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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**

b2



Date: **JUN 01 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: SELF-REPRESENTED

**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 with the field office or service center that originally decided your case by filing a 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,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner states that it is a nonprofit research organization with 300 employees and a gross annual income of \$15,000,000.<sup>1</sup> It seeks to employ the beneficiary as a utilization review coordinator and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

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

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] requires 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 [(2)] requires 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, a proposed

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<sup>1</sup> It must be noted that the support letter dated January 8, 2010 indicates that the petitioner is a long-term, acute care hospital that treats patients with complex respiratory and medical needs.

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.

In the petitioner’s support letter dated January 8, 2010, the petitioner states that the beneficiary will work as a utilization review coordinator. The petitioner broke down the day-to-day

responsibilities of the proffered position as follows:

No[.] of Hours/ Week	% of Time	Detailed Description of Duties and Responsibilities
30	75%	To monitor adherence to the hospital's utilization review plan to ensure the effective and efficient use of hospital services; to monitor the appropriateness of hospital admissions and extended hospitals [sic] stays; establishes and maintains efficient methods of ensuring the medical necessity and appropriateness of all hospital admissions; performs concurrent reviews for patients to ensure that extended stays are medically justified and are so documented in patient's [sic] medical records; coordinates and supervises the activities of the Utilization Review Department; using the PAS Length of Stay as a guideline, calculates the lengths of stay and continued-stay days for patients; refers to the Utilization Review Physician Advisor [for] all cases that do not meet established guidelines for admission or continued stay; assists the Utilization Review Committee in the assessment and solution of identified utilization review problems; identifies problems related to the quality of patient care and refers such problems to the Quality Assurance Committee;
10	25%	Maintains a liaison with the Social Service Department to facilitate timely discharge planning; [and] compiles monthly reports and statistics for presentation to the Utilization Review Committee.

The support letter also states that the proffered position requires at least a bachelor's degree in nursing, health administration or related field. The petitioner further claims that the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*) affirms that a bachelor's degree is required for the proffered position. The petitioner submitted copies of the beneficiary's foreign bachelor's degree and college transcripts, as well as a credential evaluation from [redacted] finding that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in nursing.

On February 3, 2010, the director issued an RFE requesting the petitioner to submit a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity, including specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, and the minimum education, training, and experience necessary to do the job. In addition, the director requested that, if the beneficiary will supervise or direct others, a line-and-block organizational chart showing the petitioner's

hierarchy and staffing levels also be submitted.

On February 22, 2010, in response to the director's RFE, the petitioner provided another break down of the day-to-day responsibilities of the proffered position as follows:

No[.] of Hours/Week	% of Time	Detailed Description of Duties and Responsibilities
30	80%	Evaluates patient medical records to determine severity of patient's illness and determining the appropriateness of level of care; serves as liason [sic] for patients and hospital with insurance companies; negotiates and advocates for patient length of stay and level of care; oversees utilization review activities eith [sic] other departments to ensure reimbursement for services provided by the hospital; leads physician weekly staffing meetings and coordinates with physician's outpatient offices for the purposes of billing; analyzes clinical diagnosis and articulate [sic] those indicators professionally; assist in the development, planning, coordination and administration of the activities of Utilization Review and Discharge Planning; review medical records daily to determine appropriateness and medical necessity of admission continued hospital stay and use of ancillary services; provides care management, crisis evaluations, and evaluations for involuntary hospitalization; interviews clients to obtain pertinent information including psychiatric, social, educational, and vocational history; makes field visits to evaluate clients to determine needs for services; assists clients in obtaining suitable services such as housing, vocational rehabilitation, financial assistance, and employment; helps clients develop necessary skills for everyday living; provides transportation for clients to obtain needed services; cooperates with other agencies and professionals to coordinate services for mutual clientele; participates in interdisciplinary team reviews for collaborative assessment and treatment planning to ensure quality care; conducts social, recreational, or occupational skill development in accordance with the treatment plan; observes and reports to licensed staff observations of client's [sic] behaviors; confers with licensed staff regarding needed

		services and referrals to other community agencies;
10	20%	Coordinates and supervises the activities of the Utilization Review Department; refers to the Utilization Review Physician Advisor [on] all cases that do not meet established guidelines for admission or continued stay; assists the Utilization Review Committee in the assessment and solution of identified utilization problems; identifies problems related to the quality of patient care and refers such problems to the Quality Assurance [sic] Committee; maintains a liaison [sic] with the Social Service Department to facilitate timely discharge planning; [and] compiles monthly reports and statistics for presentation to the Utilization Review Committee.

In addition, in response to the RFE, the petitioner stated that the proffered position is closely related to the occupation found in the *Handbook* at <http://www.bls.gov/oco/ocos014.htm>, which is Medical and Health Services Managers. The petitioner further claimed that the applicant must have a comprehensive understanding of the principles of nursing, patient management and hospital policies in order to fill the proffered position. The petitioner also stated “[a] scan of internet job listings, ([www.nonprofitdirections.com](http://www.nonprofitdirections.com)) shows that the degree requirement is normally a minimum requirement for the proffered position, all requiring a bachelor’s degree or its equivalent.” Furthermore, the petitioner claimed that “it has been previously held that a position may be considered a specialty occupation based on the complexity of the duties alone” and cited *American Bitech, Inc. v. I.N.S.*, Civ. No 2-88-262 (E.D. Tenn. Mar. 27, 1989), *Matter of Sun*, 12 I&N Dec. 535 (DD 1966), *Hong Kong TV and Video Programs, Inc. v. Ilchert*, 685 F. Supp. 712 (N.D. Cal 1988).<sup>2</sup>

The director denied the petition on March 19, 2010.

On appeal, the petitioner claims that the proffered position is a new position in the *Handbook*. In addition, the petitioner provides examples of new, emerging, and evolving occupations identified by the Federal Government, the states of Texas and Minnesota, and the National Council for Workforce Education. Further, the petitioner includes the following description of the proffered position’s duties:

Analyzes patient records to determine legitimacy of admission, treatment, and length of stay in health-care facility to comply with government and insurance company reimbursement policies[;] [a]nalyzes insurance, governmental, and accrediting agency standards to determine criteria concerning admissions, treatment, and length of stay of patients[;] [r]eviews

<sup>2</sup> As will be discussed in greater detail infra, the cases cited are irrelevant to the definition of specialty occupation at section 214(i)(1) of the Act, as each addresses instead the definition of profession at section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32).

application for patient admission and approves admission or refers case to facility utilization review committee for review and course of action when case fails to meet admission standards[;] [c]ompare inpatient medical records to established criteria and confers with medical and nursing personnel and other professional staff to determine legitimacy of treatment and length of stay[;] [a]bstracts data from records and maintains statistics[;] [d]etermines patient review dates according to established diagnostic criteria[;] [m]ay assist review committee in planning and holding federally mandated quality assurance reviews[;] [and] [m]ay supervise and coordinate activities of utilization review staff.

The petitioner also submits five job vacancy announcements.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the DOL's *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

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>3</sup> The AAO agrees with the director and finds that the duties described by the petitioner reflects the duties of a registered nurse. The "Registered Nurses" chapter of the 2012-2013 edition of the *Handbook* describes the duties of a registered nurse as follows:

Registered nurses (RNs) provide and coordinate patient care, educate patients and the public about various health conditions, and provide advice and emotional support to patients and their family members.

#### **Duties**

Registered nurses typically do the following:

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<sup>3</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 2012 – 2013 edition available online.

- Record patients' medical histories and symptoms
- Give patients medicines and treatments
- Set up plans for patients' care or contribute to existing plans
- Observe patients and record the observations
- Consult with doctors and other healthcare professionals
- Operate and monitor medical equipment
- Help perform diagnostic tests and analyze results
- Teach patients and their families how to manage their illnesses or injuries
- Explain what to do at home after treatment

Some registered nurses oversee licensed practical nurses, nursing aides, and home care aides. For more information, see the profiles on licensed practical and licensed vocational nurses; nursing aides, orderlies, and attendants; and home health and personal care aides.

Registered nurses sometimes work to promote general health by educating the public on warning signs and symptoms of disease. They might also run general health screenings or immunization clinics, blood drives, or other outreach programs.

Most registered nurses work as part of a team with physicians and other healthcare specialists.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

Registered nurses' duties and titles often depend on where they work and the patients they work with. They can focus on the following specialties:

- A specific health condition, such as a diabetes management nurse who helps patients with diabetes or an oncology nurse who helps cancer patients
- A specific part of the body, such as a dermatology nurse working with patients who have skin problems
- A specific group of people, such as a geriatric nurse who works with the elderly or a pediatric nurse who works with children and teens
- A specific workplace, such as an emergency or trauma nurse who works in a hospital or stand-alone emergency department or a school nurse working in an elementary, middle, or high school rather than in a hospital or doctor's office.

Some registered nurses combine one or more of these specialties. For example, a pediatric oncology nurse works with children and teens who have

cancer.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Registered Nurses, <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-2> (accessed May 22, 2012).

Under the section on “How to Become a Registered Nurse,” the *Handbook* states that:

In all nursing education programs, students take courses in nursing, anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take four years to complete; ADN and diploma programs usually take two to three years to complete.

All programs also include supervised clinical experience in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in extended and long-term care facilities, public health departments, home health agencies, or ambulatory (walk-in) clinics.

Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse.

Many registered nurses with an ADN or diploma find an entry-level position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

*Handbook*, 2012-13 ed., Registered Nurses, <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4> (accessed May 22, 2012).

The *Handbook* indicates that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. Because the *Handbook* indicates that working as a registered nurse does not normally require at least a bachelor's degree in a specific specialty or its equivalent, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied 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.

As stated earlier, 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).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Finally, for the reasons discussed in greater detail below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner on appeal submitted copies of five advertisements for utilization review coordinator positions. Only one of the advertisements provided, however, establish that a bachelor's degree is generally required, but even that posting did not require a bachelor's degree or the equivalent in a *specific specialty*. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. For instance, while the second, third, and fourth job announcements are for positions in the health care industry, the positions appear to be for psychiatric and behavioral health treatment facilities and, therefore, they cannot be found to be parallel positions in similar organizations. In addition, while the first and fifth job announcements are also for positions in the health care industry, the positions appear to be for large, corporate health care companies with thousands of employees and, therefore, they also cannot be found to be parallel positions in similar organizations. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>4</sup>

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<sup>4</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what

The petitioner 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." Here, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of utilization review coordinator.

Specifically, even though the petitioner claims that the proffered position's duties are so complex in nature that a bachelor's degree is required, the petitioner failed to demonstrate how the utilization review coordinator's duties as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique. While one or two courses in nursing may be beneficial in performing certain duties of a utilization review coordinator position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in nursing or its equivalent are required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other registered nurses positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for registered nursing positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than registered nurses or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of utilization review coordinator is so complex or unique relative to other registered nursing positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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statistically valid inferences, if any, can be drawn from just 5 job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar health care companies. *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 utilization review coordinator for a 300-person health care company 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.

Furthermore, the petitioner indicated that it has consistently required a degree in nursing, health administration or related field for the proffered position. However, the petitioner does not provide any evidence to support this claim. 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)). Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).<sup>5</sup>

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. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than registered nurse positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.<sup>6</sup>

The AAO notes the petitioner's claim, in response to the RFE, that "it has been previously held that a position may be considered a specialty occupation based on the complexity of the duties alone." In support of this statement, the petitioner cites *American Bictech, Inc. v. I.N.S.*, Civ. No 2-88-262 (E.D. Tenn. Mar. 27, 1989), *Matter of Sun*, 12 I&N Dec. 535 (DD 1966), *Hong Kong TV and Video Programs, Inc. v. Ilchert*, 685 F. Supp. 712 (N.D. Cal 1988). However, all three cases predate the creation of the H-1B specialty occupation classification at section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). Furthermore, these cases deal

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<sup>5</sup> Even if a petitioner may believe or otherwise assert that a proffered position requires a specific 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").

<sup>6</sup> It is noted that the Level I wage for a registered nurse, SOC code 29-1111, in Los Angeles county was \$29.39 per hour at the time this petition was filed. This far exceeds the proffered wage rate of \$16.15 per hour on the Form I-129. Nevertheless, even if the petitioner had offered the beneficiary the minimum Level I wage required, such a wage indicates that this is an entry-level position for an employee who has only basic understanding of the occupation. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage.

with whether the beneficiaries are members of the professions as defined in section 101(a)(32) of the Act. As indicated earlier, the issue before the AAO is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession. Thus, the matters cited by counsel are irrelevant to the instant petition.<sup>7</sup>

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

Beyond the decision of the director, it cannot be found that the submitted Labor Condition Application (LCA), certified for a medical and health services manager position, SOC code 11-9111.00, corresponds to this petition filed for a registered nurse position, SOC code 29-1111. Moreover, the occupational classification issue aside, the AAO finds that the LCA provided in support of the instant petition indicates that the proffered position is a full-time position and that the beneficiary will be compensated at \$17.50 per hour, which equates to \$36,400 per year. However, the Form I-129 indicates that the beneficiary will be compensated at the rate of \$33,600 per year. It must therefore be concluded that the LCA does not correspond to the petition for this additional reason. In other words, even if it were determined that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to the correct classification and to the rate of pay on the Form I-129.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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.*

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the correct occupational classification and to the rate of

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<sup>7</sup> The AAO notes that the primary, fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree, or its equivalent, to be in a specific specialty.

pay on the Form I-129, and the petition must be denied for this additional reason.

Alternatively, the petitioner's sworn statement on the Form I-129 indicates that it will not comply with section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1), and pay the required wage to the beneficiary as attested on the LCA. As such, even if the LCA were found to correspond to the petition, the petition could still not be approved due to the failure to establish a bona fide job offer. USCIS cannot approve a petition in which a petitioner indicates that it will more likely than not fail to adhere to the terms and conditions of employment.

Finally, 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.

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