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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 05 2012 Office: CALIFORNIA SERVICE CENTER File:

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:

**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 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 December 4, 2009. The petitioner stated that it is healthcare staffing company with 2-3 employees and a gross annual income of approximately \$545,000 and a net annual income of approximately \$51,000.<sup>1</sup>

Seeking to employ the beneficiary in what it designates as a medical and healthcare services manager position, the petitioner filed this H-1B petition in an endeavor to classify him 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 had not satisfied any of the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualified for classification as a specialty occupation. On March 10, 2010, counsel for the petitioner submitted an appeal. Counsel claims that the director's basis for denial was erroneous, and contends that the petitioner satisfied all evidentiary requirements.

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

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

The 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 and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services on a part-time basis (20 hours per week) in a position that it designates as

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<sup>1</sup> In its letter of support, dated November 8, 2009, the petitioner stated that it has two employees. On the Form I-129, which is dated November 17, 2009, the petitioner reported that it currently has three employees. In response to the RFE, the petitioner submitted a letter dated January 4, 2010, indicating that it employs two people.

a medical and healthcare services manager. The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 18, 2009. Specifically, the director requested additional information from the petitioner to demonstrate that the proffered position of medical and healthcare services manager is a specialty occupation. The petitioner was asked to provide additional evidence, including 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.

In response to the RFE, the petitioner provided a letter of support dated January 4, 2010, which included the job duties of the proffered position. The job duties that the petitioner submitted in this letter are identical to the list of responsibilities it provided with the Form I-129. The petitioner stated that it seeks to employ the beneficiary to perform the following duties:

- Manage clinical, professional, clerical and administrative staff along with managing recruitment and selection of new employees. Train new and existing team members. Participate in staff development, ensuring department activities are consistent with [the petitioner's] policies and procedures and contractual agreements. Oversee the day-to-day management of the company in coaching, counseling, performance appraisals, policies, procedures and orientation to department philosophy. Liaison and negotiate with medical (often at the most senior levels) and non-medical staff internally, and with people in external organizations, e.g. social services, voluntary groups or the private sector. Foster consistent cross-departmental communication, in particular initiatives and/or issues. (40% of time, 8 hours per week)
- Assist with maintaining compliance with State Contract, General Rules and Regulations and Administrative Rules as outlined by the State of California. Including: staff education of compliance and regulatory issues, ensure that policies and procedures manual is available and updated and Member and Provider education regarding covered benefits, health and wellness issues are discussed. (20% of time, 4 hours per week)
- Attend meetings, write reports and deliver presentations to a variety of audiences. Sit in on committees and represent the views of departments and teams. Identify limitations and problems; make recommendations for alternate work procedures. Participate in the development and administration of clinically based quality projects. Use internal and external resources to assist with the design and production of plan-wide data projects. (15% of time, 3 hours per week)
- Study and keep abreast of all relevant legislative and regulatory requirements and their impact upon health and clinical services; Devote time in developing

and implementing a staff-coordination system that will be available to other managers at the conclusion of his period of stay. (5% of time, 1 hour per week)

The AAO notes that the primary functions for the proffered position, as provided by the petitioner, are taken from general job descriptions, virtually verbatim, from the Internet.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. The AAO will first make some preliminary findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

The title of the proffered position, medical and healthcare services manager, is amorphous and may include a range of duties, some of which may be performed with experience alone, some of which may require a general bachelor's degree, and some of which may require a bachelor's or higher degree in a specific discipline. To determine whether this medical and healthcare services manager position is a specialty occupation, the AAO must look beyond the job title and consider 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, as reflected in the descriptions of the position as quoted above, the petitioner describes the proposed duties in terms of 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.

In its letter of support, the petitioner described itself as "a privately-held health care system." It stated that its "primary mission is to develop, manage and operate program services focused on all aspects of medical, rehabilitative, chemical dependency and behavioral health care. We currently employ two employees . . . ." The substantive requirements of the beneficiary's duties, listed above, are unclear, particularly when viewed in terms of the size, scope and nature of the petitioning entity's business operations.<sup>2</sup> For example, the AAO acknowledges that the

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<sup>2</sup> As previously noted, the petitioner reported that its staff consists of 2 to 3 employees. The AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would

petitioner claims that the beneficiary will "manage all of our staffed employees." However, the petitioner has not provided any information or documentation to establish that its operations consist of personnel or "staffed employees" other than the owner and possibly one to three additional employees (based upon the Quarterly Wage Reports submitted).

In its November 9, 2009 and January 4, 2010 letters, the petitioner stated that in the past few years it has "experienced phenomenal growth of the business, expanding the number of our services, our staff and our client base. With the growth of the business, so does the complexity of our operations. It is in this context that we need to hire a Medical and Healthcare Services Manager." Again, the AAO finds the petitioner's statements questionable, particularly the information regarding the petitioner's expanding staff, given that in the very same letters the petitioner stated that "we currently employ two employees." The petitioner failed to provide any documentation to substantiate its "phenomenal growth" and "expanding" services, staff and client base. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

As described, the duties fail to communicate either the actual work entailed or an adequate correlation between that work and the petitioner's stated business operations. For instance, the abstract level of information provided regarding the proffered position and the duties comprising it is exemplified by the phrases "[m]anage clinical, professional, clerical and administrative staff;" "[t]rain new and existing team members;" and "[p]articipate in staff development, ensuring department activities are consistent with [the petitioner's] policies and procedures;" "oversee the day-to-day management of the company in coaching, counseling, performance appraisals, policies, procedures and orientation to department philosophy;" "[l]iaison and negotiate with medical (often at the most senior levels) and non-medical staff internally;" "[f]oster consistent cross-departmental communication;" and "[s]it in on committees and represent the views of departments and teams."

More specifically, although the petitioner claims that a major function of the beneficiary's job duties entails managing staff, the petitioner fails to provide any information or evidence regarding the "clinical, professional, clerical and administrative staff" that the beneficiary will manage, (including who specifically this consists of, given that the petitioner stated that the business consists of two to three employees). A review of the petitioner's organizational chart does not shed any light on this issue. The petitioner also claims that the beneficiary will "[t]rain new and existing team members." However, the matters and substance of the training that the beneficiary will provide has not been adequately described. Furthermore, the petitioner's reference to "new and existing team members" is also unclear, given the size of the petitioner.

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employ the beneficiary in position requiring a level of knowledge that may be obtained only through a baccalaureate degree or higher in or its equivalent.

The petitioner's intended tasks for the beneficiary to "[p]articipate in staff development, ensuring department activities are consistent with [the petitioner's] policies and procedures" and "oversee the day-to-day management of the company in coaching, counseling, performance appraisals, policies, procedures and orientation to department philosophy" is also vague in regard to the duties the beneficiary will perform. Moreover, the petitioner failed to provide clarification regarding its reference to "department activities," and "department philosophy" given the size, scope and nature of the petitioner's business operations.

Furthermore, the petitioner claims that the beneficiary will "[f]oster consistent cross-departmental communication" and "[s]it in on committees and represent the views of departments and teams." However, again, the petitioner's intended duties for the beneficiary with regarding to "cross-departmental communication" and "represent[ing] the views of departments and teams" is unclear, given the petitioner reportedly consists of 2 to 3 employees. The petitioner does not adequately describe the actual duties involved in performing these tasks. The petitioner fails to communicate (1) the specific 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.

Based upon a complete review of the record, the AAO finds that the petitioner has not provided an adequate description of the specific duties and responsibilities to be performed by the beneficiary as a "medical and health services manager" in relation to the petitioner's particular business, given its size and scope of operations. Furthermore, the insufficiently described functions said to comprise the proffered position are not in themselves indicative of the need for attainment of a particular level of education in a body of highly specialized knowledge in a specific specialty. The petitioner's job description for the proffered position contains numerous generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which this broad spectrum of duties would manifest themselves in their actual performance within the petitioner's day-to-day business operations.

Moreover, the AAO will highlight an aspect of the petition that undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect is the discrepancy between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated on the Labor Condition Application (LCA) submitted in support of the petition.

With the Form I-129 petition, the petitioner provided a letter of support dated November 9, 2009, in which the petitioner provided its educational requirements for the proffered position. In this letter, the petitioner stated the following:

It is also the company's hiring policy to require a Masters or higher for Medical & Health Services Manager. We would not consider anyone with lesser qualifications for this professional position.

In conclusion, the nature of our business operations coupled with the complexity of the actual duties of the position necessitates a minimum requirement of a Masters degree. The duties of the position are clearly those of a specialty occupation we would not consider anyone with less qualification for this professional level position.

The record reflects that the petitioner and counsel have provided inconsistent information as to the petitioner's degree requirement for the proffered position. For example, as noted above, the petitioner initially stated that a "Masters degree" was the minimum educational requirement for the position. However, the petitioner stated in its response to the RFE that "for the position of Medical & Health Services Manager we need someone with at least a Bachelor's degree, preferably a Masters." In the cover letter submitted with the petition, counsel stated that for the proffered position "a holder of at least a Bachelor's Degree majoring in Nursing or related field is a rational, common in the field, and is economically feasible requirement for the petitioning company." In response to the RFE, counsel stated "[p]etitioner states the level of difficulty in successfully carrying out these job duties and that an applicant requires a Masters Degree." The record contains several discrepancies on this issue. Inconsistencies in the record may raise concerns about the veracity of the petitioner's assertions. 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).

Further, the petitioner and counsel repeatedly claim that the duties of the proffered position are "highly specialized and complex," requiring a high-level of responsibility and that the beneficiary will "[m]anage clinical, professional, clerical and administrative staff." Counsel stated that the beneficiary "spearheads and is responsible for the entire Service-related component of Petitioner's organization" and is "responsible for laying down the groundwork and the parameters by which staffed employees will provide healthcares (sic) services to clients." However, the claims are doubtful when reviewed in connection with the LCA submitted by the petitioner with the Form I-129 petition. In this regard, 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" 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.<sup>3</sup> 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,

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<sup>3</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

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.<sup>4</sup> The 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 wage levels.<sup>5</sup> 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 claimed that the proffered position entails highly specialized and complex tasks, a high-level of responsibility and direct managerial functions, including managing all of the petitioner's staffed employees. The petitioner further stated that the beneficiary will oversee the day-to-day management of the company in multiple areas and implement policies, objectives and procedures. The petitioner stated that it would not consider anyone with less than a master's degree for the proffered position. 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 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

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<sup>4</sup> 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.

<sup>5</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. This aspect of the petition 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.

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. As noted previously, 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.

The AAO will now address whether the petitioner has provided sufficient evidence 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.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

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

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

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

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

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 indicated that the beneficiary would be employed as a medical and healthcare services manager. 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 here incorporates by reference its earlier discussion regarding the abstract, generalized, and generic terms by which the petitioner describes the proposed duties. The petitioner's descriptions of the duties of the proffered position are broad and generic and do not convey either the substantive nature of the specific matters upon which the beneficiary would focus or the practical and theoretical level of knowledge that the beneficiary would have to apply to those matters. Because of the lack of specificity as to the duties the beneficiary would perform on a day-to-day basis, the particular level of knowledge to be applied in this case is not self-evident.

When determining whether the record of proceeding establishes that a particular position meets the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the AAO routinely reviews the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>6</sup>

In reviewing the *Handbook*, the AAO looked at the description of "Administrative Service Managers" and "Medical and Health Services Managers" as well as well as other positions depicted in the *Handbook*, including the occupations in the chapter on "Human Resources, Training, and Labor Relations Managers and Specialists."<sup>7</sup>

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<sup>6</sup> All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

<sup>7</sup> For these chapters, *see* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Administrative Service Managers*, on the Internet at

The AAO finds that, when compared with the full spectrum of the duties that comprise the occupational categories "Administrative Service Managers," "Medical and Health Services Managers" and "Human Resources, Training, and Labor Relations Managers and Specialists" as described in the *Handbook*, the duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary performs some tasks that resemble the duties associated with each of these occupational categories. The AAO finds the proffered position appears to be a combination of occupations as described in the *Handbook*. However, upon review of the relevant occupational categories, it must be noted that the *Handbook* does not support the claim that the proffered position qualifies as a specialty occupation.

As will now be discussed, the occupational category "Administrative Service Managers" does not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. The section regarding the "Training, Other Qualifications, and Advancement" of the *Handbook's* chapter on "Administrative Service Managers" states the following:

Education and experience requirements for these managers vary widely, depending on the size and complexity of the organization. In small organizations, experience may be the only requirement. In large organizations, however, administrative services managers may need a bachelor's degree and appropriate experience.

***Education and training.*** Specific education and training requirements vary by job responsibility. Office managers in smaller operations or lower-level administrative services managers with fewer responsibilities may only need a high school diploma combined with appropriate experience, but an associate degree is increasingly preferred.

In larger companies with multiple locations, equipment, and technologies to coordinate, higher-level administrative services managers need at least a bachelor's degree. Managers of highly complex services, such as contract, insurance, and regulatory compliance, generally need at least a bachelor's degree in business administration, human resources, accounting, or finance. Lower-level managers may also need a bachelor's degree, but related postsecondary technical training may also be substituted for managers of printing, security, communications, or information technology. Those involved in building management should take a drafting class. Regardless of major, courses in office

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<http://www.bls.gov/oco/ocos002.htm> (visited February 15, 2012), Medical and Health Services Managers at <http://www.bls.gov/oco/ocos014.htm> (visited February 15, 2012) and Human Resources, Training, and Labor Relations Managers and Specialists at <http://www.bls.gov/oco/ocos021.htm> (visited February 15, 2012).

technology, accounting, computer applications, human resources, and business law are highly recommended.

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Whatever the educational background, it must be accompanied by related work experience reflecting managerial and leadership abilities. Many administrative services managers obtained their experience by specializing in one area at first, then augmenting their qualifications by acquiring work experience in other specialties before assuming managerial duties.

The *Handbook's* information on the educational requirements for the occupational classification "Administrative Service Managers" indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* states that administrative service managers in smaller operations may only need a high school diploma combined with appropriate experience, although an associate degree is increasingly preferred.

Despite counsel's assumption to the contrary, "Medical and Health Services Managers" also do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. 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 (which they do not), 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.

Regarding the educational requirements for entry in to the occupation of "Medical and Health Services Managers," the *Handbook* states the following:

Medical and health services managers must be familiar with management principles and practices. A master's degree in health services administration, long-term care administration, health sciences, public health, public administration, or business administration is the standard credential for most generalist positions in this field. However, a bachelor's degree is adequate for some entry-level positions in smaller facilities, at the departmental level within healthcare organizations, and in health information management. Physicians' offices and some other facilities hire those with on-the-job experience instead of formal education.

The *Handbook* states that the entry requirements for the occupation include on-the-job experience or formal education, such as a bachelor's degree or a higher degree in a number of fields. The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for medical and health services managers. More specifically, according to the *Handbook*, some employers hire individuals with on-the-job experience instead of formal education. The AAO notes that when discussing that a bachelor's degree may be an adequate

educational credential to work in some facilities, the *Handbook* does not state that such degree must be in a specific specialty. Moreover, although the *Handbook* indicates that a master's degree is the standard requirement for most generalist positions, it also states that a degree in one of a number of fields is acceptable.

USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a *specific specialty* that is directly related to the proffered position. According to the *Handbook*, degrees in a wide variety of fields, such as health services administration, long-term care administration, health sciences, public health, public administration, or business administration, are acceptable.<sup>8</sup> Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

As will now be discussed, the occupations falling under the chapter "Human Resources, Training, and Labor Relations Managers and Specialists" do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* states, in pertinent part, the following about this occupation:

There are many types of human resources, training, and labor relations managers and specialists. In a small organization, a *human resources generalist* may handle all aspects of human resources work, and thus require an extensive range of knowledge. The responsibilities of human resources generalists can vary widely, depending on their employer's needs.

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Employment and placement. *Employment and placement managers* supervise the recruitment, hiring, and separation of employees. They also supervise employment, recruitment, and placement specialists, including employment interviewers. *Employment, recruitment, and placement specialists* recruit and place workers.

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<sup>8</sup> The AAO acknowledges that the petitioner claims that the beneficiary possesses "the equivalent of a U.S. Bachelor & Masters in Nursing." However, USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. See *Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Determining whether a proffered position is a specialty occupation is a separate issue from determining whether a beneficiary is qualified for the proffered position.

*Recruitment specialists* maintain contacts within the community and may travel considerably, often to job fairs and college campuses, to search for promising job applicants. Recruiters screen, interview, and occasionally test applicants. They also may check references and extend job offers. These workers must be thoroughly familiar with their organization, the work that is done, and the human resources policies of their company in order to discuss wages, working conditions and advancement opportunities with prospective employees. They also must stay informed about equal employment opportunity (EEO) and affirmative action guidelines and laws, such as the Americans with Disabilities Act.

*Employment interviewers*—whose many job titles include *human resources consultants*, *human resources development specialists*, and *human resources coordinators*—help to match employers with qualified jobseekers. Similarly, *employer relations representatives*, who usually work in government agencies or college career centers, maintain working relationships with prospective employers and promote the use of public employment programs and services.

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Training and development. *Training and development managers and specialists* create, procure, and conduct training and development programs for employees. Managers typically supervise specialists and make budget-impacting decisions in exchange for a reduced training portfolio. Increasingly, executives recognize that training offers a way of developing skills, enhancing productivity and quality of work, and building worker loyalty. Enhancing employee skills can increase individual and organizational performance and help to achieve business results. Increasingly, executives realize that developing the skills and knowledge of its workforce is a business imperative that can give them a competitive edge in recruiting and retaining high quality employees and can lead to business growth.

Other factors involved in determining whether training is needed include the complexity of the work environment, the rapid pace of organizational and technological change, and the growing number of jobs in fields that constantly generate new knowledge and, thus, require new skills. In addition, advances in learning theory have provided insights into how people learn and how training can be organized most effectively.

*Training managers* oversee development of training programs, contracts, and budgets. They may perform needs assessments of the types of training needed, determine the best means of delivering training, and create the content. They may provide employee training in a classroom, computer laboratory, or onsite production facility, or through a training film, Web video-on-demand, or self-paced or self-guided instructional guides. For live or in-person training, training managers ensure that teaching materials are prepared and the space appropriately set, training and instruction stimulate the class, and completion certificates are

issued at the end of training. For computer-assisted or recorded training, trainers ensure that cameras, microphones, and other necessary technology platforms are functioning properly and that individual computers or other learning devices are configured for training purposes. They also have the responsibility for the entire learning process, and its environment, to ensure that the course meets its objectives and is measured and evaluated to understand how learning impacts performance.

*Training specialists* plan, organize, and direct a wide range of training activities. Trainers consult with training managers and employee supervisors to develop performance improvement measures, conduct orientation sessions, and arrange on-the-job training for new employees. They help employees maintain and improve their job skills and prepare for jobs requiring greater skill. They work with supervisors to improve their interpersonal skills and to deal effectively with employees. They may set up individualized training plans to strengthen employees' existing skills or teach new ones. Training specialists also may set up leadership or executive development programs for employees who aspire to move up in the organization. These programs are designed to develop or "groom" leaders to replace those leaving the organization and as part of a corporate succession plan. Trainers also lead programs to assist employees with job transitions as a result of mergers or consolidation, as well as retraining programs to develop new skills that may result from technological changes in the work place. In government-supported job-training programs, training specialists serve as case managers and provide basic job skills to prepare participants to function in the labor force. They assess the training needs of clients and guide them through the most appropriate training. After training, clients may either be referred to employer relations representatives or receive job placement assistance.

Planning and program development is an essential part of the training specialist's job. In order to identify and assess training needs, trainers may confer with managers and supervisors or conduct surveys. They also evaluate training effectiveness to ensure that employees actually learn and that the training they receive helps the organization meet its strategic goals and achieve results.

Depending on the size, goals, and nature of the organization, trainers may differ considerably in their responsibilities and in the methods they use. Training methods also vary by whether the training predominantly is knowledge-based or skill-based or sometimes a combination of the two. For example, much knowledge-based training is conducted in a classroom setting. Most skill training provides some combination of hands-on instruction, demonstration, and practice at doing something and usually is conducted on a shop floor, studio, or laboratory where trainees gain experience and confidence. Some on-the-job training methods could apply equally to knowledge or skill training and formal apprenticeship training programs combine classroom training and work experience. Increasingly, training programs involve interactive Internet-based training modules that can be

downloaded for either individual or group instruction, for dissemination to a geographically dispersed class, or to be coordinated with other multimedia programs. These technologies allow participants to take advantage of distance learning alternatives and to attend conferences and seminars through satellite or Internet communications hookups, or use other computer-aided instructional technologies, such as those for the hearing-impaired or sight-impaired.

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Other emerging specialties in human resources include *international human resources managers*, who handle human resources issues related to a company's overseas operations and *human resources information system specialists*, who develop and apply computer programs to process human resources information, match jobseekers with job openings, and handle other human resources matters; and *total compensation* or *total rewards specialists*, who determine an appropriate mix of compensation, benefits, and incentives.

The section regarding the "Training, Other Qualifications, and Advancement" of the *Handbook's* chapter on "Human Resources, Training, and Labor Relations Managers and Specialists" states the following:

The educational backgrounds of human resources, training, and labor relations managers and specialists vary considerably, reflecting the diversity of duties and levels of responsibility. In filling entry-level jobs, many employers seek college graduates who have majored in human resources, human resources administration, or industrial and labor relations. Other employers look for college graduates with a technical or business background or a well-rounded liberal arts education.

***Education and training.*** Although a bachelor's degree is a typical path of entry into these occupations, many colleges and universities do not offer degree programs in personnel administration, human resources, or labor relations until the graduate degree level. However, many offer individual courses in these subjects at the undergraduate level in addition to concentrations in human resources administration or human resources management, training and development, organizational development, and compensation and benefits.

Because an interdisciplinary background is appropriate in this field, a combination of courses in the social sciences, business administration, and behavioral sciences is useful. Some jobs may require more technical or specialized backgrounds in engineering, science, finance, or law. Most prospective human resources specialists should take courses in principles of management, organizational structure, and industrial psychology; however, courses in accounting or finance are becoming increasingly important. Courses in labor law, collective bargaining, labor economics, and labor history also provide a

valuable background for the prospective labor relations specialist. As in many other fields, knowledge of computers and information systems is useful.

An advanced degree is increasingly important for some jobs. Many labor relations jobs require graduate study in industrial or labor relations. A strong background in industrial relations and law is highly desirable for contract negotiators, mediators, and arbitrators; in fact, many people in these specialties have law degrees. A master's degree in human resources, labor relations, or in business administration with a concentration in human resources management is highly recommended for those seeking general and top management positions.

The duties given to entry-level workers will vary, depending on whether the new workers have a degree in human resource management, have completed an internship, or have some other type of human resources-related experience. Entry-level employees commonly learn by performing administrative duties—helping to enter data into computer systems, compiling employee handbooks, researching information for a supervisor, or answering phone calls and handling routine questions. Entry-level workers often enter on-the-job training programs in which they learn how to classify jobs, interview applicants, or administer employee benefits; they then are assigned to specific areas in the human resources department to gain experience. Later, they may advance to supervisory positions, overseeing a major element of the human resources program—compensation or training, for example.

The AAO notes that the *Handbook* does not report that, as an occupational group, "Human Resources, Training, and Labor Relations Managers and Specialists" require at least a bachelor's degree in a specific specialty. The *Handbook* explains that because of the diversity of duties and levels of responsibility, the educational backgrounds of human resources, training, and labor relations managers and specialists vary considerably. (As previously discussed, the petitioner indicated on the LCA that its proffered position for the beneficiary is an entry-level position.) The *Handbook* states that in filling entry-level jobs, many employers seek college graduates who have majored in human resources, human resources administration, or industrial and labor relations. According to the *Handbook*, other employers look for college graduates with a technical or business background or a well-rounded liberal arts education and entry-level employees commonly learn by performing administrative duties and entering enter on-the-job training programs.

The AAO finds that the duties of the proffered position do not fall directly within any one occupation within the *Handbook*. There are some aspects of the duties of the proffered position that relate to the occupations cited above; however, none of the occupations encompass all of the duties of the proffered position. 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. While the beneficiary may perform some tasks in common with the occupations listed above, the beneficiary's duties would not be fully encompassed by any one of these occupational groups. Further, it must be noted that none

of the occupations constitute an occupational group that categorically requires a specialty-occupation level of education that is, at least a U.S. bachelor's degree, or the equivalent, in a specific specialty.

The petitioner has not established that the proffered position falls under the occupational category "Medical and Health Services Managers." Accordingly, the *O\*NET* Summary Report for the occupational category "Medical and Health Services Managers," referenced by counsel, is not persuasive in establishing that the proffered position qualifies as a specialty occupation that normally requires at least a bachelor's degree or its equivalent in a specific specialty.<sup>9</sup> Furthermore, the AAO notes that *O\*NET* Summary Reports do not state specific educational requirements for occupations. Rather, occupations are classified according to a five-level "Job Zone" rating system. The Job Zone classification provides users with a guide to the vocational preparation levels of occupations, based on data from job incumbents and occupational experts regarding the levels of education, experience, and training needed for work in the occupations.<sup>10</sup> It must be noted, that *O\*NET OnLine* Job Zones do not state that a degree for any occupation must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *O\*NET OnLine* Summary Reports are not probative of a position being a specialty occupation.

Upon review of the record, the AAO finds that 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.

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<sup>9</sup> *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> (visited on February 15, 2012).

<sup>10</sup> DOL's report "Procedures for *O\*NET* Job Zone Assignments" describes the procedure within the *O\*NET* Data Collection Program for assigning Job Zone information to occupations. See [http://www.onetcenter.org/dl\\_files/JobZoneProcedure.pdf](http://www.onetcenter.org/dl_files/JobZoneProcedure.pdf) (visited on February 15, 2012). Additional information is available at the *O\*NET OnLine* Internet site at <http://www.onetonline.org/help/online/zones> (also visited on February 15, 2012).

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

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 or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent. The petitioner did not submit any letters or affidavits to meet this criterion of the regulations.

The documents provided do not establish 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.

The petitioner and counsel claim that the duties of the proffered position are complex or unique and they contend that the petitioner has provided sufficient documentation to satisfy this prong through the evidence submitted. However, a review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day 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, that 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 he will receive specific instructions on required tasks and expected results. His work will be reviewed for accuracy. The petitioner 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, the petitioner has failed to establish 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 duties of the medical and health services manager position 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 and skills for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent. It appears that the requisite knowledge for the position could be developed via a wide range of unrelated degree programs, from job experience alone, from junior college or community college courses, from training provided by vocational programs or by vendors, or by some combination thereof.

Counsel stated that "[w]e have carefully reviewed [the beneficiary's] transcript of records, which shows completion of the following relevant coursework in Fundamentals of Healthcare Management: [1] Nursing Management & Leadership, [2] Organizational Theory & Leadership and [3] Human Resource Leadership in Workplace." While the three courses listed by counsel may be beneficial in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of courses leading to a baccalaureate or higher degree in nursing (or its equivalent) are required to perform the duties of the particular position here. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 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).

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 of medical and health services manager 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, or the equivalent, in a specific specialty 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.<sup>11</sup>

In the instant matter, the petitioner provided the following information regarding its recruitment for the position:

We have exhausted all means and exerted all efforts to find the most suitable applicant for the position of Medical & Health Services Manager in our company. We conduct non-discriminatory recruitment. Besides hiring U.S. workers, we also hire qualified professionals internationally. The only eligibility criteria are the qualifications of the applicant along with an ability to perform highly specialized duties. [The beneficiary] was selected after a similar selection process.

The petitioner did not provide any further information or documentation regarding its methods for recruiting the beneficiary for the position. The petitioner did not indicate the total number of people who have served, or are currently serving, in the position of medical and health services manager.

Counsel stated that a "Labor Certification Application Posting Certification, Job Posting Notice" ["Notice of Filing of the LCA"] was submitted "to prove petitioner has conducted in-house recruitment and outside recruitment with stated minimum requirements." The referenced documentation states that it is being "posted in compliance with 20 C.F.R. 734 and the terms of the filed Labor Certification Application" and that it was posted for ten consecutive days at the petitioner's office.

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<sup>11</sup> 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.

The "Notice of Filing of the LCA" is a statement to the petitioner's workers that it has a job opportunity available, that a foreign worker may be placed in the position and that interested parties may read the notice and provide comments to DOL. Its primary purpose is not intended to be a form of recruitment. Moreover, the AAO observes that during the time period in which the notice was posted, the petitioner submitted the Form I-129 petition on behalf of the beneficiary to USCIS. The document, which was posted in connection with the LCA on behalf of the beneficiary, is not sufficient to establish a history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

The AAO notes that the petitioner 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. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d 384. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In the instant case, insufficient evidence was submitted regarding the petitioner's past recruiting and hiring practices. 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 petitioner and counsel claim that the duties of the medical and health services manager 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, in nursing or a related degree.

The AAO incorporates by reference and reiterates its earlier discussion that the generalized and generic nature of the description of the proposed duties submitted by the petitioner fails to adequately establish the actual work that the beneficiary would perform, let alone the relative specialization and complexity of any specific duties that would be involved, and that the LCA submitted by the petitioner indicates that the proffered position is low-level, entry position relative to others within the occupation. Accordingly, the petitioner has failed to establish that the duties of the proffered position are so specialized and complex that their performance would

require knowledge at a level associated with at least a bachelor's degree, or the equivalent, in a specific specialty.

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

Without a comprehensive description of the beneficiary's actual duties in connection with the petitioner's business, or other evidence to support the petitioner's claim that the proffered position is a specialty occupation, the AAO is precluded from determining that the proffered position is a specialty occupation. The petitioner has failed to provide sufficient substantive evidence that the duties of the actual position require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline that relates to the proffered position. Accordingly, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the AAO finds that the petition must also be denied because the LCA filed with it does not correspond to the petition, in that, as previously discussed in this decision, the wage level specified in the petition is indicative of a job involving materially less responsibility and an application of knowledge materially less than claimed by the petitioner in its statements about the proffered position.

In this regard, the petitioner should note that the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the

federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The wage level specified in the LCA indicates the proffered position is actually a low-level, entry position relative to others within the occupation. Based upon this wage rate, the beneficiary is only required to have a basic understanding of the occupation. He will be expected to perform routine tasks that require limited, if any, exercise of judgment. The beneficiary will be closely supervised, his work will be closely monitored and reviewed for accuracy and he will receive specific instructions on required tasks and expected results. Thus, the LCA does not actually support the proffered position as described by the petitioner.

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:

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. For this reason also, the petition must be denied.

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

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