



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **AUG 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 19, 2012. In the Form I-129 visa petition, the petitioner describes itself as a multi-specialty surgery center established in 1999. In order to employ the beneficiary in what it designates as a surgery/OR nurse manager 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 September 21, 2012, finding that (1) the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions, and (2) the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation position. On appeal, counsel asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief and additional evidence in support of this assertion.

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions. For this additional reason, the petition may not be approved. It is considered an independent and alternative basis for denial.¹

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as a surgery/OR nurse manager to work on a full-time basis. In a support letter dated August 9, 2012, the petitioner stated that the beneficiary will perform the following duties in the proffered position:

1. Oversee in service of new policies and procedures, as well as new equipment (2%)

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

2. Schedule, complete updates, and maintain timely employee performance evaluations and competencies. (3%)
3. Prepare and administer budgets, reports, and evaluations. (2%)
4. Ensure that staff maintains professional standards of nursing practice for our clients by communicating current nursing techniques and policies to our staff RNs. (5%)
5. Ensure Circulator/OR RN staff makes provisions for instrument, supply, and equipment requirements of surgical procedures, as assigned. (5%)
6. Ensures Circulator/OR RN staff completes timely and accurate documentation of information, including but not limited, to that of Patient Charts, Preference Cards, Incident Reports, Nursing Notes and Surgical Log[.] (5%)
7. Obtain an overview of the patient status through review of the patient chart, personal observation, and reports from the Circulator/OR RN and Recovery Room/ PACU RN. (3%)
8. Interpret diagnostic measures such as labs, chest x-rays and EKGs. (2%)
9. Identify goals for patient care and evaluate nursing care plan and modify/resolve problems accordingly by providing instructions to the Circulator/OR RN and Recovery Room/ PACU RN staff. (3%)
10. Ensure the following pre-operative procedures are completed by Circulator/OR RN staff: (10%)
 - Verification of OR schedule to determine patient's name, surgeon, anesthetist and the nature of the surgical intervention for proper identification of patient and plan of action intra- operatively.
 - Drugs are requested as required by anesthetist or physician.
 - Inspect the OR to ensure patient safety and comfort and the smooth flow of the procedure.
 - All equipment, including room temperate and humidity, lights and suction, anesthesia machine, should be checked daily for safety, functioning capability, and complete assembly.
 - Ensure the patient has undergone physical/psychological assessments, as well as to decrease patient anxiety and help plan nursing actions intra-operatively by the Circulator/OR RN.
 - Ensure that the Circulator/OR RN accompanies patient to the OR and assists in transfer to the OR table.
11. Ensure the following intra-operative procedures are completed by the Circulator/OR RN staff: (30%)
 - Anticipate the needs of the surgical team and provide supplies and equipment as requested.
 - Coordinate all activities within the OR in order to provide for a non-eventful, safe, effective and timely surgical intervention.
 - Provide for patient's needs, both physiologically as well as psychologically:
 - Maintain an environment free of disturbing sounds and statements.

- Remain alert to any break in technique, which may contaminate the operative field.
 - Maintain patient comfort during the surgical procedure. Make sure all the bony area is properly padded with cushion.
 - Maintain patient's body temperature during the surgical procedure. Apply warm blanket and warming devices, such as Bair Huger.
 - Assist the anesthesiologist to monitor patient's airway during the surgical procedure. Assess any potential problems.
 - Direct and assist Surgical Technician in preparation for the surgical procedure according to established procedure and the surgeon's preference card.
 - Count sponges, needles, etc with the Surgical Technician and properly document the count. Inform surgeon of any discrepancies.
 - Handle all implants:
 - Insure the proper sterilization for all the implants.
 - Check patient identification to be matched with the implants.
 - Maintain minimum OR traffic during any implantation.
 - Make sure all the implants are properly recorded in the implant log.
 - Handle all specimens:
 - Accurate and complete identification on labels and stickers, placement in appropriate containers/solutions, and dispatch to laboratory per established procedures.
 - Make sure all the specimens are properly recorded in the specimen log.
 - For medical-legal indices, maintain accurate records of patient-oriented data during the surgical procedure (i.e. vital signs).
 - Assist with dressings.
12. Ensure the following post-operative procedures are completed by the Circulator/OR RN and Recovery Room/ PACU RN staff: (30%)
- Provide assistance as needed for delivery of patient care: remain at the patient's side to assist anesthetist as required with suctioning, extubation, etc.
 - Transfer patient to post-op gurney or wheelchair if patient receives only local anesthesia.
 - Monitor patient's safety during transferring to recovery room, including airway, temperature, heart rhythm, etc.
 - Deliver patient condition report to the Recovery Room/PACU RN to identify problems or potential problem, as well as identify any dressings and discharge instructions.
 - Complete patient care documentation and distribute to designated area.
 - Ensure appropriate specimens are identified and delivered to appropriate area:

- Ensure all specimens have been placed for dispatch and entered in the Specimen Log.
- Direct and assist with inter-case clean-up to provide smooth flow of subsequent cases.
- Direct and/or perform all terminal cleaning activities.
- Turn off oxygen at the end of the surgical day.
- Assure sufficient sterile packs are available and ready for the following day's surgery.

(Text appears as submitted by the petitioner. Format has been slightly altered for clarity.) In its letter of support accompanying the initial I-129 petition, the petitioner asserted varying minimum education requirements for the proffered position. The petitioner first stated that proffered position requires "a minimum of a college degree or its equivalent in Nursing." The petitioner later stated that "[i]t is only through academic coursework gained while attaining a baccalaureate degree in Nursing that a Surgery/OR Nurse Manager would be able to administer the highly specialized and complex duties of the job." The petitioner also stated that the "minimum academic requirement for [the proffered position] is a bachelor's degree in Nursing and a current California Registered Nurse license." The petitioner further claimed that the position requires "relevant work experience in the clinical nurse setting and demonstrated knowledge of operation room instrumentation, maintenance, and care."

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her U.S. degree, her nursing license, and her professional experience. The petitioner provided a copy of the beneficiary's diploma and transcript from [REDACTED] indicating that she was granted a Bachelor of Science in Nursing in September 2011 (seven months prior to the H-1B submission). The petitioner also submitted documentation indicating that the beneficiary is a registered nurse in the State of California. The petitioner claims that the beneficiary has two years of clinical nursing experience, initially "as a Nursing Student/Intern" and thereafter she gained "experience working for the Petitioner as a Registered Nurse in its Surgery/Operating Room." It appears that the beneficiary's experience with the petitioner has been as an F-1 student in Optional Practical Training (OPT).

In addition, the petitioner submitted an 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 "Medical and Health Services Managers" - SOC (ONET/OES) code 11-9111, at a Level I (entry level) wage.

Along with the Form I-129, the petitioner provided evidence in support of the petition, including (1) a printout of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for the occupational category of Medical and Health Services Managers; (2) a printout of the Occupational Information Network (O*NET) OnLine Summary Report for the occupation "Medical and Health Services Managers"; (3) printouts of several online job advertisements; (4) a copy of a brochure regarding the petitioner's services; (5) printouts from the petitioner's website; and (6) a

letter and curriculum vitae for [REDACTED].²

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 2, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation, and that the beneficiary is qualified to perform services in a specialty occupation position.

On September 11, 2012, the petitioner and counsel responded to the director's RFE by providing letters and additional evidence. Specifically, the petitioner provided (1) a printout of the *Handbook's* chapter on the occupational category "Registered Nurses"; (2) printouts of additional job postings, and a chart discussing the postings; (3) a letter and curriculum vitae from [REDACTED]; (4) printouts of several online articles; (5) a letter and resume from [REDACTED]; (6) a letter and biographical summary from [REDACTED]; (7) resumes for some of the petitioner's employees; (8) documents regarding the petitioner's business operations (including a list of procedures performed in the petitioner's facilities, photos of the petitioner's locale, and copies of patient satisfaction surveys); (9) e-mail correspondence between the beneficiary and the California Board of Registered Nursing; (10) a description of selected academic courses; (11) a letter from [REDACTED]; (12) printouts of e-mail correspondence and attachments related to the beneficiary's prior professional experience; (13) a copy of the beneficiary's [REDACTED] certificate; and (14) copies of previously submitted documents.

The director reviewed the information provided by the petitioner. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director also found that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation position. The director denied the petition on September 21, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief and additional evidence.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

² The AAO notes that [REDACTED] states that she reviewed "a detailed description of the 'Surgery/OR Nurse Manager' position including the principle duties and responsibilities of the position." She also states that "[i]n this case, the position of 'Surgery/OR Nurse Manager' is said to require the services of an individual who possesses at least a bachelor's degree in nursing plus *two years of previous nursing experience as a Circulator/OR RN* and demonstrated knowledge of operating instrumentation, maintenance and care (emphasis added)." The petitioner did not acknowledge or provide an explanation as to the reason that the qualifications [REDACTED] attributes to the proffered position are not identical the petitioner's stated requirements in its letter of support.

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, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Upon review, the AAO observes that the record of proceeding contains numerous discrepancies, which call into question the accuracy of information provided by the petitioner in conjunction with this petition.

The AAO notes that in its support letter dated April 9, 2012, and in the LCA submitted in support of the instant petition, the petitioner has represented that the beneficiary will work at three different work sites. Specifically, the petitioner stated that the beneficiary "is not working off-site since she will be physically working at [the petitioner's] offices."

According to the petitioner, the beneficiary will work at the following locations:

- [REDACTED] in Oakland, California
- [REDACTED] in Oakland, California
- [REDACTED] in Castro Valley, California

The AAO observes that the petitioner's letterhead and website printouts indicate that its office is located at [REDACTED] in Oakland, California. The other addresses do not appear on the petitioner's materials provided in the record.

The petitioner claims that the beneficiary will also work at [REDACTED] Oakland, CA [REDACTED]. Public records indicate that this address appears to correspond to [REDACTED] office, an individual who provides physical and occupational therapy services. The AAO observes that the third address listed by the petitioner as a work site for the beneficiary is [REDACTED] Castro Valley, CA [REDACTED]. An Internet search of public records reveals that this address pertains to [REDACTED]. The petitioner has not explained which of the duties of the position the beneficiary would perform at these offices.

The record does not indicate what relationship (if any) [REDACTED] and [REDACTED] have with the petitioning company. It appears that the beneficiary will work for multiple employers. If the beneficiary is scheduled to perform work for any other employer, each employer must submit a separate Form I-129 petition for the portion of the beneficiary's time to be spent performing duties for that employer. Moreover, the petitioner has not explained why the beneficiary is required to work at three different offices, and has not described what she will do at each location. Additionally, the petitioner has not addressed who will perform the duties of the proffered position when the beneficiary is at a different office location.

Further, in the instant case, the petitioner has provided inconsistent information regarding the requirements of the proffered position. The petitioner's various statements regarding the academic requirements for the surgery/OR nurse manager position do not establish that the position qualifies as a specialty occupation. That is, in a letter submitted with the Form I-129 petition, the petitioner initially asserted that the education requirement for the proffered position is "a minimum of a college degree or its equivalent in Nursing." Thus, it appears that an associate's degree may be acceptable. Later in the letter, the petitioner stated that performance of the duties of the proffered position requires "academic coursework gained while attaining a baccalaureate degree in Nursing." In the same letter, the petitioner also stated that the minimum requirements for the position are "a bachelor's degree in Nursing and a current California Registered Nurse license." The petitioner did not provide an explanation for the variances in the requirements for the position.

Thus, according to the petitioner, the proffered position can be performed by an individual with any college degree in nursing, coursework completed as part of a bachelor's degree in nursing, or a bachelor's degree in nursing. The AAO observes that the minimum educational requirements stated by the petitioner for the proffered position do not establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question, and results in a baccalaureate degree. Notably, the petitioner's assertions that the duties of the proffered position can be performed with either a "college degree" in nursing (which could include an associate's degree), or "coursework" completed during a bachelor's degree program fail to state a requirement for a bachelor's degree in a specific specialty or its equivalent. Thus, the petitioner's statements are tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Moreover, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge gained through the attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

While the petitioner has identified its position as that of a surgery/OR nurse manager, the description of the beneficiary's duties in the record of proceeding lack the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Moreover, the petitioner's assertions with regard to the various educational requirements it identifies for the position are conclusory and unpersuasive, as they are not supported by the job description or substantive evidence.

The AAO observes that the petitioner and counsel repeatedly emphasize that the proffered position pertains to the occupational category of medical and health service managers, and not a general

registered nurse position. For example, in a letter dated September 6, 2012 submitted in response to the RFE, the petitioner claims that the proffered position "is different than other 'non-specialty occupation' positions such as Registered Nurse because its job duties are more discretionary, complex, and sophisticated- exceeding the normal position standards of a Registered Nurse." However, the description of the proffered position provided by the petitioner indicates that the beneficiary will spend 20% of her time performing various administrative tasks, and 80% of her time "ensuring [that pre-operative, intra-operative, post-operative] procedures are completed by the Circulator/OR RN staff" and "ensur[ing] Circulator/OR RN staff make provisions" for required supplies, instruments and equipment, and complete documentation. The petitioner has not sufficiently described what specific tasks the beneficiary will undertake to "ensure" that others complete the described activities. Further, the petitioner uses vague language to describe the beneficiary's administrative duties. For instance, the petitioner states that the beneficiary will be responsible for "communicating current nursing techniques and policies to [the petitioner's] staff RNs." However, the petitioner fails to further explain the actual tasks involved in such communications, which could include a wide range of activities. Thus, it is not apparent whether the beneficiary will be holding formal trainings, providing ad hoc feedback to subordinates, issuing regular written policy updates to staff, or "communicating" with staff via some other means.

The job duties of the proffered position, as provided by the petitioner, do not convey the substantive nature of actual work that the beneficiary would perform. Rather, the petitioner's description conveys only generalized functions of the occupational category at a generic level. This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Further, upon review of the record of proceeding, the AAO notes that the enclosed LCA does not appear to correspond to the claimed duties and requirements of the proffered position. Consequently, as will be discussed below, the petitioner has failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

More specifically, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Medical and Health Services Managers" at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant 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.³

³ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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.⁴ 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 as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The petitioner's designation of the proffered position as a Level I (entry) level position indicates that the beneficiary is required to have "only a basic understanding of the occupation." However, the petitioner and counsel claims that the beneficiary will be responsible for overseeing the duties of personnel to set medical standards and ensuring the smooth flow of events before, during and after surgical procedures. According to the petitioner and counsel, the duties are specialized and complex because they involve the oversight and coordination of healthcare personnel, including their training and development, while at the same time performing health administrative functions

⁴ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

such as managing the budget, developing policies, and ensuring regulatory compliance. The petitioner and counsel assert that such skills are advanced and require leadership skills. Further, the petitioner and counsel report that the duties are discretionary, complex and sophisticated.

More specifically, in a letter dated April 9, 2012, the petitioner indicated that the beneficiary will be responsible for ensuring that "healthcare professionals are trained on the current healthcare procedures," and therefore "must demonstrate proficiency and knowledge of applicable policies, State and Federal regulations, and accreditation standards." The petitioner also claimed that the beneficiary "must be familiar with orthopedic, Ear Nose and Throat (ENT), pain management, lithotripsy, and general surgical procedures." Thus, although the petitioner designated the position as a Level I (entry) level position, the petitioner represents that proffered position requires substantial knowledge of the occupation beyond the "basic understanding" required of Level I positions.

Further, the designation of the position at a Level I wage level indicates that the beneficiary will "perform routine tasks that require limited, if any, exercise of independent judgment." However, the AAO observes that the petitioner has represented that extensive exercise of independent judgment is required of the beneficiary in the proffered position. In support of the Form I-129 petition, the petitioner provided a letter from [REDACTED] dated April 6, 2012. The AAO observes that counsel and the petitioner rely heavily on this letter. [REDACTED] states that the proffered position involves "serving as a clinical expert." She further states that the proffered position "requires an individual who must make accurate and complex clinical decisions," and "make[s] these decisions in a high acuity setting." [REDACTED] elaborates that the beneficiary "must make quick, sometimes life-and-death decisions." Thus, the petitioner has represented that the proffered position requires extensive independent exercise of judgment, which appears to surpass that expected of a Level I position.

Thus, upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner and counsel conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner

has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.

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

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

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

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether 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 . . . 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. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner

failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved for this independent reason.

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

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

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

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

As such and 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.

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

employment described by the petitioner qualifies as a specialty occupation, 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)(I), 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.

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

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "Medical and Health Services Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Medical and Health Services Managers," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Medical and Health Services Managers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become a Medical and Health Services Manager" states, in pertinent part, the following about this occupational category:

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

⁵ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Medical and Health Services Managers, on the Internet at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-4> (last visited August 27, 2013).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the wage level of 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 and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant U.S. Department of Labor (DOL) explanatory information on wage levels, the beneficiary will be closely supervised and her work closely monitored and reviewed for accuracy. Furthermore, she will receive specific instructions on required tasks and expected results. DOL guidance indicates that a job offer for a research fellow, a worker in training, or an internship indicates that a Level I wage should be considered. Thus, the petitioner's designation of the proffered position as a Level I (entry) position strongly suggests that the beneficiary will not serve in a high-level or senior position in the occupation.

The *Handbook* does not support the assertion that at least a bachelor's degree *in a specific specialty* is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* states that although possession of an advanced degree is a common pathway to work in this field, some facilities hire those with on-the-job experience instead of formal education. The *Handbook* does not state that such experience must be equivalent to at least a bachelor's degree in a specific specialty. The narrative of the *Handbook* provides as an example that managers of physical therapy may be experienced physical therapists who have administrative experience. Thus, for this occupation, a baccalaureate or higher degree in a specific specialty or its equivalent is not normally the minimum requirement for entry.

Although the *Handbook* states that medical and health services managers typically need at least a bachelor's degree to enter the occupation, the *Handbook* does not indicate that such a degree must be in a specific specialty. The narrative of the *Handbook* reports that a degree in health services, long-term care administration, public health, public administration, or business administration are common for entry into the occupation. Notably, a degree in nursing is not listed in the *Handbook* as an acceptable field of study for these positions. Moreover, the *Handbook* does not state that

licensure as a registered nurse is required for this occupational category. Thus, the petitioner's claimed requirements do not appear to correspond to the requirements for the occupation as stated in the *Handbook*.

The *Handbook* indicates that degrees in disparate fields (e.g., health services, long-term care administration, public health, public administration, and business administration) are acceptable for entry into the occupation. Thus, it does not appear that a degree in a specific specialty, or its equivalent, is necessary for entry into this occupation. For example, absent evidence to the contrary, the fields of health services and business administration are not closely related specialties.⁶ Accordingly, as such evidence fails to establish a minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Notably, the *Handbook* states that a degree in business administration is acceptable. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty degree in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum entry requirement for this occupation.

Thus, for the reasons discussed above, the AAO does not find that the *Handbook* supports a claim that "Medical and Health Services Managers" comprise an occupational group for which at least a bachelor's degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation.

⁶ In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

In response to the RFE, the petitioner indicated that the occupation of "Registered Nurses" is "relevant" to the proffered position. The director reviewed the job description provided by the petitioner and found that the proffered position falls under the occupational classification of "Registered Nurses." The subchapter of the *Handbook* entitled "How to Become a Registered Nurse" states, in pertinent part, the following about this occupational category:

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

Education

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

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

Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical 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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Registered Nurses, on the Internet at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4> (last visited August 27, 2013).

The *Handbook* does not report that, as an occupational group, "Registered Nurses" require at least a bachelor's degree in a specific specialty, or its equivalent. The *Handbook* states that registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. In

addition, there are programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field. Thus, the *Handbook* does not indicate that a bachelor's degree (or higher) in nursing, or its equivalent, is normally the minimum requirement for entry into the occupation.

On appeal, counsel claims that in *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000), the court held that H-1B specialty occupation positions do not need to have a degree in a specific specialty. The AAO notes that in *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

The AAO agrees with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

Moreover, the AAO also agrees that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. The AAO does not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a

body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, the AAO does not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was 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].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. As previously mentioned, 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement. The petitioner did not submit any letters or affidavits from firms or individuals in the industry.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided several job postings and several letters. The AAO reviewed the evidence submitted, but finds that the documentation does not establish that the petitioner has met this prong of the regulations.

In the Form I-129, the petitioner stated that it is multi-specialty surgery center established in 1999, and has 70 employees. The petitioner reported its gross annual income as approximately \$7 million and its net annual income as \$997,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 622110 – "General Medical and

Surgical Hospitals."⁷ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments known and licensed as general medical and surgical hospitals primarily engaged in providing diagnostic and medical treatment (both surgical and nonsurgical) to inpatients with any of a wide variety of medical conditions. These establishments maintain inpatient beds and provide patients with food services that meet their nutritional requirements. These hospitals have an organized staff of physicians and other medical staff to provide patient care services. These establishments usually provide other services, such as outpatient services, anatomical pathology services, diagnostic X-ray services, clinical laboratory services, operating room services for a variety of procedures, and pharmacy services.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 622110 – General Medical and Surgical Hospitals on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 27, 2013).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The AAO reviewed the job advertisements submitted by the petitioner. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

More specifically, some of the advertisements do not state a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent. For example, the advertisement from [REDACTED]

⁷ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited August 27, 2013).

states that an "ideal candidate" would have a BSN. Similarly, the advertisement from for a head nurse indicates that a BSN or its equivalent is preferred. The advertisement from also indicates that a "BSN or bachelor's in health care field with five or more years of experience [is] preferred." The AAO observes that a *preference* for a degree is not an indication of a requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Further, some of the advertisements indicate that *enrollment* in a bachelor's degree program is sufficient education to meet the position's selection criteria. For example, the posting from the indicates that the position requires a "BSN or actively matriculating for a BSN or Bachelor Degree with Nursing certification." Similarly, the advertisement from states that a "[c]andidate can be considered for the position if they are actively enrolled in an accredited, approved bachelor's program or BSN program and can complete the remaining coursework within one (1) year of hire." Matriculation in or partial completion of a degree program is not the same as attainment of a bachelor's degree in a specific specialty. In addition, the AAO notes that the advertisement from requires a "BSN or 5 years of management experience." The AAO observes that five years of experience is not considered to be equivalent experience to a bachelor's degree pursuant to the relevant USCIS regulations.⁸ Finally, the AAO notes that the "confidential posting" submitted by the petitioner is listed at a "Bachelor's Degree" education level. However, the posting itself does not indicate that a bachelor's degree is required, and no specific specialty is mentioned. As previously discussed, since there must be a close correlation between the required specialized studies and the position, the requirement of a degree

⁸ In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

with a generalized title, such as bachelor's degree, 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).

Moreover, as the petitioner has failed to adequately establish the duties of the proffered position, the AAO is unable to ascertain what duties render another position "parallel" to the proffered position. However, the AAO notes that several of the positions appear to be more advanced than the proffered position. The AAO again observes that the petitioner designated the proffered position as a Level I (entry) level position. 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 and will perform routine tasks that require limited, if any, exercise of judgment. The AAO notes that several of the postings do not advertise entry-level positions and, thus, are not parallel to the proffered position. For example, the advertisement from [REDACTED] indicates that the advertised position requires "5 years pre/post operative experience." The position posted by [REDACTED] requires "extensive experience," and the position posted by [REDACTED] requires "five-years of experience as a first-line manager coupled with five years clinical nursing." The ambulatory surgery center manager position advertised on [REDACTED] requires a minimum of five years of management experience. Thus, it does not appear that these positions are entry-level positions and therefore cannot be considered parallel to the proffered position, which the petitioner designated as a Level I (entry) level position on the LCA.

Finally, none of the advertisements contain sufficient information regarding the advertising organizations such that the AAO can conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.⁹

The AAO observes that even if all of the job postings indicated that a requirement of bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹⁰ *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

⁹ The AAO observes that in response to the RFE, counsel provided a chart detailing some of the information found in the postings. However, no comparison of the advertising organizations or of the advertised positions to the petitioner and the proffered position was provided. Notably, although counsel highlighted certain information regarding the advertising organizations, such as number of beds and number of operating rooms, this information as it relates to the petitioner was not provided.

¹⁰ According to the *Handbook's* detailed statistics on Medical and Health Services Managers, there were approximately 303,000 persons employed in this occupation in 2010. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Medical and Health Services Managers, on the Internet at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-1> (last visited August 27, 2013).

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").

Thus, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty, or its equivalent, for organizations that are similar to the petitioner, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty (or its equivalent) for entry into the occupation in the United States.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions to the proffered position, among similar organizations to the petitioner.

In addition to the job postings, the petitioner submitted several letters and articles to support the assertion that the proffered position qualifies as a specialty occupation under this prong of the regulation. As a preliminary matter, the AAO notes that the term "recognized authority" means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

The first letter, submitted with the initial I-129 petition, is from [REDACTED], nurse practitioner at the [REDACTED] in Athens, Georgia. [REDACTED] curriculum vitae indicates that she is an adjunct professor at [REDACTED]¹¹ [REDACTED] bases her comments on her review of "a detailed description of 'Surgery/OR Nurse Manager' position, including the principal duties and responsibilities of that position, as well as four other job descriptions of similar positions among similar organizations." She also states that "[i]n this case, the position of 'Surgery/OR Nurse Manager' is said to require the services of an individual who possesses at least a bachelor's degree in nursing plus two years of previous nursing experience as a Circulator/OR RN and demonstrated knowledge of operating instrumentation, maintenance and

¹¹ [REDACTED] letter indicates that she teaches classes at [REDACTED]; however, her curriculum vitae indicates that her employment at [REDACTED] ceased in 2011.

care." The petitioner did not acknowledge or provide an explanation as to the reason that the qualifications [REDACTED] attributes to the proffered position are not identical the petitioner's stated requirements. Moreover, the AAO observes that none of the job descriptions upon which [REDACTED] based her assessment were attached to her letter so that USCIS could also review the information.

Based on her review of these documents, [REDACTED] concludes that in her "expert opinion," the proffered position "is indeed a specialty occupation and *most definitely* requires the services of an individual with a minimum of a Bachelor's degree in nursing." [REDACTED] opines regarding typical duties of operating room nurses, but does not demonstrate any specific knowledge of the petitioner or the proffered position. Further, [REDACTED] states that the O*NET "registered nurse" classification includes "advanced practice nurses" and it is her "professional opinion that this position falls within that classification." Notably, it does not appear that [REDACTED] is aware that the petitioner stated that the proffered position is not a certified advanced nursing position.

The AAO observes that [REDACTED] does not relate her conclusion to specific, concrete aspects of the petitioner's business operations to demonstrate a sound factual basis for the conclusion about the requirements for the particular position here at issue. There is no evidence that [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. She does not demonstrate or assert any knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Further, she does not provide a substantive, analytical basis for her opinion and ultimate conclusion. Thus, the letter does not support the assertion that the proffered position qualifies as a specialty occupation.

In response to the RFE, the petitioner provided a letter from [REDACTED], Director of the [REDACTED] and [REDACTED]. [REDACTED] states that "[a]s an industry expert with over 16 years of experience in the healthcare profession, [she] confirm[s] that it is the standard in the industry to require a minimum or a Bachelor's degree in Nursing for a Surgery/Operating Room (OR) Nurse Manager or similar position." Notably, [REDACTED] does not provide any statistics, citations to reports, or factual information to substantiate her assessment. The AAO observes that although the petitioner has declined to classify the proffered position as a "registered nurse," insisting that the position is properly classified as a "medical and health services manager," the petitioner has submitted this letter from the [REDACTED] in support of the application. The submission of this letter as "[i]ndustry-related professional association information," as the letter is described by counsel in its September 7, 2012 response to the RFE, suggests that the petitioner considers the proffered position to correspond to the occupation of "registered nurse."

The petitioner also provided three articles to demonstrate that the proffered position qualifies as a specialty occupation under this prong of the regulation. The AAO reviewed the articles in their entirety and finds that none of the articles establish that a bachelor's degree in a specific specialty is an industry-wide standard for entry into the occupation. To the contrary, the article entitled, "[REDACTED]" states that "there is no single standard for education required for entry into professional (registered) nursing practice." The article details four

levels of nursing education, the highest of which is a BSN, and reviews various unsuccessful efforts in different states to implement an industry-wide educational standard for entry into nursing practice.

The petitioner also submitted a "fact sheet" from the American Association of Colleges of Nursing (AACN) entitled, "[REDACTED]" This fact sheet advocates for the hiring of more nurses with BSNs over those with other types of education. The AAO notes that the AACN describes itself as "the national voice for baccalaureate and graduate nursing programs." The AAO observes this fact sheet does not establish that a BSN is an industry-wide standard for the minimum education necessary for entry into any particular occupation. To the contrary, the fact sheet states that "only 50.0 percent of nurses hold degrees at that baccalaureate level and above" and that there are efforts to create a better-educated nursing workforce through the collaboration between two-year and four-year nursing programs. Moreover, the fact that advocacy for a particular educational standard is necessary suggests that such a standard is not accepted industry-wide.

In addition, the petitioner submitted a [REDACTED] article entitled, "[REDACTED]" dated June 23, 2012. The article indicates that some healthcare facilities are requiring nurses to obtain BSN degrees. However, the article does not indicate that a BSN is the current minimum education requirement for entry into the nursing occupation. Rather, the article states that "[t]he need [for nurses] is so great that nurses without a bachelor's degree are still in demand." The article indicates that policies requiring nurses to obtain a BSN "are limited to a small fraction of the nation's more than 5,000 hospitals," but that the number is rising. The AAO observes that while the article states that a growing number of health care facilities find hiring more nurses with a baccalaureate education desirable, the article does not establish that such education is the current minimum required for entry into the occupation.

The petitioner also provided three additional letters in response to the RFE. The petitioner submitted a letter from [REDACTED], an adjunct faculty member at [REDACTED] in Oakland, California. Based on his "education and clinical experience," and a review of the description of the proffered position, [REDACTED] "confirm[s] that a Bachelor of Science in Nursing is the appropriate minimum educational requirement for the position." The AAO observes that the description of the proffered position that [REDACTED] reviewed in order to reach his conclusion was not provided or described. [REDACTED] states that "the operators of most ambulatory surgery centers agree that the preferred minimum educational attainment of their nurse managers is a Bachelor's in Nursing (BSN)." The AAO notes that a *preference* for a particular level of education obviously does not indicate a requirement for such a degree.¹² Thus, [REDACTED] does not state an industry-wide requirement for a minimum of a bachelor's degree in a specific specialty, or its equivalent.

¹² The AAO notes that a *preference* for a particular degree does not indicate a *requirement* for the same. See *Bob Huddleston State Farm Insurance Agency v. Holder*, No. 2:10-cv-02257-MMD-PAL, 2013 Dist. WL 1195519 (D. Nev. March 22, 2013) (upholding a denial of an H-1B petition, noting in part that an indication that a baccalaureate degree may be *preferred* does not indicate that it is *required*).

The petitioner submitted a letter from [REDACTED], medical manager of the [REDACTED]. The AAO observes that [REDACTED] is listed as one of the surgeons that perform procedures at the petitioner's surgery center. [REDACTED] does not mention his affiliation with the petitioner. In his letter, [REDACTED] states that he has reviewed the job description for the proffered position and finds that "its requirement of a Bachelor's degree in nursing for entry into the profession is in accordance with the industry standard." [REDACTED] claims that he has "hired employees in similar roles to oversee operations of similar size and scope." However, the job duties that [REDACTED] describes for the employees he has hired differ substantially from the proffered position. Notably, the individuals that he has hired are not responsible for ensuring that pre-operative, intra-operative, and post-operative procedures are completed by OR nursing staff, which comprises 70% of the beneficiary's duties. Thus, [REDACTED] opinion does not appear to be based on positions that are parallel to the proffered position.

In addition, the petitioner submitted a letter from [REDACTED] a general surgeon. [REDACTED] performs surgeries at the petitioner's surgery facility. [REDACTED] states that he has been using the petitioner's facility for three years, and describes the beneficiary as an "excellent nurse manager." [REDACTED] states that he has "worked [the beneficiary] as she is the Nurse Manager who is responsible for a majority of the surgeries performed at [the petitioner's facility]." He claims that she is "an excellent Nurse Manager" and that the surgical team is managed by the beneficiary. He attests that he has "witnessed how [the beneficiary's] academic training is instrumental in the position of nurse manager at [the petitioner's surgery center] and in [his] personal interactions with [the beneficiary] and the team of medical professionals that she supervises." Notably, based upon [REDACTED] statement the beneficiary is serving in the proffered position of "Nurse Manager." However, the petitioner described the beneficiary as having "experience working [at the petitioner's] as a Registered Nurse in [the] Surgery/Operating Room."

The AAO notes that none of the individuals who have provided letters in support of the instant petition have established any expertise pertinent to the recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Moreover, none cite specific instances in which their past opinions have been accepted or recognized as authoritative on this particular issue. The opinion letters contains no evidence that they are based on scholarly research conducted by the authors in the specific area upon which they are opining. They provide no documentary support for their ultimate conclusions (e.g., statistical surveys, authoritative industry or government publications, or professional studies).

The AAO may, in its discretion, use as advisory opinions or 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. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The documents provided do not establish that a requirement of a bachelor's degree (or higher) in a specific specialty, or its equivalent, is common to the industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted a copy of a brochure regarding the petitioner's services; printouts from the petitioner's website; resumes for some of the petitioner's employees; a list of procedures performed in the petitioner's facility; photos of the petitioner's locale; and copies of patient satisfaction surveys. The petitioner also submitted the above described letters. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of clinical case manager.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not established that the duties of the proffered position require at least a baccalaureate degree in a specific specialty, or its equivalent. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition.

More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹³

¹³ For additional information regarding wage levels as defined by DOL, see U.S. Dept't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or is equivalent. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. The petitioner provided a description of some of the courses completed by the beneficiary in her degree program. However, while a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background, certifications, and prior nursing experience will assist her in carrying out the duties of the proffered position. However, 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. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the

proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific 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 petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the director's RFE, the petitioner submitted documents related to four individuals who hold positions with the petitioner, other than the proffered position. Specifically, the petitioner provided resumes for [REDACTED], [REDACTED], [REDACTED] and [REDACTED].¹⁴ In response to the RFE, counsel described this evidence as "Documentation of Petitioner's Previous Employment History for positions similar to [the proffered position]."¹⁵ On appeal, counsel

¹⁴ [REDACTED] resume does not indicate that she currently or in the past worked for the petitioner. The resumes of [REDACTED] and [REDACTED] indicate that they serve as staff nurses for the petitioner. [REDACTED] resume indicates that she serves as a registered nurse for the petitioner.

¹⁵ Counsel claims that the evidence is "Documentation of Petitioner's Previous Employment History for positions similar to the proffered position of Surgery/OR Nurse Manager." Notably, the evidence provided

provides wage reports for these individuals, and provides their titles, confirming that none of them are currently or were previously employed in the proffered position. Information regarding the petitioner's hiring history for other positions is not probative evidence regarding the petitioner's hiring history for the proffered position. Further, the AAO notes that in response to the RFE, the petitioner stated that it has "hired only degreed individuals for [the proffered position]." However, the petitioner indicated that it does not have any job vacancy announcements because it has always hired internally. The AAO observes that the petitioner has not provided probative documentation on other individuals who have held the proffered position.

The petitioner stated in the Form I-129 petition that it has 70 employees and was established in 1999 (approximately thirteen years prior to the filing of the H-1B petition). Notably, the petitioner did not specify the total number of individuals that have held the proffered position and how many of them had a bachelor's degree in a specific specialty, or its equivalent. The submission of documentation regarding four employees (who have not served in the proffered position) is not sufficient to establish eligibility under this criterion of the regulations.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The AAO acknowledges that the petitioner may believe that the nature of the specific duties of the position in the context of its business operations 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, or its equivalent. The AAO reviewed all of the evidence in the record that was before the director, including the job description and the evidence regarding the petitioner's business operations, such as a copy of a brochure regarding the petitioner's services, printouts from the petitioner's website, resumes for some of the petitioner's employees, a list of procedures performed in the petitioner's facility, photos of the petitioner's locale, and copies of patient satisfaction surveys. The AAO also reviewed the letters and articles provided in support of the instant petition. However, the AAO finds that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the

indicates that the individuals serve as nurses.

lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

On appeal, counsel cites an unpublished AAO decision from 1994, and indicates that it is relevant to the instant matter.¹⁶ A copy of the unpublished decision was not provided. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the unpublished decision cited by counsel.

If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit a copy of the unpublished decision. As the record of proceeding does not contain any evidence of the unpublished decision, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

¹⁶ The petitioner has not established that the educational requirements – as stated approximately 18 years prior to the H-1B submission for an occupation – accurately reflect the *current* academic requirements for the occupation.

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

A 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 has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications.

As previously mentioned, 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 at 1043, *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.