thus, it is difficult to conduct a legitimate comparison of their business operations with advertising organizations.⁸ Further, the

⁸ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from eight job postings with regard to determining the common educational requirements for entry into parallel positions in similar healthcare facilities. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of registered nurses for a healthcare facility like the end-client in this matter required a bachelor's or higher degree in a specific specialty or its equivalent, 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.

advertisements do not specify that a bachelor's degree in a specific specialty is required for the advertised positions. Only one advertisement for a nursing supervisor position from MediStar indicates "graduate degree" as an education requirement, but it does not require specific specialty. The other seven advertisements do not require a bachelor's degree, but only indicate a preference for a bachelor's degree. Therefore, the petitioner failed to establish that bachelor's degree or higher in a specific specialty is required for parallel positions in similar organizations.

The petitioner has also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. Neither the petitioner nor its counsel has provided evidence to distinguish the proffered position as unique from or more complex than registered nurse positions, such as those as described in the *Handbook*, that can be performed by persons without a specialty degree or its equivalent.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree or its equivalent for the position.

The AAO usually reviews the employer's past recruiting and hiring practices, as well as information regarding employees who previously held the position. Here, the relevant entity for application of the criterion would be BRMC, the place of actual work and the entity to which the beneficiary would be assigned to do that entity's work.

Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high caliber candidates but is necessitated by performance requirements of the position.⁹

The petitioner did not provide information regarding its normal requirements and recruitment history for the position, and also did not provide such for its end client, BRMC. The petitioner claims that a bachelor's degree in nursing is the minimum requirement for the proffered position. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As the

⁹ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).¹⁰

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

While the petitioner and its counsel contend that the nature of the proffered position's duties are so specialized and complex that the proffered position must be classified as a specialty occupation, relative specialization and complexity are not sufficiently developed by the petitioner and, in light of the absence of evidence to the contrary, the duties of the proposed position are have not been established as so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty.¹¹ In this regard the AAO notes that there is no evidence that [REDACTED] has adopted or endorsed the petitioner's duty description. The AAO, therefore, concludes that the proffered position does not meet the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further except to note that even if the petitioner had established that the proffered position required at least a bachelor's or higher degree in a specific specialty, the petitioner failed to establish that the beneficiary is qualified for the proffered position since the petitioner did not submit: (1) an evaluation of the beneficiary's foreign degree evidencing

¹⁰ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

¹¹ It is further noted that any claims of specialization and complexity are simply not credible given the Level I designation on the supporting LCA. If the proffered position did in fact involve some level of complexity relative to other registered nurses, the petitioner would have to have submitted an LCA certified for at least a Level III, and more likely a Level IV, position.

that it is the equivalent of a U.S. bachelor's degree in a specific specialty, and (2) evidence to demonstrate that the beneficiary is licensed to practice nursing in New Jersey.

For the reasons related in the preceding discussion, the petitioner has failed to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO is unable to conclude that the proffered position is a specialty occupation. Accordingly, 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 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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.