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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

PUBLIC COPY

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Date: **MAR 20 2012**

Office: VERMONT SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner claims to be a healthcare and IT services firm with 18 employees. It seeks to employ the beneficiary as a nurse manager pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the petitioner has not established that the proposed position qualifies for classification as a specialty occupation.

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

The primary issue before the AAO is whether the proffered 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 that requires:

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

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

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

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

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

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

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

In this matter, the petitioner seeks the beneficiary’s services as a nurse manager at its end client’s facility. On the Form I-129, the petitioner describes the proposed duties as: coordinate and assist with designing and implementation of patient care services with other departments.” The

petitioner's support letter dated December 2, 2009 indicates that the proffered position would require the beneficiary to perform the following duties:

- Coordinate and assist with designing and implementation of patient care services with other departments.
- Implement an effective, on-going program to measure, assess and improve the quality of nursing care, treatment, and services delivered to members.
- Participate in evaluation of current services and programs, propose changes and expansion of services and programs.
- Assist in recruitment and retention of nursing staff.
- Participate in activities promoting professional growth.
- Oversees [sic] development of the nursing budget. Maintain financial viability and support nursing management in the budget process. Track budget expenditures and report on issues of over-budget expenditures and changes to an approved budget.
- Ensure all state and Federal compliance, where applicable, with regulatory or credentialing agencies such as Joint Commission, state and federal agencies, Medicare and Medicaid and NJ Licensing Board.
- Plan, implement and administer programs and services, including personnel administration, training, and coordination of medical, nursing and physical staff.
- Maintain awareness of advances in medicine, computerized diagnostic and treatment equipment, data processing technology, government regulations, health insurance changes, and financing options.
- Collaborate with other health care professionals and service providers to ensure optimal patient care.
- Coordinate and conduct educational programs and in-service training sessions on topics such as clinical procedures, personal health, routine self care etc. Identify training needs and conduct training sessions for nursing/medical staff.
- Participate in the development of organization's nursing service philosophies, goals, policies, priorities and procedures.
- Develop and assist others in development of care and treatment plans.
- Assist and instruct nursing staff in areas such as the assessment, development, implementation and evaluation of disability, illness, management, technology, or resources.
- Make clinical recommendations to physicians, health care providers, insurance companies, patients and also health care organizations.
- Participate in clinical research projects by reviewing protocols, reviewing patient records, monitoring compliance, and meeting with regulatory authorities.
- Prepare reports to document patients' care activities.

The petitioner's support letter goes on to state that as with any nurse manager, the usual minimum requirement for performance of the job duties is a bachelor's degree in nursing or a related field. Counsel for the petitioner also submitted a letter dated November 23, 2009 from [REDACTED],

(“the end client”), which provides the same description of the duties for the proffered position. The end client’s support letter also states that the minimum education requirements to perform these job duties are a bachelor’s degree in nursing or a related field. The petitioner submitted the beneficiary’s registered nurse license from New Jersey, a letter from [REDACTED] certifying that the beneficiary graduated from the said university with a bachelor of science degree in nursing on August 20, 2008, a diploma and transcripts from Fairfield University, a course-by-course evaluation report dated July 20, 2006 from the Educational Credential Evaluators, Inc. (ECE), and the beneficiary’s Bachelor of Commerce and Master of Business Economics degrees from South Gujarat University.

The submitted Labor Condition Application (LCA) was certified for a “Nurse Manager” under SOC Code 11-9111.00 Medical and Health Services Managers to work on a full-time basis at the end client’s office at [REDACTED] at Level I prevailing wage of \$74,027 per year.

On December 10, 2009, the director requested additional information from the petitioner to establish that the proffered position is a specialty occupation.

In response to the director’s RFE, counsel for the petitioner referenced data from *Dictionary of Occupational Titles (DOT)*, *Occupational Employment Statistics (OES)* and *Occupational Informational Network (O*NET)* online and stated that the data indicates that the proffered position clearly requires a bachelor’s degree as it is rated with an SVP of 8 or greater.

Counsel submitted a copy of a professional position evaluation dated January 14, 2010 prepared by [REDACTED] Virginia ([REDACTED]), which concludes that the proffered position involves a range of specialized, senior-level, medical and nursing management duties which clearly demands a level and depth of knowledge, expertise and technical capacity commensurate with the prior attainment of a bachelor’s degree in nursing or related field.

In response, counsel also submitted three advertisements for similar positions from other entities, an agreement between the petitioner and the end client for staffing, a list of the petitioner’s employees with their job duties and education requirements, the petitioner’s organizational chart, memorandum dated November 27, 2002 from [REDACTED], [REDACTED] November 27, 2002 Memo) and a decision of the AAO on August 31, 1994.

The director determined that according to the U.S. Department of Labor’s (DOL’s) *Occupational Outlook Handbook (Handbook)*, a four-year degree or higher is not normally the minimum requirement for entry into nursing; that the job postings submitted fail to show the degree requirement is common to the industry in parallel positions among similar organizations; that the petitioner failed to establish that the subject nursing activity is so complex, unique or specialized that it can be performed only by a person with a four-year degree; and that based on the size and scope of the employer’s healthcare facility, a registered nurse with an associate degree and limited experience

in a healthcare facility could perform the nurse manager's duties. Accordingly, the director concluded that the petitioner have met none of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify the position as a specialty occupation under any of the criteria and denied the petition.

On appeal, counsel for the petitioner reiterated that the proffered position is not a registered nurse position but a nurse manager position, that data from authoritative sources such as *DOT*, *OES* and *O*NET* Online supports the professional nature of the proffered position. Counsel argues that the facility size should not be indicative of whether a job advertisement is suitable or whether a petitioner's need is genuine. Counsel also asserts that the director misunderstood USCIS' own guidance on adjudication of H-1B petitions filed on behalf of nurses per the Williams' November 27, 2002 Memo.

To determine whether the proffered position, as described in the initial petition and in the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner obtained the LCA under the title of Medical and Health Services Managers and claims that the proffered position should be analyzed as a medical and health services manager in determining whether it qualifies as a specialty occupation. The *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos014.htm> (last accessed March 8, 2012) describes "Medical and Health Services Managers" as follows in pertinent parts:

Medical and health services managers, also referred to as *healthcare executives* or *healthcare administrators*, plan, direct, coordinate, and supervise the delivery of healthcare. These workers are either specialists in charge of a specific clinical department or generalists who manage an entire facility or system.

Large facilities usually have several *assistant administrators* who aid the top administrator and handle daily decisions. Assistant administrators direct activities in clinical areas, such as nursing, surgery, therapy, medical records, and health information.

In smaller facilities, top administrators handle more of the details of daily operations. For example, many *nursing home administrators* manage personnel, finances, facility operations, and admissions, while also providing resident care.

Clinical managers have training or experience in a specific clinical area and, accordingly, have more specific responsibilities than do generalists. For example, directors of physical therapy are experienced physical therapists, and most health information and medical record administrators have a bachelor's degree in health information or medical record administration. Clinical managers establish and implement policies, objectives, and procedures for their departments; evaluate personnel and work quality; develop reports and budgets; and coordinate activities with other managers.

According to the *Handbook*, medical and health services managers are a group of occupations, including healthcare executives, healthcare administrators, assistant administrators in large facilities, top administrators in smaller facilities, and clinical managers for various departments of health care facilities. The end client's organizational chart, submitted in response to the RFE, indicates that there are 19 employees and, therefore, it is not a large facility. In addition, the organizational chart demonstrates that the beneficiary is not the top administrator at this small facility as she reports to the facility administrator, who in turn reports to the CEO. Therefore, the petitioner failed to submit sufficient evidence in the record to establish that it seeks to employ the beneficiary in a position of medical and health services manager.

It is noted that the petitioner submitted an agreement made on September 29, 2009 by and between the petitioner and [REDACTED] the end client facility. According to the agreement, the petitioner will staff the beneficiary in the end client facility as a full-time nurse manager and in return the petitioner shall be paid at the rate of \$35.00 per hour for the services provided by the beneficiary. However, the petition and submitted LCA show that the petitioner is obligated to pay the beneficiary Level I prevailing wage at an annual salary of \$74,027 (\$35.59 per hour). The petitioner is a profit corporation, but it appears that the petitioner would lose \$0.59 for every hour the beneficiary provides staffing services to the end client. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). This inconsistency raises questions on authenticity of the agreement or *bona fide* of the job offer. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In response to the director's RFE and on appeal, counsel for the petitioner claims that the proffered position most closely resembles 075.167-010 Nurse, Supervisor. The AAO concurs with counsel's assertion and will review and consider the proffered position as a nurse supervisor in the proceedings. Counsel further asserts that according to the *DOT*, the position carried an SVP 8 or greater, clearly showing that the job requires a bachelor's degree. The *DOT*, 4th Ed., Rev. 1991,

available at <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOT01B.HTM> (last accessed March 8, 2012) states in pertinent part that:

075.167-010 NURSE, SUPERVISOR (medical ser.)

Directs, through head nurses, activities of nursing staff: Plans and organizes activities in nursing services, such as obstetrics, pediatrics, or surgery, or for two or more patient-care units to ensure patient needs are met in accordance with instructions of physician and hospital administrative procedures. Coordinates activities with other patient care units. Consults with NURSE, HEAD (medical ser.) 075.137-014 on nursing problems and interpretation of hospital policies to ensure patient needs are met. Plans and organizes orientation and in-service training for unit staff members, and participates in guidance and educational programs. Assists in formulating budget. Engages in studies and investigations related to improving nursing care. *GOE: 10.02.01 STRENGTH: L GED: R5 M4 L5 SVP: 7 DLU: 87*

The AAO finds that the *DOT* does not support the assertion that an assignment of an SVP rating of 8 is indicative of a specialty occupation. This is obvious upon reading Section II of the *DOT*'s Appendix C, Components of the Definition Trailer, which addresses the Specialized Vocational Preparation (SVP) rating system.¹ The section reads:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);

¹ The Appendix can be found at the following Internet website: <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM>.

- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Thus, an SVP rating of 8 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation. Moreover, the *DOT* lists nurse supervisor as an SVP rating of 7 instead of SVP 8 as counsel asserted. Therefore, the *DOT* information is not probative of the proffered position being a specialty occupation.

Counsel also referred to the description of 11-9111.00 Medical and Health Services Managers from the *OES* and *O*NET* and, based on these, claims that the proffered position is professional level position because the wage level determination clearly indicates that the related position is a Job Zone 5 with an SVP range of 7.0 to <8.0 requiring a bachelor's degree. In fact, the DOL's *O*NET* Online shows that the *OES* code and title which matches the *DOT* code and title 075.167-010 Nurse, Supervisor should be converted into *OES* code 29-1141.00 Registered Nurses, not *OES* code 11-9111.00 Medical and Health Services Managers. See <http://www.onetonline.org/crosswalk/DOT?s=075.167-010&g=Go> (last accessed March 8, 2012). Furthermore, as previously discussed, an SVP rating of 8 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation.

The *Handbook*, 2010-11 ed., describes "Registered Nurses" as follows in pertinent parts:

Registered nurses (RNs), regardless of specialty or work setting, treat patients, educate patients and the public about various medical conditions, and provide advice and emotional support to patients' family members. RNs record patients' medical histories and symptoms, help perform diagnostic tests and analyze results, operate medical machinery, administer treatment and medications, and help with patient follow-up and rehabilitation.

RNs teach patients and their families how to manage their illnesses or injuries, explaining post-treatment home care needs; diet, nutrition, and exercise programs; and self-administration of medication and physical therapy. Some RNs may work to promote general health by educating the public on warning signs and symptoms of disease. RNs also might run general health screening or immunization clinics, blood drives, and public seminars on various conditions.

When caring for patients, RNs establish a care plan or contribute to an existing plan. Plans may include numerous activities, such as administering medication, including careful checking of dosages and avoiding interactions; starting, maintaining, and discontinuing intravenous (IV) lines for fluid, medication, blood, and blood products; administering therapies and treatments; observing the patient and recording those observations; and consulting with physicians and other healthcare clinicians. Some RNs provide direction to licensed practical nurses and nursing aides regarding patient care. RNs with advanced educational preparation and training may perform diagnostic and therapeutic procedures and may have prescriptive authority.

Most RNs work as staff nurses as members of a team providing critical healthcare. However, some RNs choose to become advanced practice nurses, who work independently or in collaboration with physicians, and may focus on the provision of primary care services. *Clinical nurse specialists* provide direct patient care and expert consultations in one of many nursing specialties, such as psychiatric-mental health. *Nurse anesthetists* provide anesthesia and related care before and after surgical, therapeutic, diagnostic and obstetrical procedures. They also provide pain management and emergency services, such as airway management. *Nurse-midwives* provide primary care to women, including gynecological exams, family planning advice, prenatal care, assistance in labor and delivery, and neonatal care. *Nurse practitioners* serve as primary and specialty care providers, providing a blend of nursing and healthcare services to patients and families. The most common specialty areas for nurse practitioners are family practice, adult practice, women's health, pediatrics, acute care, and geriatrics. However, there are a variety of other specialties that nurse practitioners can choose, including neonatology and mental health. Advanced practice nurses can prescribe medications in all States and in the District of Columbia.

U.S. Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook *Handbook*, 2010-11 ed., "Registered Nurses," <http://www.bls.gov/oco/ocos083.htm> (last accessed March 8, 2012).

Based on the duties as described by the petitioner, it does not appear that the beneficiary would perform the duties as quoted above and described in the *Handbook* for nurse practitioners because the beneficiary would not prescribe medications to the residents of the facility. The beneficiary would not perform the duties of clinical nurse specialists because the proposed duties of the proffered position includes that of providing expert consultations in one of many nursing specialties, such as psychiatric-mental health, as well as prescribing medications.

Although the job description includes some supervisory or managerial duties, the AAO finds that the evidence in the record indicates that (1) the petitioner is seeking to employ the beneficiary in a registered nurse position, instead of a nurse manager position or a medical and health services manager position, and (2) the duties of the proffered position proposed by the petitioner most closely resemble that of registered nurses as covered in the *Handbook's* chapter on "Registered Nurses."

With respect to education and training requirements for "Registered Nurses," the *Handbook* states as follows:

The three typical educational paths to registered nursing are a bachelor's degree, an associate degree, and a diploma from an approved nursing program. *Nurses most commonly enter the occupation by completing an associate degree or bachelor's degree program.* Individuals then must complete a national licensing examination in order to obtain a nursing license. Advanced practice nurses—clinical nurse specialists, nurse anesthetists, nurse-midwives, and nurse practitioners—need a master's degree.

Education and training. There are three typical educational paths to registered nursing—a bachelor's of science degree in nursing (BSN), *an associate degree in nursing (ADN), and a diploma.*

A bachelor's or higher degree is often necessary for administrative positions, research, consulting, and teaching.

Many RNs with an ADN or diploma later enter bachelor's degree programs to prepare for a broader scope of nursing practice. Often, they can 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. Accelerated master's degree in nursing (MSN) programs also are available. They typically take 3-4 years to complete full time and result in the award of both the BSN and MSN.

Licensure and certification. In all States, the District of Columbia, and U.S. territories, students must graduate from an approved nursing program and pass a

national licensing examination, known as the National Council Licensure Examination, or NCLEX-RN, in order to obtain a nursing license.

Id. (emphasis added).

The petitioner has set forth the duties for the proffered position and categorized the position as a registered nurse. In short, the descriptions provided in the *Handbook* do not clearly show that registered nurses are positions for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum entry requirement. While the *Handbook* states that advanced practice nurses need a master's degree, it clearly indicates that completing an associate degree program and obtaining a nursing license by passing a national licensing examination is the minimum requirement to enter the occupation of registered nurses.

The record's descriptions of the proposed duties are limited to generic and generalized functions which are normally performed by registered nurses pursuant to descriptions in the *Handbook*, and based on the fact that the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty or its equivalent is a minimum entry requirement for this occupation, it cannot be found that the petitioner has satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty, and the petitioner failed to demonstrate that parallel nurse manager positions for organizations that are similar to the petitioner require a college degree in a specific specialty for entry into the occupation.

The petitioner submitted a professional position evaluation dated January 14, 2010 from [REDACTED] as an expert opinion letter, concluding that the proffered position involves a range of specialized, senior-level, medical and nursing management duties which clearly demand a level and depth of knowledge, expertise and technical capability commensurate with the prior attainment of a bachelor's degree in nursing or a related field. However, [REDACTED] does not list the reference materials on which he relies as a basis for his conclusion. It appears that [REDACTED] did not base

his opinion on any objective evidence, but instead restates the proffered position description as provided by the petitioner. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). Therefore, the AAO finds that the letter from [REDACTED] does not establish that the proffered position is one for which the industry requires at least a bachelor's degree in a specific specialty as a minimum educational requirement to enter into the occupation.

In addition, the record also contains three advertisements for nurse manager positions from other businesses. The first advertisement is for a nurse manager position at Regional Medical Center of San Jose requiring graduate of accredited nursing program; BSN or equivalent bachelor's degree; master's degree preferred; the second advertisement is for a nurse manager – birthing center at St. Mary's Medical Center in Blue Springs, Missouri requiring a bachelor's degree in nursing or health care management, or current enrollment in BSN or bachelors in health care management degree program; and the third advertisement is for a nurse manager – emergency department at a healthcare facility in Chicago, Illinois requiring a BSN with a current RN license. Therefore, the first and second advertisements do not establish that a nurse manager requires a U.S. bachelor's degree in a specific specialty or its equivalent as entry-level minimum requirements; and the third advertisement is for an emergency department nurse manager, which is not similar to nurse manager at an adult day care. In addition, the record does not contain any information about the end client facility and, thus, the AAO cannot determine whether all these three positions are located in organizations that are similar to the end client facility.

Therefore, the petitioner failed to demonstrate that it meets the requirements of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree or its equivalent for the position. The petitioner provided a list of its employees with their duties and educational backgrounds. However, the petitioner did not provide a list of employees at the end client facility, which include their job duties and educational backgrounds. As the record has not established a prior history of hiring for the proffered position only persons with at

least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).²

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. While the petitioner and its counsel contend that the nature of the proffered position's duties are so specialized and complex that the proffered position must be classified as a specialty occupation, relative complexity is not sufficiently developed by the petitioner and, absent evidence to the contrary, the duties of the proposed position are not so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty, or its equivalent.³ The AAO, therefore, concludes that the proffered position does not meet the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel asserts that the director should consider the proffered position as a specialty occupation based on the ██████████ November 27, 2002 Memo. The AAO notes that the memo indicates that an upper-level "nurse manager" in a *hospital* administration position may be H-1B equivalent. However, as previously discussed, the end client facility only has 19 employees and, therefore, it is not a large health care facility like a hospital. Regardless, even if the end client facility was a large health care facility, USCIS memoranda merely articulate internal guidelines for USCIS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987)).

Counsel also refers to a decision issued by the AAO concerning that the position of a team leader/nurse position qualifies as a specialty occupation. The AAO notes that the facts in that decision are not analogous to the instant petition. For instance, in the AAO decision, the beneficiary was responsible for the overall administration of a nursing unit, which included training, assigning

² While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

³ It is further noted that any claims of specialization and complexity are simply not credible given the Level I designation on the supporting LCA. If the proffered position did in fact involve some level of complexity relative to other registered nurses, the petitioner would have to have submitted an LCA certified for at least a Level III, and more likely a Level IV, position.

and supervising professional and non-professional personnel assigned to the unit. In addition, the beneficiary had the authority to assign and direct professional and non-professional nursing personnel in their work. More importantly, even if the facts of that case were analogous to those in this matter, it is an unpublished decision and, as such, is not binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the petitioner failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

In Part 5 of the Form I-129, the petitioner indicates that the beneficiary will work in Whippany, New Jersey from November 23, 2009 until November 22, 2012. However, the agreement between the petitioner and [REDACTED] indicates that the beneficiary is contracted to work in Whippany, New Jersey from December 1, 2009 until December 30, 2011. Since the contract will expire prior to November 22, 2012 and the petitioner has not provided additional contracts covering the remainder of the requested validity period, it is apparent that in addition to performing work in Whippany, New Jersey, the beneficiary may be sent to other client sites on an as-needed basis as the petitioner provides health care and nursing staff to various hospitals, clinics, and doctor's offices.

Therefore, based on the limited evidence submitted pertaining to the assignment(s) of the beneficiary for the duration of the requested validity period, the petitioner has failed to submit the itinerary required by 8 C.F.R. § 214.2(h)(2)(i)(B). For this additional reason, the petition may not be approved.⁴

⁴ It is further noted that 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. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative

Also, beyond the decision of the director, the petitioner failed to submit a valid LCA covering all work locations for the beneficiary at the time of filing.

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 Department of Labor (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). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA with the DOL when submitting the Form I-129.

In the instant case, the petitioner filed the LCA with USCIS along with the initial petition. As noted above, on the Form I-129, the petitioner indicated that the beneficiary would work in Whippany, New Jersey. The certified LCA submitted with the petition identified this location as the worksite for the beneficiary.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Title 20 C.F.R. § 655.705(b) further indicates that an LCA must correspond to the petition with which it is submitted. While the LCA submitted identifies Whippany, New Jersey as the location where the beneficiary may perform services, the record indicates that the beneficiary may be tasked to various client sites as needed. Since the agreement submitted by the petitioner does not cover the requested validity period on the Form I-129

employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. *See* section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

and based on the fact that the petitioner provides health care and nursing staff at various facilities, it is apparent that the potential work locations for the beneficiary could vary widely based on client needs during the course of the requested validity period. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this additional reason, the petition may not be approved.

Finally, the AAO will quickly address the issue of whether or not the petitioner qualifies as an H-1B employer or agent. The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

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

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

As such, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, the director would be unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary. Therefore, the director's decision is affirmed, and the petition must be denied for this additional reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications.

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).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative bases for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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