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Invasion of personal privacy

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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**



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Date: **JUN 08 2012**

Office: CALIFORNIA SERVICE CENTER

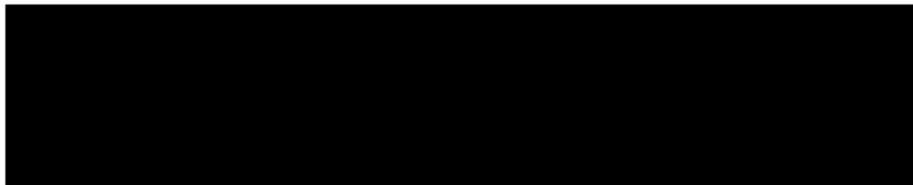


IN RE:



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. Kelly
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 12, 2010. In the Form I-129, the petitioner stated that it is a skilled nursing facility, established in 1993, with 200 employees.¹ The petitioner claims that its gross annual income is \$12 million and that its net annual income is \$1 million.

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

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B. 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's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition.² Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to establish that the Labor Condition Application (LCA) submitted with the petition properly supports the Form I-129. For this additional reason the petition may not be approved, and it is considered an independent and alternative basis for denial.

¹ In the Form I-129, the petitioner stated that it employed 200 people. In response to the RFE, counsel submitted a letter stating that the petitioner "presently employs one hundred thirty one [200] full time employees."

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a patient safety officer on a full-time basis at a salary of \$53,872 per year. The petitioner provided the following job description for the proffered position:

Reports to: Director of Nursing

Job Duties:

1. Responsible for the planning, organizing and direction of all administrative and functional activities to the hospital's patient safety, quality and regulatory compliance programs;
2. Provides administrative leadership for the Risk Management, Performance Improvement, as well as the Education Department and Case Management.

Requirements:

1. Bachelor's Degree in nursing or similar health care related field.
2. Excellent oral and written communication and interpersonal skills.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 30, 2010. The director requested the petitioner submit additional documentation, including evidence to demonstrate that the proffered position is a specialty occupation. The director outlined the evidence to be submitted, which included a more detailed description of the work to be performed by the beneficiary for the entire period requested, including specific job duties, the percentage of time to be spent on each job duty, level of responsibility and hours per week of work. The director also asked the petitioner to explain why the work to be performed requires the services of a person who has a college degree or the equivalent in the occupational field. The director requested the petitioner provide an explanation of what differentiates the proffered position from other related "non-specialty occupation" positions. Additionally, the petitioner was asked to submit an organizational chart, or other probative evidence, of the petitioner's hierarchy and staffing levels and to identify the proffered position on the chart.³

In response to the director's RFE, the petitioner resubmitted the above job description along with additional evidence. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties 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

³ The petitioner failed to provide any documentation regarding its hierarchy and staffing levels. In response to the RFE, the petitioner concurrently submitted a letter from counsel stating that the beneficiary would "be reporting to and under the direct supervision of the Administrator of [the petitioner]" and a description of the proffered position stating "Reports to: Director of Nursing." No explanation for the variance was provided.

specific specialty. The director denied the petition on October 4, 2010. Counsel submitted an appeal of the denial of the H-1B petition.

Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

The regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require evidence to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (8), and (12).

With the RFE, the director notified the petitioner that additional documentation was required to establish that the present petition meets the criteria for H-1B classification. The petitioner was given a reasonable opportunity to provide the requested information for the record before the visa petition was adjudicated. The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the request for additional evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it was material in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner failed to fully address and/or to submit this information with the initial petition or in response to the RFE and did not provide a valid reason for neglecting to provide the evidence. The AAO notes that the petitioner now attempts to submit some of the requested information on appeal.

With regard to the information and evidence that was encompassed in the RFE but only submitted on appeal, the AAO notes that it is outside the scope of this appeal. Evidence requested in an RFE but not included in the petitioner's RFE response will not be considered if later submitted. *See* 8 C.F.R. §§ 103.2(b)(8)(iv) and (b)(11). *See also Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Specifically, the AAO notes that the RFE clearly requested the type of expanded information about the proffered position and its constituent duties that counsel now submits for consideration on appeal in the "Job Description" document marked as Exhibit 02. Accordingly, neither that exhibit nor comments about it need to be considered by the AAO. However, to help the petitioner better understand the inadequacy of its claim that the proffered position is a specialty occupation, the AAO will also address the additional information provided in the "Job Description" document that is Exhibit 02 on appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the information and documents with the initial petition or in response to the director's request for evidence. *Id.* The AAO notes that the evidence was specifically requested by the director in the RFE. Accordingly, if the petitioner wishes to submit additional evidence, not supplied with the petition or in response to the RFE, it may file a new petition, with fee, for consideration by USCIS. Under the circumstances, the AAO need not and does not consider the sufficiency of that requested evidence submitted by the petitioner on appeal in the form of Exhibit 02.

To determine whether this patient safety officer position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. The AAO finds that the petitioner has not done so.

As a matter critically important in its determination of the merits of this appeal, the AAO finds that the petitioner has not sufficiently described the duties of the proffered position. Upon review of the petitioner's job description, the AAO notes that the description of the duties is generalized and generic. The crux of the failure to establish eligibility for this benefit is that the petitioner failed to adequately describe the proffered position in order to substantiate its claim that that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. A petitioner must provide a description of duties sufficient to allow an evaluation of the proffered job position so that the director may ascertain whether the tasks of the proffered position comprise the duties of a specialty occupation. In this matter, the petitioner has failed to do so. The director specifically requested the petitioner provide a more detailed description of the proffered position, to include specific job duties, the percentage of time to be spent on each job duty, level of responsibility and hours per week of work. However, the petitioner failed to submit this information and did not provide an explanation for its failure to provide the requested information.

As already discussed, in the appeal's Exhibit 02, the petitioner submitted a new job description for the patient safety officer position with additional job duties. Again, the AAO notes that the petitioner and counsel did not provide any explanation for neglecting to provide the evidence for the director to consider prior to adjudicating the H-1B petition. The AAO extrapolated the following job

duties from the petitioner's new job description:

Responsible for the planning, organizing and direction of all administrative and functional activities to the hospital's patient safety, quality and regulatory compliance programs

- In charge for [sic] the design and implementation of a comprehensive program intended to promote safety and reduce the risk of injuries, infections and liability exposure of patients, employees and guests. 15%
- Have in-depth knowledge of the requirements of health care delivery, applicable laws and standards, accepted professional safety practices, as well as effective communication and interpersonal skills. 10%
- Ensures the maintenance of records required for safety and hazard control by all authorities having jurisdiction. 10%
- Ensures compliance with all federal, state and local laws. 10%
- Manages staff activities to reduce the risk of injuries. 10%
- Performs periodic and random security inspections, assists with aggressive patients. 5%

Provides administrative leadership for the Risk Management, Performance Improvement, as well as the Education Department and Case Management.

- Leads in the development and implementation of risk management programs. 10%
- Applies organization skills, hands-on management and risk management consultative skills to both identify patient safety and risk exposure in various healthcare settings. 10%
- Leads team efforts in developing solutions to difficult or complex patient situations to ensure goals and objectives are met. 10%
- Advices [sic] senior management of deficiencies and remedial/disciplinary efforts to decrease deficiencies. 5%
- Interfaces with various external and internal individuals and groups. 5%

Upon review of the new job description, the AAO finds that, as reflected in the description of the position, the petitioner describes the proposed duties in terms of abstract, generalized and generic functions that do not convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Furthermore, the petitioner did not provide any documentation to substantiate the job duties and responsibilities of the proffered position.

The abstract level of information provided regarding the proffered position and the duties comprising it is exemplified by the phrase "interfaces with various external and internal individuals and groups." This statement provides absolutely no insight into the duties of the position. Another example, is the phrase "[h]ave in-depth knowledge of the requirements of health care delivery, applicable laws and standards, accepted professional safety practices, as well as effective communication and interpersonal skills." This statement offers no indication of how the patient safety officer would apply his/her knowledge and communication/interpersonal skills and does not include any information regarding a specific task or responsibility. The petitioner describes the tasks of the proffered position in vague, general terms that do not adequately convey the substance of the beneficiary's day-to-day duties. For example, the petitioner states that the patient safety officer "advices [sic] senior management of deficiencies and remedial/disciplinary efforts to decrease deficiencies" but fails to provide any specific details as they relate to this particular position and, thus, the described task is essentially meaningless. The petitioner also claims that the patient safety officer "applies organizational skills, hands-on management and risk management consultative skills" and "[l]eads team efforts in developing solutions to difficult or complex patient situations to ensure goals and objectives are met" but does not sufficiently describe how these vague phrases translate to specific duties within the scope of the position. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. That is, the tasks fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not supported by the job descriptions or substantive evidence.

Moreover, the AAO finds that there are significant discrepancies in the record of proceeding with regard to the demands and level of responsibilities of the proffered position. This is highlighted by the discrepancy between what the petitioner claims about the level of responsibility inherent in the proffered position, on the one hand, and, on the other, the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of the petition. The AAO finds that this aspect of the petition undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position.

The petitioner and counsel repeatedly claim that the duties of the proffered position are specialized and complex. The petitioner asserts that the beneficiary be "responsible for planning, organizing and direction of all administrative and functional activities to the hospital's patient safety, quality and regulatory compliance programs" and will provide "administrative leadership." Moreover, in the appeal, the petitioner and counsel claim that the beneficiary will be "in charge for the design and implementation of a comprehensive program" and "advise senior management of deficiencies and remedial/disciplinary efforts." Additionally, in the appeal the petitioner claims that the proffered position requires "in depth knowledge" and that the beneficiary will manage staff activities and lead risk management programs. The petitioner states that the beneficiary will also lead risk management programs, as well as "lead team efforts in developing solutions to difficult or complex patient situations" and apply "hands-on management and risk management consultative skills."

In this regard, the assertions of the petitioner and counsel are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. The AAO notes that the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Medical and Health Services Managers" - SOC (ONET/OES Code) 11-9111, at a Level 1 (entry level) wage.

Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁴ Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁵ The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the

⁴ 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.

⁵ 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.

wage levels.⁶ A Level 1 wage rate is described by DOL as follows:

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

The petitioner and counsel repeatedly claim that the duties of the proffered position are specialized and complex. However, the AAO must question the level of complexity, independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position. The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands and level of responsibilities of the proffered position.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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:

⁶ 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.

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations.

The AAO finds that the petitioner's statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level 1 entry-level position. This conflict undermines the overall credibility of the petition. The petitioner and counsel failed to provide any explanation for the inconsistencies in the record with regard to the wage level for the proffered position. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582.

Accordingly, even if it were determined that the petitioner overcame the director's grounds for denying the petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to the claimed duties of the proffered position and that is certified for the proper wage classification.

The AAO will now specifically address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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 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 [(2)] which 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 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), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

The 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.⁷ The AAO compared the responsibilities that comprise the occupational categories as described in the *Handbook* to the duties of the proffered position, to the extent that they are depicted in the record of proceeding. The AAO finds that the duties of the proffered position do not fall directly within any one occupation within the *Handbook* as the petitioner's descriptions of the duties of the proffered position are broad and generic and do not adequately convey the substantive nature of the specific matters upon which the beneficiary would focus.

The petitioner designated the proffered under the occupational category "Medical and Health Services Managers" on the LCA.⁸ In the appeal, counsel stated that the petitioner's classification of the proffered position under the occupational category "Medical and Health Services Managers" was an approximation of an occupation for the proffered position.

The AAO reviewed the chapter of the *Handbook* on "Medical and Health Services Managers". Contrary to counsel's assertion, the *Handbook* does not indicate that "Medical and Health Services Managers" comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.⁹ Thus, even if the generic statements that comprise the information about the proffered position and its duties were sufficient to demonstrate that the position falls under the occupational classification of medical and health services managers, the *Handbook* does not indicate that entry into positions in the occupation normally requires at least a bachelor's degree, or its equivalent, in a specific specialty.

⁷ 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/OCO/>.

⁸ In the appeal, counsel objects that the director analyzed the proffered position under the occupational category of registered nurses. It must be noted that in the RFE, the petitioner indicated that the position appeared to be a registered nurse and requested the petitioner submit a detailed description of the proffered position to clarify the duties and responsibilities that the beneficiary would perform. In response to the RFE, the petitioner failed to provide any further specificity as to the beneficiary's duties. Moreover, the petitioner's response included a printout regarding the occupational category of registered nurses in support of its assertion that the position is a specialty occupation and counsel stated that "the Illinois Department of Employment Security (IDES) lists "Registered Nurses" as among the jobs requiring a Bachelor's Degree (four years of college). . . . A review of these authoritative sources illustrates that the proffered position in the location of employment clearly meets the criterion [for a specialty occupation]." The petitioner also submitted job announcements, which counsel claimed were for parallel positions to the proffered position. The job announcements included postings categorized by the advertising organizations as registered nurse positions. Notably, the petitioner repeatedly submitted a job description of the proffered position stating that the beneficiary would report to the Director of Nursing.

⁹ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Medical and Health Services Managers, on the Internet at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm> (visited May 30, 2012).

The *Handbook* provides the following information regarding the education and work experience for this occupational category:¹⁰

Education

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 also are common.

Prospective medical and health services managers have a bachelor's degree in health administration. These programs prepare students for higher level management jobs than programs that graduate students with other degrees. Courses needed for a degree in health administration often include hospital organization and management, accounting and budgeting, human resources administration, strategic planning, law and ethics, health economics, and health information systems. Some programs allow students to specialize in a particular type of facility, such as a hospital, a nursing care home, a mental health facility, or a group medical practice. Graduate programs often last between 2 and 3 years and may include up to 1 year of supervised administrative experience.

Work Experience

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. For more information, see the profile on physical therapists.

USCIS consistently interprets the term "degree" to mean not just any baccalaureate or higher degree, but one in a *specific specialty* that is directly related to the position. The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for medical and health services managers. (As previously discussed, the petitioner indicated on the LCA that its proffered position for the beneficiary is an entry-level position.) According to the *Handbook*, some employers hire individuals with on-the-job experience instead of formal education.¹¹ The AAO notes that when

¹⁰ 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).

¹¹ 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

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, the *Handbook* indicates that a master's degree in one of a number of fields, including business administration, is common.¹²

The director reviewed the job description provided by the petitioner and found that the proffered position falls under the occupational classification of "Registered Nurses."¹³ The *Handbook* states, in pertinent part, the following about the duties of this occupation:¹⁴

Registered nurses usually take one of three education 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.

Education

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

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.

¹² A statement that a bachelor's degree or higher in business administration is common to the industry is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, 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).

¹³ 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).

¹⁴ 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-4> (visited May 30, 2012).

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.

The *Handbook* does not report that, as an occupational group, "Registered Nurses" require at least a bachelor's degree in a specific specialty. The *Handbook* states that registered nurses usually take one of three education 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. In addition, there are programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

As previously noted, the petitioner submitted a printout regarding the occupational category of registered nurses from the "Illinois Occupational Outlook in Brief" (the Illinois Brief) in support of its assertion that the position is a specialty occupation. Counsel stated that "the Illinois Department of Employment Security ('IDES') lists 'Registered Nurses' as among the jobs requiring a Bachelor's Degree (four years of college). . . . A review of these authoritative sources illustrates that the proffered position in the location of employment clearly meets the criterion [for a specialty occupation]." Upon review of the Illinois Brief, the AAO notes that it is intended to provide a list of the occupations with the most openings each year. It does not provide in-depth information regarding any of the occupations and does not provide the job duties and responsibilities for the occupational category of registered nurses. Further, the Illinois Brief does not indicate that a four-year bachelor's degree for the occupations listed must be in a specific specialty closely related to the requirements of that occupation (as required for H-1B classification). Thus, even if the proffered position were determined to fall under the occupational category of registered nurses, the Illinois Brief does not establish satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Notably, in the appeal, counsel emphatically claims that the proffered position is not a registered nurse. No explanation was provided for asserting that the Illinois Brief section regarding "Registered Nurses" was relevant to this proceeding upon its submission in response to the RFE, but then claiming that the position is not a registered nurse position in the appeal. These inconsistent claims undermine the petitioner's credibility with regard to the actual nature and requirements of the proffered position. A petitioner must provide sufficient information so that the director may ascertain whether the tasks of the proffered position comprise the duties of a specialty occupation

The petitioner also submitted an *O*NET OnLine* Summary Report for Medical and Health Services Managers.¹⁵ It must be noted that the *O*NET OnLine* Summary Report, is insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. It is first noted that the petitioner has not established that its proffered position falls under the occupational category of Medical and Health Services Managers. Counsel claims that *O*NET OnLine* lists Patient Safety Officer as a recognized specialty associated with the occupational category Medical and Health Services Managers. Upon review of the report, the AAO finds that this is not an accurate statement of the report. *O*NET OnLine* states that there are 11 recognized apprenticeable specialties associated with this occupation, which are listed as the following:

LTC Nurse Management (On-the Job Learning (OJL)); LTC Nurse Management - Charge Nurse Specialty ((On-the Job Learning (OJL)); LTC Nurse Management - Infection Control Specialty (On-the Job Learning (OJL)); Long Term Care Nurse Management; LTC Nurse Management - Quality Assurance Specialty (On-the Job Learning (OJL)); LTC Nurse Management - Resident Assessment Specialty (On-the Job Learning (OJL)); LTC Nurse Management - Staff Development Specialty (On-the Job Learning (OJL)); Home Health Director; Home Health Director; Senior Housing Manager; Senior Housing Manager

Counsel simply makes a claim regarding the nature of the proffered position but the record is devoid of any evidence to establish that its proffered position falls into any of these apprenticeable specialties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, *O*NET OnLine* does not state a requirement for at least a master's degree for the occupation. Rather, it assigns the occupation a Job Zone "Five" rating. It does not indicate that a degree for Job Zone Five occupations must be in a specific specialty closely related to the requirements of that occupation. The *O*NET OnLine* report submitted by the petitioner is not probative of the proffered position being a specialty occupation.

There is a lack of evidence in the record of proceeding substantiating the nature and educational level of knowledge that would be required for the actual performance of the beneficiary's work. As noted earlier, the job description for the proffered position is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. A petitioner may not establish a position as a specialty occupation by submitting a vague, general description rather than providing specifics substantiated by the requirements of the petitioner. The petitioner has

¹⁵ *O*NET OnLine* is accessible at <http://www.onetonline.org/>. As stated on the Home Page of this Internet site, *O*NET OnLine* is created for the U.S. Department of Labor's Employment & Training Administration by the National Center for *O*NET* Development. The *O*NET OnLine* Summary Report for the occupational classification Medical and Health Services Managers is accessible on the Internet at <http://www.onetonline.org/link/summary/11-9111.00>.

failed to provide substantive evidence regarding the actual work that the beneficiary would perform and sufficient details regarding the nature and scope of the beneficiary's employment. Moreover, without a comprehensive description of the specific duties the beneficiary will perform for the petitioner, the petitioner has failed to establish the nature of the position and the level of complexity, uniqueness and/or specialization that the job might entail.

Upon complete review of the record, the petitioner has not established that the proffered 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 position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

The petitioner stated that it is a skilled nursing facility, established in 1993, with 131 or 200 employees. The petitioner claims that its gross annual revenue is \$12 million and that its net annual income is \$1 million. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 623110 – "Nursing Care Facilities."¹⁶

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

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations in the petitioner's industry attesting that a degree is a minimum entry requirement. The petitioner also did not submit letters or affidavits from firms or individuals in the industry attest that such firms routinely employ and recruit only individuals with at least a bachelor's degree in a specific specialty.

¹⁶ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity. Each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed May 30, 2012).

The AAO reviewed the advertisements submitted in response to the RFE, as discussed below. However, 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.

Contrary to the petitioner's purpose for submitting them, the record's job-vacancy advertisements are not evidence of a common degree-in-a-specific-specialty requirement in positions that are both (1) parallel to the proffered position and (2) located in organizations similar to the petitioner. There is no independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting histories for the type of job advertised. Additionally, as they are only solicitations for hire, they are not evidence of the advertisers' actual hiring practices.

The postings provided by the petitioner are devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the business operations. Counsel claims that the petitioner deliberately submitted job postings designed to cover not only similar organizations but the entire spectrum. However, to satisfy this prong of the criterion under the regulation, the petitioner must demonstrate that the degree requirement is common to the industry in parallel positions among similar organizations. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The postings for dissimilar organizations are outside the scope of consideration for this criterion, which encompasses only organizations similar to the petitioner. Thus, documentation regarding dissimilar organizations is extraneous.

Moreover, it is not sufficient to assert that organizations are similar without providing documentation to substantiate those claims. 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).

Additionally, the petitioner must establish that the advertisements are for parallel positions to the proffered position. In the instant case, the content of the advertisements and the record's information about the proffered position are too limited and generalized to establish that the advertised positions are parallel to the petitioner's proffered position. Although the advertised positions may involve some healthcare-related duties, the petitioner has not established that these advertised positions are parallel to the proffered position.

The AAO also reviewed the five job vacancy advertisements submitted on appeal and, on the basis of that review, found that they too are not probative evidence that the proffered position is a specialty occupation.

The advertisement labeled Exhibit 03 is for a Manager of Patient Safety at a hospital – not a skilled care facility – and the 21 duties that it lists materially exceed those that the petitioner has ascribed to the proffered position.

The advertisement for Senior Risk Management Specialists marked as Exhibit 04 on appeal is also for a university medical center – not a skilled care facility – and it specifies a "4 year degree" as a requirement, but does not state a specific specialty as required major or academic concentration.

The advertisement marked Exhibit 05 is also for a different type of organization than the petitioner's skilled facility – namely a psychiatric hospital – and it also specifies that its required "4 Year Degree" be in a "social services or a related field."

The Exhibit 06 advertisement is for a position of much broader scope and responsibility, in that it is for a Regional Director of Patient Safety and lists a wider range of duties than ascribed by the petitioner to the proposed position. There is insufficient information regarding the advertising employer to make a determination as to whether the position is located in an organization similar to the petitioner.

Finally, the Patient Safety Coordinator advertisement marked as Exhibit 07 on appeal is also for a different set of organizations than the petitioner, namely, hospitals, and its stated duties materially exceed those of the proffered position as described in the record of proceeding.

It is further noted that the number of advertisements is not sufficient to establish an industry-wide practice, and there is no independent evidence that they accurately reflect an industry standard of recruiting and hiring for the type of position that is the subject of this petition. 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 these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *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 required a bachelor's or higher degree in a specific specialty or its equivalent for organizations that are 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 normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Thus, based upon a complete review of the record, the petitioner has not established that at least a bachelor's 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.

Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment. The beneficiary's work will be closely supervised and monitored and she will receive specific instructions on required tasks and expected results. Her work will be reviewed for accuracy. The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Furthermore, the petitioner has not established that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the patient safety officer duties 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. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent.

The petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few related courses may be beneficial in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered

position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

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

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, 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.¹⁷

The AAO notes that the petitioner and counsel claim repeatedly that the duties of the proffered position can only be employed 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. As noted above, 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 a 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

¹⁷ 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.

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").

In the instant case, counsel stated the proffered position is a new position and that the petitioner deemed this criterion of the regulations to be inapplicable. No evidence regarding any current or past recruitment efforts for this position was submitted. 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 in a specific specialty or its equivalent.

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. Moreover, the petitioner has not provided any 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.

Upon review of the record, the petitioner has not met its burden of proof to establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, 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. Thus, the appeal will be dismissed and the petition denied.

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.

It must be noted that 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.

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. Accordingly, the appeal will be dismissed, and the petition will be denied.

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