



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2

Date: **JUN 08 2012** Office: VERMONT SERVICE CENTER

IN RE:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

If you believe the 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,

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

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 23, 2010. The petitioner is a nursing and rehabilitation center with a gross annual income of approximately \$12 million and 151 employees.

Seeking to employ the beneficiary as a charge nurse, the petitioner filed this H-1B petition in an endeavor to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on October 25, 2010, finding that the petitioner had not established that the proffered position qualifies as a specialty occupation. On appeal, the petitioner asserts that the director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO 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.

Furthermore, the AAO will also address an additional, independent ground for denial of the petition, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, for this reason as well, the appeal will be dismissed and the petition will be denied, with each reason considered as an independent and alternative basis for denial.

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

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R.

§ 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

The AAO notes that on the Form I-129 the petitioner identified the proffered position as that of a charge nurse, but that the LCA submitted in support of the petition was certified not for a nursing occupation but, rather, for the Medical and Health Services Managers occupational classification. The AAO also notes, that in contrast with the type of position for which the LCA was certified, the petitioner and counsel argue the merits of the proffered position as being that of a Registered Nurse (RN) requiring at least a Bachelor's Degree in Nursing (BSN).

In a supporting letter dated March 25, 2010 the petitioner states that the beneficiary will:

Conduct and certify walk-through using the medical records roster in order to provide accurate data for the daily census activity report, billing purposes, and room assignment in compliance with State and Federal regulations; oversee the proper administration of total care to all residents; interpret, implement and enforce all facility policies and procedures; assign responsibility for the direct care of specified residents and assign Registered Nurses (RN) and CNA staff; assign breaks for the RN and CAN staff; prepare written job performance evaluations which are reviewed by the Director of Nursing and Administrator; counsel subordinates and take disciplinary action, including suspension of employees when necessary; recommends termination of RN and CAN staff to Director of Nursing Services and Administrator; be in charge of the unit and in the absence of administrative personnel, is in charge of the facility. The beneficiary is also responsible for providing prescribed medical treatment and personal care services to the facility's residents; taking and recording patients' vital signs; administer specified medication orally or by injection; and collaborating with physicians, health care team and patients' family in delivering a plan of care.

More than 50% of her time will be dedicated to overseeing the patient/nurse staff assignments, monitoring and demonstrating proper clinical care and clinical technique, including reviewing the documentation of patient files of the nurses under her to ensure timeliness, efficacy of care plan and accuracy, and ensuring

that all care and documentation is in keeping with both the Department of Health requirements and facility policy. Approximately fifteen percent of the time will be spent on arranging staff assignments for next shift. Another approximately fifteen percent of her time will be spent attending required committee meetings and leadership meetings. The balance of the time (roughly twenty percent) will be spent overseeing that the reports given of patients' files from one shift to another are complete and accurate, and performed in a timely manner, including overseeing that all patients have received required medication during that 12 hour shift period, nurse evaluations, etc. and then giving report to the person taking over for her on the day shift.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 30, 2010. The director requested the petitioner submit additional documentation, including evidence to demonstrate that the proffered position is a specialty occupation. In response, counsel provided a revised list of duties, along with the percentage of time to be spent on each job duty. The description of the job is similar to the previously submitted information; however, duties related to direct patient care have been expanded and counsel asserts that these duties account for 50% of the beneficiary's time.

Essential Functions - Clinical (Account for 50% of job time)

- Obtains and administers prescribed medications and treatments in accordance with approved nursing techniques. Documents same according to facility policy and Standards of Practice 10%
- Obtains supplies and prepares equipment to aid physician during treatments and examinations of residents. 2%
- Observes patient, records significant conditions and reactions and notifies supervisor, family (responsible party), and physicians of resident's condition and reaction to drugs, treatments and significant incidents. Documents same according to facility policy and Standards of Practice. 10%
- Takes temperature, pulse, blood pressure, and other vital signs to detect deviations from normal and assess condition of resident. Notifies parties as above and documents according to facility policy and Standards of Practice. 7%
- Ensures nursing assistants function in compliance with State and Federal Regulations and facility and corporate policies. 7%
- Administers approximate disciplinary action for nursing staff non-compliance with State and Federal Regulations and corporate policies and procedures. 4%
- Keeps resident's family and physician informed of any changes in resident behavior, medications or conditions of health. 5%
- Modifies resident care plan and aide flow sheets in conjunction with resident changes in condition. 5%

Essential Functions - Unit Management (Account for 50% of job time)

- Oversees the proper administration of total care to all residents. 10%
- Interprets, implements and enforces all facility policies and procedures. 10%
- Assigns responsibility for the direct care of specified residents and assigns CNAs (Certified Nurses Assistants) to groups of residents. 2%
- Supervises CAN [sic] staff. 7%
- Assists in the orientation and training of new CNAs. 2%
- Counsels subordinates and takes disciplinary actions, including suspension of employees when necessary. 2%
- Is in charge of the unit, and in the absence of administrative personnel, is in charge of the facility. 8%
- Conducts and certifies midnight census walk-through using the Medical Records roster in order to provide accurate data for the Daily Census Activity Report, billing purposes, and room assignment, etc., in compliance with State and Federal Regulations. 9%

Counsel also discussed the difference in duties and abilities for nurses with a bachelor's degree and those without a bachelor's degree. Furthermore, counsel claimed that a baccalaureate degree is normally the minimum requirement for entry as a charge nurse and the degree requirement is common to the industry, by providing four job advertisements.

Counsel states that "nurses in administrative roles ought to have their H-1B petition approved" and references a USCIS memorandum from [REDACTED], Executive Associate Commissioner, INS Office of Field Operations in support of his assertion. See memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (Nov. 27, 2002) (hereinafter referred to as the Williams Memo). The AAO observes that counsel did not quote or reference any portion of the Williams Memo in support of his contention. In any event, the AAO finds that counsel's assertion is incorrect, as it is not an accurate summary of any portion of the Williams Memo. It appears that counsel is referring to part C of the memo, which states the following:

C. Nurses in Administrative Positions

Certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree. (See Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook at 269.) Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (See Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook at 75.)

The AAO finds that, as evident in the wording of the memo, this quoted section of the Williams Memo refers to nurses in administrative positions, such as upper-level nurse managers in hospital administration positions and nursing services administrators – categories to which the proffered

position has not been shown to belong. Further, even for those two types of positions addressed above, the Williams Memo indicates no categorical qualification as specialty occupations. Rather, even for such positions the Williams Memo indicates that the petitioner has the burden to establish that its particular position satisfies the statutory and regulatory standards for a specialty occupation. This the petitioner has not done.

The Williams Memo states that registered nurses generally do not meet the requirements for H-1B classification, however, certain specialized nursing occupations are likely to require a bachelor's or higher degree, and accordingly, be H-1B equivalent. The AAO finds that, as described in the record of proceeding, the proffered position and the duties comprising it do not fall into the advanced nursing occupations identified in the Williams Memo.¹ Rather, the proffered position fits within the range of RN specialty positions described at section E of the Memo as those for which qualification as a specialty occupation would depend upon the extent and weight of the evidence presented in the petition. Thus, while the Williams Memo summarizes the statutory and regulatory standards for establishing an H-1B specialty occupation, it is not evidence that the particular position that is the subject of this petition is a specialty occupation. Also, as this decision reflects, the extent and weight of the evidence in this record of proceeding does not establish that the proffered position is one that requires at least a bachelor's degree, or the equivalent, in a specific specialty.

Further, the AAO observes that the description of the duties of the proffered position does not specifically identify any tasks that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent, for instance, from a two or three-year program in nursing at a junior college.

The director denied the petition on October 25, 2010, finding that the evidence of record does not establish that the job offered qualifies as a "specialty occupation" under section 101(a)(15)(H)(i)(b) of the Act.

In the appeal, filed on November 26, 2010, counsel for the petitioner claims that the director failed to apply the preponderance of evidence standard when evaluating the evidence. Counsel reiterated his position in the RFE response that a charge nurse is a specialty occupation position because the job advertisements show that the position requires a bachelor's degree and the degree is common to the industry. Counsel further stated that the employer normally requires a degree for the position which the petitioner attested to in the response to the RFE. Counsel further repeated his argument that the duties of the position are complex due to its supervisory responsibilities.

¹ The four types of RN positions that the Williams Memo recognizes as categorically requiring at least a specialty-occupation level of education are Clinical Nurse Specialists; Nurse Practitioners; Certified Registered Nurse Anesthetists; and Certified Nurse-Midwife. The AAO finds these categories to be the same as the four APN specialties that the *Handbook* identifies as requiring at least a master's degree in nursing. The AAO reiterates that the record of proceeding establishes that the proffered position does not fit within any of these APN specialties.

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

The AAO conducts its own separate, independent, and *de novo* review of the records of proceeding pertaining to the matters before it. In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the director's decision does not comport with the evidence of record and that the decision is a function of a failure to apply the preponderance of the evidence standard. Applying the preponderance of the evidence standard, the AAO finds that the director's determination that the petitioner did not establish the proffered position as a specialty occupation was correct.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The 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.²

The petitioner indicated that the beneficiary would be employed as a charge nurse. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

A review of the duties of the proffered position reveals that the position involves a combination of duties of a registered nurse and medical and health services manager. This is confirmed by counsel, who stated in the response to the RFE that half of the beneficiary's duties are similar to that of a standard registered nurse.

The AAO reviewed the chapter of the *Handbook* on "Registered Nurses."³ The *Handbook* provides the following information, in pertinent part, regarding the duties for this occupational category:⁴

- 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

² 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/>.

³ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Registered Nurses, on the Internet at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-1> (visited May 30, 2012).

⁴ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 Edition*, Registered Nurses, on the Internet at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-2> (visited May 30, 2012).

- 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.

Similarly, the beneficiary's clinical duties include obtaining and administering prescribed medications and treatments, observing patient, recording significant conditions and reactions, taking temperature, pulse, blood pressure, and other vital signs to detect deviations from normal and assess condition of resident, etc. Therefore, the beneficiary's clinical duties, which consist of 50% of the proposed duties, comport with those of a registered nurse. The AAO further finds that the administrative and supervisory duties identified by the petitioner are consistent with and have not been shown to exceed those of an RN without a BSN who is working as a charge nurse.

As indicated in the following excerpt from the "How to Become a Registered Nurse" section of the *Handbook*, a Bachelor's degree in Nursing (BSN) is neither required for licensure as a Registered Nurse nor normally required for the general range of RN jobs, regardless of their specialty. In pertinent part, this section reads:⁵

Registered nurses usually take one of three educational paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. Registered nurses must also be licensed.

⁵ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 Edition*, Registered Nurses, on the Internet at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4> (visited May 30, 2012).

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.

The *Handbook's* information on the educational requirements for the occupational classification "Registered Nurses" indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

Even if the evidence in the record of proceeding had established the proffered position as falling within the Medical and Health Services Managers occupational classification – and the evidence does not – the position would still not qualify as a specialty occupation. The AAO finds that according to the *Handbook*, a bachelor's or higher degree, or the equivalent, in a specific specialty is not normally a minimum requirement for inclusion in the Medical and Health Services Managers occupational classification.

According to the relevant *Handbook* chapter, medical and health services managers typically perform the following duties:⁶

- 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

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-2> (visited May 30, 2012).

It could be argued, though not persuasively as will be evident in further comments below, that the beneficiary's proposed duties include overseeing the proper administration of total care to all residents; interpreting, implementing, and enforcing all facility policies and procedures; supervising staff, etc. These duties resemble those of a medical and health services manager. However, 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:⁷

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.

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

⁷ 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 May 30, 2012).

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.⁸

The AAO further finds that, to the extent it is described in the record of proceeding, the proffered position does not fall within the Medical and Health Services Managers occupational category, as its supervisory, administrative, and other duties would not be performed at the elevated hierarchical management level that characterizes that occupational category, as reflected in the following excerpt from the *Handbook* chapter on Medical and Health Services Managers:⁹

Medical and health services managers, also called healthcare executives or healthcare administrators, plan, direct, and coordinate medical and health services. They might manage an entire facility or specialize in managing a specific clinical area or department, or manage a medical practice for a group of physicians. . . .

Aside from and in addition to counsel's advocacy of the proffered position as an RN position, the AAO finds that evidence of record simply does not establish that the beneficiary would be performing duties managing something on the order of an entire facility, clinical area/department or medical practice.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. However, it is not self-evident that, as described in the record of proceeding, that the normal entry requirement for the proffered position would be at least a bachelor's degree, or its equivalent, in a specific specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not

⁸ 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.

⁹ 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).

sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. In this latter regard, the AAO observes that, on appeal, counsel asserts that "[f]or most hospitals, shift managers and charge nurse positions are bachelor degree positions," and that the supervisory dimension of the proffered position mandates at least a BSN or its equivalent. However, as the record of proceeding lacks documentary evidence to support these assertions, they merit no evidentiary weight. Simply going on record without providing adequate supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

In determining whether there is a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

Here and as already discussed, the petitioner has not established that its proffered position falls under an occupational classification for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. 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, the petitioner provided four job announcements.

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).

Counsel fails to establish that the submitted advertisements are for parallel positions in similar organizations in the same industry. For example, counsel provided an advertisement posted by the University of Louisville Hospital for a "charge nurse" position in the orthopedics/medical surgery unit. Its website states that it is a leading academic medical center offering the latest in research, equipment and expertise.¹⁰ It received national recognition as a leader in areas such as trauma, stroke, high risk obstetrics, radiology/diagnostic imaging, cancer and regional clinical centers.¹¹ While the size and number of employees are unknown, the scope and the scale of their operations do not appear to be similar to the petitioner. The petitioner is a nursing home while the advertising organization is a hospital that provides a full range of medical services. Moreover, the duties for the advertising position do not require any clinical care for patients, but only administrative duties that involve managing the hospital staff such as participating in employee evaluations, counseling and coaching employees as necessary, and assigning patients and tasks according to staff expertise and credentials. Since the duties of the proffered position involve both clinical and administrative/management duties, the proffered position is not parallel to the advertised position.

A job posting was also provided from Cedars-Sinai. The "Education and Work Experience Preferences" state "BSN preferred." Thus, the job posting indicates only a *preference*, not a requirement, for a candidate with a bachelor's degree.

The petitioner submitted two advertisements that appear to have been posted by staffing agencies. The record is devoid of sufficient information regarding the employers to conduct a legitimate comparison of the business operations and the petitioner failed to establish that the advertising organizations are similar to it. Thus, further review of the postings is not necessary.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

¹⁰ See the University of Louisville Hospital website available on the Internet at <http://www.university-hospital.org/about-the-hospital/who-we-are/> (last accessed May 8, 2012).

¹¹ *Id.*

The job announcements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from four advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹²

The documents provided do not establish that a degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

A review of the record indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Counsel claims that the duties of the proffered position are complex, unique and/or specialized. Counsel specifically claims that the proffered position is not a registered nurse, but a charge nurse and is the head supervising nurse on the floor. However, the AAO questions the level of

¹² According to the *Handbook's* detailed statistics on registered nurses, there were approximately 2,737,400 persons employed as registered nurses in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm> (last accessed May 8, 2012). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from four postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that a degree requirement in a specific specialty was common to the industry for the position of charge nurse (or parallel positions) among organizations similar to the petitioner, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

complexity, uniqueness and/or specialization of the duties and responsibilities of the position based upon discrepancies found in LCA.

The AAO notes that the petitioner stated on the LCA that the wage level for the proffered position is Level 1 (entry). The AAO finds the wage level for the proffered position questionable. A prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.¹³

Prevailing wage determinations start with a Level 1 (entry) and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.¹⁴ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

In the "Prevailing Wage Determination Policy Guidance" prepared by DOL, a Level 1 wage rate is describes as follows:¹⁵

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an

¹³ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

¹⁴ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

¹⁵ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

internship are indicators that a Level 1 wage should be considered.

Counsel claimed that a charge nurse is the head supervising nurse on the floor and the duties of the position are complex due to its supervisory responsibilities. In the response to the RFE, the petitioner through counsel stated that the charge nurse is:

Tasked with management and responsibility of the subordinate nursing staff. The charge nurse may train and teach subordinate nurse about the art and skill of delivering nursing services to patients. The charge nurse is also responsible for analyzing and reviewing specific nurses' strengths and weaknesses and recommending additional job responsibilities for successful subordinate nurses. Likewise, the charge nurse will recommend decreased job duties, including possible termination, for subordinate floor nurses who are insufficiently capable of performing their job duties.

Clinical leadership is a key job responsibility. As a clinical leader, the charge nurse will promote and develop teamwork within a multi-professional environment, demonstrate critical analysis and decision-making skills, and lead the delivery of clinically excellent, high-quality service influencing and facilitating change within the facility. The charge nurse will set, implement, and monitor steps to insure effective practice.

The AAO notes that the stated duties and responsibilities conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. The wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment, that she would be closely supervised, that her work would be closely monitored and reviewed for accuracy, and that she would receive specific instructions on required tasks and expected results. The AAO finds that the claimed level of complexity, independent judgment and understanding is materially inconsistent with the LCA certification for a Level 1 entry-level position.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. 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.¹⁶

In the instant case, the petitioner and counsel claim that the petitioner normally requires a bachelor's degree for the position and all of its current employees in the position hold a bachelor's degree. Counsel provided the names of charge nurses, an organizational chart, and copies of its payroll. However, the petitioner did not submit any documentation relating to educational credentials of the employees. Furthermore, no evidence regarding any current or past recruitment efforts for this position was submitted. Thus, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty

The AAO notes that the petitioner claims that the duties of the proffered position can only be performed by a degreed individual. 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 384. 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").

¹⁶ To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In the instant case, the record of proceeding does not establish that the petitioner normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

The AAO again incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position on the LCA as a low-level, entry position relative to others within the occupation. Therefore, it is simply not credible that the position is one with specialized and complex duties as such a position would likely be classified at a higher-level, requiring a significantly higher prevailing wage. The petitioner has not provided sufficient documentary evidence to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

As previously noted, simply going on record without providing adequate supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The petitioner failed to meet its burden of proof to establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 cannot conclude that the petitioner has established the proffered position as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the petitioner has not submitted a certified LCA that corresponds to the petition. The AAO has already entered its finding that the evidence in the record of proceeding – and, in fact, even the arguments advanced therein – is inconsistent with the occupational classification (Medical and Health Services Managers) for which the LCA was certified.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petitioner, appeal, motion, request, or other document

submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

Moreover, 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) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

With respect to the LCA, DOL provides clear guidance for selecting the most relevant *O*NET* occupational code classification.¹⁷ The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The *O*NET* description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of *O*NET* occupations, the SWA should default directly to the relevant *O*NET-SOC* occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the

¹⁷ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

In this case, the petitioner filed the Form I-129 with USCIS on April 23, 2010. The LCA provided at the time of filing was certified (1) for a medical and health services manager, (2) pursuant to occupational code, 11-0000, management occupations, (3) within McAllen-Edinburg-Mission, Texas, and (4) at a prevailing wage of \$46,072 a year. However, as reflected in the AAO's discussions and findings earlier in this decision, to correspond to the content of this petition, the LCA should have been certified for (1) a registered nurse, (2) pursuant to the occupational code, 29-1000, health diagnosing and treating practitioners, (3) within McAllen-Edinburg-Mission, Texas, and (4) at a prevailing wage of \$49,005 a year. Although the LCA was certified for proper metropolitan statistical area (MSA), it does not otherwise correspond to the proffered position.

Thus, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA in the occupational specialty for the requested employment for the beneficiary. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. §§214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B) by providing a certified LCA that corresponds to the instant petition. For this additional reason, the petition may not be approved.

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 will be dismissed. The petition will be denied.