



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **APR 30 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:  
[Redacted]

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen 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

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

On the Form I-129 visa petition, the petitioner describes itself as a skilled nursing business established in 2003. In order to employ the beneficiary in what it designates as a clinical health educator position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's two requests for additional evidence (RFE); (3) the petitioner's responses to the RFEs; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds two additional aspects which, although not addressed in the director's decision, nevertheless also preclude approval of the petition, namely: (1) failing to submit evidence requested by the director in her RFE, which precluded a material line of inquiry; and (2) providing as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the LCA was certified for a wage level below that which is compatible with the levels of responsibility, judgment, and independence the petitioner claimed for the proffered position through its descriptions of its constituent duties.<sup>1</sup> For these additional two reasons, the petition must also be denied.

In its January 12, 2011 letter of support, the petitioner stated that it engages in the business of providing coordinated and comprehensive health care to homebound individuals and others who wish to have health care services. The petitioner claimed that, under the supervision of physicians, it provides the following services: skilled nursing; home health aides; physical therapy; medical social services; speech therapy; occupational therapy; diet counseling/nutrition; and medical supplies and appliances.

The petitioner explained that healthcare is a highly regulated industry and that it must ensure that its practices conform to state and federal laws, as well as to requirements issued by other regulatory bodies. According to the petitioner, the competency of its staff is always monitored, and in order to receive reimbursements from [REDACTED] and health insurance organizations it must agree to

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis (See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified these two additional grounds for denial.

subject itself to various periodic surveys, one of which is designed to ensure that its staff meets certain competency standards. To this end, it seeks to employ the beneficiary as a full-time clinical health educator to plan and execute all required in-house trainings for its employees. Specifically, she would perform the following tasks:

- Planning, developing, and implementing all training and clinical skill-building activities related to the maintenance of the company's staff competency standards and continuing learning education program;
- Consulting with the petitioner's Nurse Director to assess the clinical skills and training needs of new and existing employees;
- Establishing an appropriate curriculum of training, seminars, procedures, and manuals for the annual survey and nursing reinforcement training required by state and federal law;
- Preparing a syllabus of course materials outlining the objectives of the training, the methodologies to be used, and the expected results.
  - The petitioner explained that this syllabus may cover a wide range of topics including basic to advanced nursing management, wound management, safety in the workplace, case management, discharge planning, healthcare policies and procedures, compliance regulations, proper use of medical equipment, clinical certification regulations, utilization review, etc.;
- Preparing and obtaining educational materials for use in teaching and demonstrating skilled nursing procedures;
- Regularly participating in conferences and seminars that formulate progressive professional staff development programs designed to meet the changing needs of the healthcare community.

The director found this description of the duties of the proffered position insufficient to warrant approval of the petition, and issued an RFE on March 14, 2011. The director requested, *inter alia*, that the petitioner submit a more detailed description of the work to be performed by the beneficiary, including specific job duties and percentages of time to be spent on each duty.

However, counsel's April 13, 2011 letter submitted in response to the RFE did not contain a more detailed description of the work to be performed by the beneficiary. Instead, counsel simply restated the duties of the proffered position as set forth by the petitioner when it filed the petition and added the percentages of time the beneficiary would spend performing each task.<sup>2</sup> However, beyond this simple addition and the addition of a sentence stating that the beneficiary would not direct or supervise anyone, the proposed duties were not discussed in any further detail than they were when the petition

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<sup>2</sup> According to counsel, the beneficiary would spend twenty-five percent of her time performing the first two duties; twenty percent of her time performing the third duty; twenty percent of her time performing the fourth duty; twenty percent of her time performing the fifth duty; and ten percent of her time performing the sixth duty.

was filed. The petitioner's description of the duties of the proffered position was essentially unchanged.

To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (USCIS) must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, etc. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

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

With the RFE, the director notified the petitioner that additional information was required to establish that the present petition meets the criteria for H-1B classification. The AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the request for additional evidence was appropriate under the above cited regulations, not only on the basis that it was required initial evidence, but also on the basis that it was material in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the entire period of employment requested in the petition.

The director also placed the petitioner on notice, via the RFE, that additional information was required, and the petitioner was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As indicated, although the petitioner did submit "the percentage of time to be spent on each duty" as instructed in the RFE, it did not submit "a more detailed description of the work to be performed by the beneficiary." To the contrary, it simply resubmitted the job description provided when it initially filed the petition, and it did not provide a valid reason for its failure to provide this information specifically requested in the RFE. The AAO finds that the RFE's request that was framed to ascertain substantive details of the duties proposed for the H-1B beneficiary constitutes a material line of inquiry, and the AAO also finds, therefore, that petitioner's failure to provide that additional information deprived the director of material information necessary to complete a line of inquiry required for an accurate determination of the merits of the specialty occupation issue. Accordingly, 8 C.F.R. § 103.2(b)(14) precludes approval of this petition. For this reason also, the petition must

be denied. Furthermore, counsel makes several claims regarding the complexity and specialization of the duties of the proposed position. For example, in her April 13, 2011 letter counsel made the following assertions:

Further[,] it is asserted that the duties that the beneficiary is charged with are discretionary, demanding[,] complex, highly advanced, specialized or sophisticated – exceeding industry or normal positions['] standards [and] significant responsibilities.

\* \* \*

The nature of the petitioner's business and the nature of the position are such that the proffered position entails a level of complexity and uniqueness[.]

However, as will now be discussed, these assertions materially conflict with the wage level designated in the LCA that the petitioner submitted with the petition. The LCA submitted by the petitioner in support of the instant position indicates that the occupational classification for the position is "Health Educators," SOC (O\*NET/OES) Code 21-1091.00, at a Level I (entry level) wage. The *Prevailing Wage Determination Policy Guidance*<sup>3</sup> issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level I** (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 [emphasis in original].

These petitioner's assertions regarding the proposed duties' level of complexity and specialization, as well as regarding the level of independent judgment and occupational understanding required to perform them, are materially inconsistent with the petitioner's submission of an LCA certified for a Level I, entry-level position. The LCA's wage level indicates that the proffered 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 quoted above, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and her work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the proffered position's demands and level of

<sup>3</sup> Available at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf) (last accessed Apr. 9, 2013).

responsibilities. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. 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).

It should be noted that, for efficiency's sake, the AAO's discussion and findings regarding the material conflict between assertions in the petition and the LCA wage-level are hereby incorporated as part of this decision's later analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Aside from the adverse impact of the LCA wage-level against the overall credibility of the petition, the AAO will now discuss that additional issue raised by the LCA which was noted at the outset of this decision as precluding approval of the petition, namely, the fact that the LCA does not appear to correspond to the instant petition.

The DOL has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA.

With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

*Certification* means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

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

While the 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) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. As reflected in this decision's earlier discussion of the conflict between the assertions of record regarding the proffered position, on the one hand, and, on the other, the position's characterization inherent in the LCA's Level I wage-rate designation, the petitioner has failed to submit an LCA that corresponds to the claimed duties of the proffered position. Specifically, it has failed to submit an LCA whose wage-level corresponds to the level of work and responsibilities that the petitioner claims for the proffered position. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved, due to the material disparity between the petitioner's claims, in the petition, regarding the demands of the proffered position, on the one hand, and, on the other, the petitioner's submission of an LCA certified for the lowest assignable wage-level.

The AAO will now address the director's determination that the proffered position is not a specialty occupation. 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.

As reflected in this decision's earlier discussion regarding the fact that the LCA does not correspond to the petition, that conflict between the petition and the LCA in itself precludes approval of this petition, independently from and regardless of the merits of the petition. Also, as previously noted, the conflict between the LCA and the petition also adversely affects the merits of the petition, because it materially undermines the credibility of the petition's statements therein with regard to the nature and level of work that the beneficiary would perform.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

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

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

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

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

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

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

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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 will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

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 it addresses.<sup>4</sup> Although counsel and the petitioner argue that the duties of the proffered position align with those of Health Educators as that occupational category is described in the *Handbook*, the AAO finds the petitioner's description of those duties insufficient for such a determination.

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<sup>4</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

In relevant part, the *Handbook* states the following with regard to the duties typically performed by Health Educators:

Health educators teach people about behaviors that promote wellness. They develop programs and materials to encourage people to make healthy decisions. . . .

Health educators typically do the following:

- Assess the needs of the people they serve
- Develop programs and events to teach people about health topics
- Create and distribute health-related posters, pamphlets, and other educational materials
- Evaluate the effectiveness of programs and materials
- Help people find health services or information
- Supervise staff who implement health education programs
- Collect and analyze data to learn about their audience and improve programs
- Advocate for improved health resources and policies

The duties of health educators vary based on where they work. Most work in health care facilities, colleges, public health departments, nonprofits, and private businesses. Health educators who teach health classes in middle and high schools are considered teachers. . . .

In *health care facilities*, health educators often work one-on-one with patients and their families. They teach patients about their diagnoses and about necessary treatments or procedures. They direct people to outside resources, such as support groups and home health agencies. Health educators in health care facilities also help organize health screenings, such as blood pressure checks, and health classes on topics such as correctly installing a car seat. They also train medical staff to interact better with patients. For example, they may teach doctors how to explain complicated procedures to patients in simple language.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Health Educators," <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-2> (accessed Apr. 9, 2013).

The record of proceeding is not sufficient to establish that these duties align with those proposed for the beneficiary. First and foremost, the petitioner did not indicate that the beneficiary would interact with the petitioner's patients<sup>5</sup> or, for that matter, anyone not employed by the petitioner directly. Further, the beneficiary would not develop programs and materials to encourage people to make healthy decisions. She would not assess the needs of the people the petitioner serves or develop programs and events to teach them about health topics. Nor would the beneficiary help people find health services or information. Counsel made clear that the beneficiary would not supervise staff members who implement health education programs. Finally, the beneficiary would not work one-on-one with patients and their families, teach them about their diagnoses and about necessary treatments or procedures, or direct them to outside resources.

The only duty described in the *Handbook* as being normally performed by health educators that even arguably aligns with those of the proffered position is the duty of health educators to "train medical staff to interact better with patients [. . . f]or example, they may teach doctors how to explain complicated procedures to patients in simple language." However, even this duty does not fully align with the similar duty of the proffered position. The only substantive example provided by the petitioner of an actual health topic on which the beneficiary might educate the petitioner's staff was to "remind alcohol-based hand rub users to be sure to allow the alcohol to adequately dissipate[.]" While certainly important, this type of technical instruction does not align with the *Handbook*-provided duty of health educators to "train medical staff to interact better with patients." The example provided in the *Handbook* was teaching doctors how to explain complicated procedures to patients in simple language, which differs substantially from reminding members of the petitioner's staff to allow time for their hand sanitizer to dissipate. As the petitioner has not demonstrated that the proffered position belongs within the occupational category of Health Educators, the AAO will not address that occupational category any further.<sup>6</sup>

Instead, the AAO finds that many of the duties of the proffered position are similar to those of training and development managers as that occupational category is described in the *Handbook*, which states the following:

Training and development managers plan, direct, and coordinate programs to enhance the knowledge and skills of an organization's employees. . . .

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<sup>5</sup> In fact, counsel indicated precisely the opposite: in her January 12, 2011 letter, counsel stated that "[t]he job does not require the [beneficiary] to provide direct nursing care to patients nor will she participate in any treatment plan."

<sup>6</sup> Even if the AAO were to accept the petitioner's claim that the proffered position is actually that of a health educator, the petition would still not be approved, as the record of proceeding does not demonstrate that the beneficiary is qualified to perform the duties of a health educator. According to the *Handbook*, entry-level health educator positions require a bachelor's degree in either health education or health promotion. See *Handbook* at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-4> (accessed Apr. 9, 2013). The beneficiary possesses neither credential.

Executives increasingly realize that developing the skills of their organization's workforce is essential to staying competitive in business . . . Training and development managers work to align training and development with an organization's goals.

Training and development managers . . . are responsible for organizing training programs, including creating or selecting course content and materials. . . .

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Training and Development Managers," <http://www.bls.gov/ooh/management/training-and-development-managers.htm#tab-2> (accessed Apr. 9, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Although a bachelor's degree is sufficient for many positions, some jobs for training and development managers require a master's degree. Managers can come from a variety of educational backgrounds but often have a bachelor's degree in human resources, business administration, or a related field.

*Id.* at <http://www.bls.gov/ooh/management/training-and-development-managers.htm#tab-4>.

The information from the *Handbook* does not support a finding that a bachelor's degree or the equivalent, in a specific specialty, is the normal minimum entry requirement for this occupation. While the *Handbook* does indicate that most positions in that occupational category require a degree, it specifically states that a degree "from a variety of educational backgrounds" would be sufficient.

For all of these reasons, inclusion of the proffered position within this occupational category is not in itself sufficient to establish the position as one for which the normal minimum entry requirement is at least a bachelor's or higher degree, or the equivalent, in a specific specialty.

While many of the duties of the proffered position are similar to those of a training and development manager, they are aligned even more closely with those of nurse educators. While the petitioner does not indicate that the beneficiary would provide direct patient care, the *Handbook's* discussion of Registered Nurses accounts for positions such as the one proposed here.

The 2010-11 print edition of the *Handbook* states the following with regard to such positions:

Some nurses have jobs that require little or no direct patient care, but still require an active RN license. . . . *Nurse educators* plan, develop, implement, and evaluate educational programs and curricula for the professional development of student nurses and RNs. . . .

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., Registered Nurses, pp. 392-396, printed edition.

The *Handbook* states the following with regard to the educational requirements for entrance into this field:

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

\* \* \*

In all nursing education programs, students take courses in nursing, anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take four years to complete; ADN and diploma programs usually take two to three years to complete.

All programs also include supervised clinical experience in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in extended and long-term care facilities, public health departments, home health agencies, or ambulatory (walk-in) clinics.

Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse.

Many registered nurses with an ADN or diploma find an entry-level position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

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In all states, the District of Columbia, and U.S. territories, registered nurses must have a nursing license.

To become licensed, nurses must graduate from an approved nursing program and pass the National Council Licensure Examination, or NCLEX-RN.

Other requirements for licensing vary by state. . . .

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Most registered nurses begin as staff nurses in hospitals or community health settings. With experience, good performance, and continuous education they can move to other settings or be promoted to positions with more responsibility.

In management, nurses can advance from assistant unit manager or head nurse to more senior-level administrative roles, such as assistant director, director, vice president, or chief of nursing. Increasingly, management-level nursing positions require a graduate degree in nursing or health services administration. Administrative positions require leadership, communication and negotiation skills, and good judgment.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Registered Nurses," <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4> (accessed Apr. 9, 2013).

At the outset of its analysis under this criterion, the AAO notes again that the petitioner designated the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally required for this occupational category. Rather, the *Handbook* states that there are three general paths for becoming a registered nurse, i.e., a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program. The *Handbook* states that associate's degrees and diploma programs for this occupation usually take two to three years to complete. The narrative of the *Handbook* indicates that generally, licensed graduates of any of the three types of educational programs (bachelor's, associate's, or diploma) qualify for entry-level positions. Nor does the *Handbook* state a minimum requirement for at least a bachelor's degree in nursing, or its equivalent for management positions; instead, it indicates only that graduate degrees are "increasingly required." An increasing preference for a graduate degree does not equate to a normal minimum hiring requirement for a graduate degree, or even a bachelor's degree, in a specific specialty or the equivalent. For all of these reasons, the *Handbook* does not indicate that the proffered position falls under an occupational group that categorically qualifies as a specialty occupation.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in the training and development manager category would be sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of 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 at 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 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 for entry into those positions.

Nor do the job vacancy announcements submitted below satisfy the first alternative prong described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, the petition has not submitted any evidence to demonstrate that these advertisements are from companies "similar" to the petitioner. The petitioner has submitted no evidence to establish that these advertisers are similar to the petitioner in size, scope, scale of operations, business efforts, and expenditures.<sup>7</sup> Second, the petitioner has not established that all of these positions are "parallel" to the one proffered here. Nor does the petitioner submit any evidence regarding how representative these advertisements are of the usual recruiting and hiring practices with regard to the positions advertised. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

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<sup>7</sup> As noted, the petitioner described itself on the Form I-129 as a "skilled nursing" business, and it provided a North American Industry Classification System (NAICS) Code of 623110, "Nursing Care Facilities (Skilled Nursing Facilities)." U.S. Dept. of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "623110 Nursing Care Facilities (Skilled Nursing Facilities)," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Apr. 9, 2013). However, the AAO notes that the [REDACTED] is a hospital; [REDACTED] is a healthcare management company; the [REDACTED] is a general medical services provider; [REDACTED] is a health insurance company; and the [REDACTED] appears to be a network of health care providers. No information was provided regarding the business activities of [REDACTED] or of the unnamed health services company advertising its vacancy through [REDACTED].

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)).<sup>8</sup>

Furthermore, the AAO notes that these advertisers do not all require a bachelor's degree or the equivalent in a specific specialty. For example, although [REDACTED] requires an R.N. degree, it states only a "preference" for a bachelor's degree. While [REDACTED] requires a bachelor's degree, its advertisements indicate that the company would find acceptable a degree from a spectrum of specialties. The job vacancy announcement from [REDACTED] also indicates that the company would accept a candidate with a bachelor's degree from a range of specialties.

Accordingly, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The duties proposed for the beneficiary are similar to those outlined in the *Handbook* as

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<sup>8</sup> Furthermore, according to the *Handbook* there were approximately 29,800 persons employed as training and development managers in 2010. *Handbook* at <http://www.bls.gov/ooh/management/training-and-development-managers.htm#tab-6>. There were 63,400 persons employed as health educators. *Id.* at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-6>. There were 2,737,400 persons employed as registered nurses *Id.* at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-6>. Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the eight submitted vacancy announcements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if these eight job vacancy announcements supported the finding that the proffered position required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that these eight job postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

normally performed by training and development managers, and by nurse educators, and the petitioner's description of the duties which collectively constitute the proffered position lacks the detail and specificity required to establish that they surpass or exceed the duties performed by typical training and development managers or nurse educators in terms of complexity or uniqueness. As noted above the *Handbook* indicates that the performance of these typical duties does not require a bachelor's degree, or the equivalent, in a specific specialty. The AAO finds further that, even outside the context of the *Handbook*, the petitioner has simply not established complexity or uniqueness as attributes of the proffered position, let alone as attributes at such an elevated level as to comprise a position that can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Also, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the proffered 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 is indicative of a position where the beneficiary would perform routine tasks that require limited, if any, exercise of independent judgment; would be closely supervised and monitored; would receive specific instructions on required tasks and expected results; and would have her work reviewed for accuracy.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties constitute a position so complex or unique it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it did not show that the particular position for which it filed this petition is 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, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 the performance requirements of the proffered position.<sup>9</sup> In the instant case, the record does not

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<sup>9</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the occupation.

establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is not necessitated by the actual performance of the proffered position, it would not be probative of the position satisfying this particular criterion, let alone of its meeting 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").

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 at 387. 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 proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In this particular case the record lacks any documentary evidence regarding any previous history of recruiting and hiring for the proffered position only individuals who possess at least a bachelor's degree, or the equivalent, in a specific specialty. As the record of proceeding lacks evidence for consideration under this criterion, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's 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 in the specialty.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level I** (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 [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years

of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

The AAO again incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the petitioner's designation of the proffered position on the LCA as a low-level, entry position relative to others within the occupation. It is therefore simply not credible that the position is one with specialized and complex duties as such a position would likely be classified at a higher-level, requiring a significantly higher prevailing wage.

The AAO finds further that, separate and apart from the petitioner's wage-level designation of Level I on the LCA, it has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the AAO will conclude this decision by addressing the arguments advanced by counsel on appeal regarding the precedential value of H-1B approvals granted both: (1) to the petitioner for similar positions; and (2) to other petitioners for what counsel claims were also similar positions. According to counsel, "[s]o long as prior determinations remain valid and existing, [USCIS] should consider the same as a precedent and therefore [grant] deference in the determination of subsequent filings." Counsel's argument, which was not supported by citations to any statutory, regulatory, or other relevant legal authority, is not persuasive.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are

contained in the current record, they would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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

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