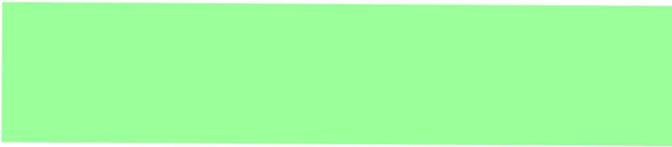




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 01 2013** 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 (AAO) in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The matter will be remanded for further consideration and entry of a new decision.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on June 22, 2011. On the Form I-129 visa petition, the petitioner describes itself as a home healthcare services agency established in 2005, with 277 employees. In order to employ the beneficiary in what it designates as a nurse manager position, the petitioner seeks 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 on August 29, 2011, finding that the petitioner failed to establish that the beneficiary is qualified to perform the duties of any specialty occupation. Counsel for the petitioner submitted an appeal of the decision on September 30, 2011. On appeal, counsel contends that the director's basis for denial of the petition was erroneous and that the petitioner satisfied its evidentiary burden. In support of these contentions, the petitioner submitted a brief and additional evidence.

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

As a preliminary matter, the AAO will discuss whether the proffered position qualifies as a specialty occupation. U.S. Citizenship and Immigration Services (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. *Cf. 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]."). In this matter, however, the director did not analyze the proffered position to determine whether it met the definition of a specialty occupation. Therefore, the AAO will first discuss its determination that, as presently constituted, the record of proceeding does not establish the proffered position as a specialty occupation.

At the outset, the petitioner should note, that since the proffered position has not been established as a specialty occupation, the director erred in attributing to it a need for, and in analyzing the beneficiary's qualifications in terms of proof of attainment of, a particular degree, or degree equivalency, in a specific specialty.

Consequently, the AAO does not have a basis to sustain the appeal, and the petition will be remanded for the director to issue a new decision that specifically addresses whether the proffered position qualifies as a specialty occupation, and that only addresses the beneficiary qualification issue to the extent necessary on the basis of the director's determination on the specialty occupation issue.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means 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), 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a nurse manager to work on a full-time basis at a salary of \$58,000¹ per year. In its support letter, dated June 9, 2011, the petitioner stated the following regarding the duties for proffered position:

¹ It is noted that in the Form I-129, at Part 5, subpart 8, the petitioner listed the wages as \$58,000 per year. On the Labor Condition Application (LCA) and in its support letter, the petitioner listed the wage rate as \$58,344, in accordance with the prevailing wage (wage level I). The AAO will discuss this discrepancy later in this decision.

We wish to clearly emphasize that [the beneficiary's] primary duty will *not* be to provide direct patient care or patient education services; we already have 21 nurses to do that.

Instead, [the beneficiary's] primary duty as Nurse Manager will be to supervise teams of Registered Nurses ("RN's"), Licensed Practical Nurses ("LPN's"), and home health aides to ensure the delivery of high-quality nursing services efficiently and in full compliance with [the petitioner's] internal policies, procedures and all applicable laws. Also, [the beneficiary] will help provide overall administrative direction and coordination of [the petitioner's] nursing policies, procedures and programs. . . . Initially, [the beneficiary] will supervise a team of [ten] RN's."

The petitioner also provided the following description of duties for the proffered position:

- Supervise RNs, LPNs[,] and home health aides . . . ;
- Assign patients to RNs and LPNs;
- Mediate all issues and concerns between RNs and Physicians / RNs and LPNs / RNs and nursing aides / RNs and assigned patients;
- Provide leadership in RN team meeting;
- Evaluate and check RNs paper work / documents (Example[:] nursing visit notes, clinical and progress notes, and plan of care for assigned patients);
- Case management;
- Research and resolve legal issues;
- Verify eligibility of benefits, complete appropriate paperwork related to eligibility issues and procedures, and resolve billing issues with various health insurance providers (e.g., Medicare, Medicaid, Molina, Passport Services, HMO, and CareSource);
- Evaluate compatibility and eligibility of patient's home health care services with insurance and doctor's office before assign[ing] patients to RNs or initial evaluation visit by RNs; [and]
- Interview and evaluate potential new hires when company needs to hire new staff of RNs.

The petitioner also provided the following approximate percentages of time to be spent by the beneficiary performing the duties of the proffered position:

[T]he Nurse Manager's job duties entail approximately 30% of time spent supervising and assigning RNs, 20% on evaluating paperwork prepared by the RNs, 20% on evaluating compatibility and eligibility of patients (related to insurance coverage), and 10% on other duties, such as interviewing and evaluating new hires. Nurse Managers only spend about 20% of their time involved with direct patient care and/or case management. In contrast, an RN spends over 50% of his or her time on patient care.

The petitioner stated that its requirements for the proffered position are “a minimum of a Bachelor of Science in Nursing (BSN) degree, the satisfaction of all RN licensure requirements in the State of Ohio, and managerial/administrative experience.” The petitioner also stated the following regarding the beneficiary’s qualifications:

[The beneficiary] is well-qualified for the Nurse Manager position. He earned a Bachelor of Science degree in Nursing in November 2008 from [redacted] Ohio. . . . Furthermore, [the beneficiary] has over one year of experience working as a registered nurse. . . . In addition, he has over three years of management experience at The UPS Store.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of “Medical and Health Services Managers” – SOC (ONET/OES Code) 11-9111.00, at a Level I wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a RFE on July 5, 2011. The petitioner was asked to submit documentation to establish that the beneficiary is qualified to perform the duties of the proffered position. The director outlined the specific evidence to be submitted.

Counsel for the petitioner responded to the RFE in a letter dated August 12, 2011, submitting the following documents in response to the director’s requests: (1) a letter, dated August 3, 2011, from [redacted] Associate Professor and Associate Dean for Undergraduate Education at the [redacted] in [redacted] Ohio; (2) a copy of [redacted] resume, that was printed on August 2, 2011, from the Internet site for the [redacted]; and (3) a printout of information from the Ohio Department of Job and Family Services’ Internet site regarding the petitioner’s status as a “Home Health Agency – Medicare Certified,” and background information about the function of such agencies in Ohio.

On August 29, 2011, the director denied the petition. Specifically, the director stated that the petitioner did not “establish that the beneficiary is qualified in a specialty occupation by virtue of possessing a baccalaureate degree in nursing and an RN license.” Therefore, the director concluded that “the beneficiary is not qualified for classification as a specialty occupation worker.”

On appeal, counsel for the petitioner contends that the director’s findings were erroneous and that the petitioner submitted sufficient evidence to prove, by a “preponderance [of the evidence],” that the beneficiary is qualified to perform the duties of the proffered position. Counsel submitted additional documentation, including, *inter alia*, (1) an affidavit of [redacted] petitioner’s President; (2) a copy of the petitioner’s organizational chart/list of employees; and (3) an opinion letter, dated September 22, 2011, from [redacted] Professor of Radiation

Oncology and Internal Medicine at the [REDACTED] in support of the contention that the beneficiary is qualified for the proffered position.

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

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

* * *

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

* * *

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

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

The AAO reviewed the record in its entirety and will make some 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. Applying the preponderance of the evidence standard, the AAO finds that the evidence in the record of proceeding as presently constituted fails to establish that the position as described is more likely than not a specialty occupation.

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 normally the minimum requirement for entry into the particular position that is the subject of the petition.

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

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the job-title "nurse manager" and the occupational category "Medical and Health Services Manager."

According to the *Handbook*, this occupational category is described as follows:

Medical and health services managers, also called healthcare executives or healthcare administrators, plan, direct, and coordinate medical and health services. They might manage an entire facility or specialize in managing a specific clinical area or department, or manage a medical practice for a group of physicians. As healthcare changes, medical and health services managers must be able to adapt to changes in laws, regulations, and technology.

Duties

Medical and health services managers typically do the following:

- Work to improve efficiency and quality in delivering healthcare services
- Keep up to date on new laws and regulations so the facility complies with them

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

- Supervise assistant administrators in facilities that are large enough to need them
- Manage finances of the facility, such as patient fees and billing
- Create work schedules
- Represent the facility at investor meetings or on governing boards
- Keep and organize records of the facility's services, such as the number of inpatient beds used
- Communicate with members of the medical staff and department heads

In group medical practices, managers work closely with physicians, nurses, laboratory technicians, and other healthcare employees. For more information, see the profiles on physicians and surgeons, registered nurses, and medical and clinical laboratory technologists and technicians.

Medical and health services managers' titles depend on the facility or area of expertise in which they work. The following are some examples of types of medical and health services managers:

Nursing home administrators manage staff, admissions, finances, and care of the building, as well as care of the residents in nursing homes. All states require them to be licensed; licensing requirements vary by state.

Clinical managers manage a specific department, such as nursing, surgery, or physical therapy and have responsibilities based on that specialty. Clinical managers set and carry out policies, goals, and procedures for their departments; evaluate the quality of the staff's work; and develop reports and budgets.

Health information managers are responsible for the maintenance and security of all patient records. They must stay up to date with evolving information technology and current or proposed laws about health information systems. Health information managers must ensure that databases are complete, accurate, and accessible only to authorized personnel.

Assistant administrators work under the top administrator in larger facilities and often handle daily decisions. Assistants might direct activities in clinical areas, such as nursing, surgery, therapy, medical records, or health information.

According to the *Handbook*, medical and health services managers plan, direct, coordinate, and supervise the delivery of healthcare, and are either specialists in charge of a specific clinical department or generalists who manage an entire facility or system. In this matter, the description of the proffered position indicates that the beneficiary will be responsible for primarily “supervis[ing] teams of RN’s, LPN’s, and home health aides to ensure the delivery of high-quality nursing services efficiently and in full compliance with [the petitioner’s] internal policies, procedures and all applicable laws,” and “that his primary duty will *not* be to provide direct patient care or patient education services.” (Emphasis in original.)

A review of the *Handbook’s* education and training requirements for this occupational category, however, indicates that it does not normally require at least a bachelor’s degree in a specific specialty or its equivalent for entry into this occupation in the United States. Therefore, this classification, does not, by virtue of this categorization, satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), it must be established that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. According to the *Handbook*, the educational requirements of a “Medical and Health Services Manager” are as follows:

Most medical and health services managers have at least a bachelor's degree before entering the field; however, master's degrees also are common. Requirements vary by facility.

Education

Medical and health services managers typically need at least a bachelor’s degree to enter the occupation. However, master’s degrees in health services, long-term care administration, public health, public administration, or business administration also are common.

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

Work Experience

Although bachelor's and master's degrees are the most common educational pathways to work in this field, some facilities may hire those with on-the-job experience instead of formal education. For example, managers of physical therapy may be experienced physical therapists who have administrative experience. For more information, see the profile on physical therapists.

Important Qualities

Analytical skills. Medical and health services managers must be able to understand and follow current regulations and be able to adapt to new laws.

Communication skills. These managers must be able to communicate effectively with other health professionals.

Detail oriented. Medical and health services managers must pay attention to detail. They might be required to organize and maintain scheduling and billing information for very large facilities, such as hospitals.

Interpersonal skills. Medical and health services managers need to be able to discuss staffing problems and patient information with other professionals, such as physicians and health insurance representatives. They must be able to motivate and lead staff.

Problem-solving skills. These managers are often responsible for finding creative solutions to staffing or other administrative problems.

Technical skills. Medical and health services managers must be able to follow advances in health care technology. For example, they may need to use coding and classification software and electronic health record (EHR) systems as their facility adopts these technologies.

Advancement

Medical and health services managers advance by moving into more responsible and higher paying positions. In large hospitals, graduates of health administration programs usually begin as administrative assistants or assistant department heads. In small hospitals or nursing care facilities, they may begin as department heads or assistant administrators. Some experienced managers also may become consultants or professors of healthcare management. The level of the starting position varies with the experience of the applicant and the size of the organization.

For those already in a different healthcare occupation, a master's degree in health services administration or a related field might be required to advance. For example, nursing service administrators usually are supervisory registered nurses with administrative experience and graduate degrees in nursing or health administration. For more information, see the profile on registered nurses.

Licenses

All states require nursing care facility administrators to be licensed; requirements vary by state. In most states, these administrators must have a bachelor's degree, pass a licensing exam, and complete a state-approved training program. Some states also require administrators in assisted-living facilities to be licensed. A license is not required in other areas of medical and health services management.

Id. at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-4> (last visited January 16, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.³ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁴ That is, in accordance with the relevant DOL explanatory

³ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) 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.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. 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.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁴ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who

information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. In the instant case, this is further signified by the fact that the offered salary of \$58,000 per year to the beneficiary is approximately \$26,000 less than the 2010 median annual wage of \$84,270 for medical and health services manager positions (as listed in the *Handbook*).

The *Handbook* does not report that a medical and health services manager needs, as a standard entry requirement, at least a bachelor's degree in a specific specialty or its equivalent. Although counsel relies on the *Handbook's* statements that indicate that a bachelor's degree may be adequate for entry-level positions, the AAO notes that the *Handbook* also indicates that "some facilities may hire those with on-the-job experience instead of formal education." In addition, it indicates that those with general degrees in business administration may enter the occupation.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, 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. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. 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,

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.

Id.

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 at 147.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has failed to establish eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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 alternatively requires a petitioner to establish that a requirement for a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide, standard requirement of at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation. The AAO notes that the record of proceeding is devoid of any evidence that responds to this first alternative prong.

For the reasons set forth above, the petitioner has failed to establish that there is a common, specialty-degree requirement for parallel positions in organizations similar to the petitioner. The

petitioner, therefore, has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a bachelor's or higher degree in a specific specialty, or its equivalent, can perform the duties associated with the position. The test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area directly related to the duties and job responsibilities of that particular position. Here, the petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty-degreed employment. In fact, the petitioner and counsel repeatedly emphasize that the proffered position is an entry-level position.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Medical and Health Services Managers" at a Level I (entry level) wage. This designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that 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.

Therefore, the evidence of record does not establish that this position is significantly different from other medical and health service manager positions such that it refutes the *Handbook's* information to the effect that there is an array of preferred degrees acceptable for such positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than medical and health services manager positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other medical and health service manager 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 petitioner has thus failed to establish either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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. Although the petitioner states that it currently

employs one nurse manager, the petitioner failed to submit any evidence that relates to this criterion. Further, and in any event, one instance of employing a person in the position is not sufficient to establish a history of recruiting and hiring for the position only persons with at least a bachelor's degree or the equivalent, in a specific specialty, as would be required to satisfy this criterion.

The AAO further notes that were USCIS limited solely to reviewing a petitioner's 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 required the individual to have a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4), which requires a petitioner to establish 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, or its equivalent.

The AAO finds that the evidence in this particular record of proceeding has not developed relative specialization and complexity as an aspect of the duties of the proffered position and, as such, the evidence of record does not establish that this position is significantly different from the nature of the duties of medical and health service manager positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, to the extent that they are depicted in the record, the nature of the duties has not been demonstrated as being so specialized and complex as to require the highly specialized knowledge usually associated with attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

The AAO will now discuss the opinion letter, dated September 22, 2011, from [REDACTED] Professor of Radiation Oncology and Internal Medicine at the [REDACTED] [REDACTED] states that the proffered position's duties "indicate a position in the 'managerial' tier of the nursing profession, and thus a position consistent with a 'specialty occupation' in a nursing field." [REDACTED] further states that he "find[s] a Bachelor's Degree in Nursing to provide the appropriate level of preparation." The AAO finds no probative value in the opinion rendered by [REDACTED] The opinion is not based upon sufficient information about the nursing management position proposed here. USCIS may, in its discretion, use as advisory opinions statements submitted as

expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS 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).

Specifically, the content of [REDACTED] letter does not demonstrate that his opinion is based upon sufficient information about the particular position at issue. First, there is no indication that [REDACTED] a professor of radiation oncology and internal medicine, has any experience as a nurse or nurse manager, or any experience in the home healthcare business. Second, the letter reveals that his knowledge of the position is limited to the duties provided to him by the petitioner and, the AAO finds, that, to the extent that they are presented in this record of proceeding, the duties are generalized and generic and not described with sufficient specificity to convey either the substantive nature of particular work that actual performance of the proffered position would entail or any correlation between the substantive requirements of such work and a need for at least a bachelor's degree, or the equivalent, in a specific specialty. Third, [REDACTED] does not relate any personal observations of the petitioner's operations or of the work that the beneficiary would perform, nor does he state that that he has reviewed any projects or work products related to the proffered position. Fourth, [REDACTED] opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for his conclusions about the educational requirements for the particular position here at issue. Additionally, [REDACTED] does not present any evidence that he is a recognized authority in the specific area where he is opining, namely, the minimum educational requirements for serving in the particular type of position for which this petition was filed. Thus, the AAO accords no probative weight to [REDACTED] opinion letter.

The AAO will now address the Williams Memo cited by counsel on appeal. Counsel claims that the director misinterpreted the Williams Memo in its decision and that the Williams Memo only "requires . . . a bachelor's degree for nursing administrative positions, unless they supervise other supervisors."

Section C of the Williams Memo states:

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

Memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses, HQISD 70/6.2.8-P (November 27, 2002).

As indicated above, the petitioner classified the proffered position as an entry-level nurse manager on the submitted LCA, not as an upper-level nurse manager position. The AAO agrees with counsel's assertion that a graduate degree is not required for an entry-level nurse manager position and finds that the director misinterpreted the Williams Memo in stating that "the record did not include sufficient evidence to establish that an applicable graduate degree . . . is not needed." However, the director also noted that the fact that the petitioner did not provide evidence of a graduate degree or graduate training was "not essential to USCIS' finding of whether the beneficiary qualifies for the proffered position by way of the appropriate degree." The AAO notes that the Williams Memo only indicates that certain upper-level nurse manager positions "may" qualify – and not that such positions categorically qualify as specialty occupations. Even if it did, as indicated above, the petitioner classified the proffered position as an entry-level nurse manager on the submitted LCA, not as an upper-level nurse manager position. Thus, despite the director's misinterpretation of the Williams Memo, the Williams Memo is not evidence that the particular position that is the subject of this petition is a specialty occupation. Finally, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In its *de novo* review, the AAO did not consider the director's statements regarding a graduate degree as part of its decision.

Finally, the AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence 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 further.

Beyond the decision of the director, it also appears that the AAO would in any event be precluded from sustaining this appeal and approving the petition because the petition is not accompanied by an LCA that corresponds to the wage stated in the petition. That is, the petition must also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition.

The general requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1), in pertinent part, as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

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

instructions that accompany the Form I-129 also specify that an H-1B petition must be filed with evidence that an LCA has been certified by DOL.

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

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

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

In the instant matter, the petitioner filed the Form I-129 with USCIS on June 22, 2011. The LCA provided at the time of filing was certified on June 14, 2011, (1) for the job title of nurse manager; (2) pursuant to occupational code, 11-9111.00 – Medical and Health Services Managers; (3) for a position in the city of Columbus, in Franklin County, in the state of Ohio; and (4) at a Level I prevailing wage of \$58,344 per year.

Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), states, in pertinent part, that the petitioner must offer wages that are at least the actual wage paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage for the position in the area of employment, whichever is greater. Here, as mentioned above, the prevailing wage for the proffered position is \$58,344 per year for full-time employment. The petitioner attested on the Form I-129 petition, however, that it would only pay the beneficiary \$58,000 per year to work full-time for the petitioner. Therefore, as it appears that the petitioner has failed to offer a wage that is equal to or greater than the prevailing wage, the petition must be denied for this additional reason.

Based on the record of proceeding, the AAO determines that it appears that the petitioner has not established that the proffered position is a specialty occupation. Also, it appears that the petitioner has failed to provide a certified LCA that corresponds to the petition. For these reasons, the petition cannot be approved.

This matter shall be remanded to the director for entry of a new decision that expressly addresses and reaches a determination on whether the proffered position qualifies as a specialty occupation.

The new decision, of course, need address the beneficiary's qualifications only if there is a favorable determination on the specialty occupation issue, which, as this decision indicates, is not supported by the evidence in this record of proceeding as it is presently constituted.

The director shall consider all evidence of record in rendering his or her decision, including all of the submissions that have presented in the present appeal.

On remand, the director, of course, is not required to issue an additional RFE, but he or she is, of course, free to request such additional evidence as he or she may deem necessary.

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.

ORDER: The director's decision is withdrawn. The matter is remanded for further consideration and entry of a new decision.