

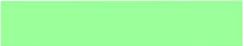
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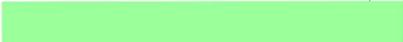
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

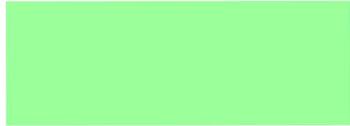


Date: **FEB 04 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition the petitioner stated that it is a non-profit rural critical access hospital and skilled nursing facility. To employ the beneficiary in what it designates as an Assistant Director of Nursing Services position, the petitioner endeavors 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The issue on appeal is before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. 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, the position must also meet one of the following criteria:

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

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty"

as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

With the visa petition, counsel submitted evidence that the beneficiary has a bachelor's degree in nursing awarded by the [REDACTED] in the Philippines. Counsel also submitted (1) a description of the proffered position; (2) a letter, dated June 29, 2010, from the petitioner's Chief Operating Officer (COO), and (3) an evaluation, dated June 10, 2010, of the proffered position. The description of the proffered position states the following duties:

1. Administrative Functions: (25%)

- a. Assist the Director of Nursing (DON) in planning, developing, organizing, implementing, evaluating and directing the day-to-day functions of the nursing services department.
- b. Recommend to the DON written material that will assist the nursing department in meeting the needs of residents.
- c. Ensure that nursing service personnel are following their respective job descriptions.
- d. Participate in facility surveys (inspections) made by authorized government agencies as requested by the administrator or DON.
- e. Participate in developing the resident's discharge plan.
- f. Perform administrative duties such as completing medical forms, reports, evaluations, studies, charting, etc., as necessary.
- g. Recommend to the DON the equipment/service needs of the nursing services department.

2. Committee Functions: (5%)

- a. Serve on the Quality Assurance and Assessment (QAA) Committee as directed.
- b. Schedule, attend, and participate in Care plan Committee meetings as necessary.
- c. Evaluate and implement recommendations from established committees as they may pertain to nursing services.

3. Personnel Functions: (20%)

- a. Assist the DON/scheduler in determining the staffing needs of the nursing services department to ensure quality of care is maintained and to meet the nursing care needs of each resident.
- b. Assist the DON in the recruitment, selection, and orientation of nursing service personnel.
- c. Schedule/develop work assignments for nursing personnel in the nursing services department.
- d. Make rounds of the nursing service unit(s) to ensure personnel are performing their work assignments in accordance with acceptable nursing standards.
- e. Make appropriate reports to the DON as required or as may be necessary.
- f. Ensure that departmental disciplinary action is administered fairly and without regard to race, color, creed, national origin, age, sex, religion, handicap, or marital status.
- g. Interpret the department's policies and procedures to personnel, residents, visitors, and government agencies as necessary.

4. Nursing Care Functions: (20%)

- a. Provide the DON with information relative to the nursing needs of the resident and to the nursing service department's ability to meet those needs to include adequate stock levels of medications, medical supplies, and equipment.
- b. Inform nursing service personnel of new admissions, their expected time of arrival, room assignments, etc.
- c. Schedule daily rounds to observe residents and to determine if nursing needs are being met.
- d. Provide direct nursing care as necessary[.]
- e. Report problem areas to the DON. Assist in developing and implementing corrective action.
- f. Authorize the use of restraints when necessary and in accordance with the facilities established policies and procedures.

5. Staff Development: (10%)

- a. Participate in developing, and conducting in-service training classes that provide instructions on job function, safety, and to ensure a well-trained nursing service department.
- b. Encourage and plan for attendance/participation of all able nursing staff at the in-service training programs.
- c. Assist in the orientation of the new employees to his/her job position and duties.
- d. Attend and participate in continuing education programs designed to keep you abreast of changes in your profession, as well as to maintain your license on a current status.

6. Safety and Sanitation: (5%)

- a. Monitor nursing service personnel to ensure that they are following established safety regulations in the use of equipment and supplies.

- b. Ensure that all nursing service personnel follow established departmental policies and procedures, to include appropriate dress code, and the use of safety equipment when moving or lifting a resident.
 - c. Ensure that nursing service personnel participate in all fire safety and disaster preparedness drills in a safe and professional manner.
- 7. Care Plan and Assessment Functions: (10%)**
- a. Participate in the development of a written and comprehensive assessment of the nursing needs of each resident.
 - b. Participate in the development of a written care plan, review and revise as necessary.
 - c. Ensure that all personnel involved in providing care to the resident are aware of the needs identified in the resident's care plan.
- 8. Resident Rights: (5%)**
- a. Maintain the confidentiality of all resident care information.
 - b. Monitor nursing care to ensure that all residents are treated fairly, and with kindness, dignity and respect.
 - c. Ensure that nursing care is provided in privacy and that personnel knock before entering a resident's room.
 - d. Ensure that nursing services personnel are knowledgeable of the residents' responsibilities and rights to include the right to refuse treatment, and that all is in accordance with the facility's policies and governing advance directives.
 - e. Report and investigate all allegations of resident neglect, abuse and/or misappropriation of resident property.

As to the educational requirement of the proffered position, the job description states, "Must possess a Baccalaureate of Science degree in Nursing (BSN) from an accredited college or university."

In her June 29, 2010 letter, the petitioner's COO stated:

Because of the administrative and management duties, and the combination of clinical and management skills and judgment involved and the functions to be performed a Bachelor's Degree is required for the position.

The June 10, 2010 evaluation of the proffered position was prepared by a faculty member of [REDACTED] in West Palm Beach, Florida, who stated that she has a doctorate in adult education. She reiterated some of the duties of the proffered position and stated, "in order to adequately perform the responsibilities required for the [proffered position], an individual would need the knowledge obtained by acquiring a Bachelor's degree in Nursing or a related subject." The evaluator further stated:

I base my assessment that [the proffered position] would require specialized knowledge and experience after conducting a thorough review of employment websites including www.monster.com, www.jobs.com and www.careerbuilder.com.

The evaluator provided her précis of seven vacancy announcements. Each is for a position with the job title Assistant Director of Nursing, except one, the job title of which is Assistant Director of Nursing Services. The evaluator stated that six of those positions require a "[b]achelor's degree in a related field of work," and stated that the seventh one requires a bachelor's degree in nursing or a related field. The evaluator did not indicate whether the vacancy announcements were any more specific about what fields would be considered to be related to those positions. The vacancy announcements the evaluator relied upon in reaching her opinion were not submitted and are not a part of the record.

On August 3, 2010, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation.

In response, counsel submitted her own letter, dated August 23, 2010, in which she asserted that the evidence provided demonstrates that the petitioner has satisfied the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), (3), and (4). She stated that the evaluation previously provided demonstrates that a bachelor's degree is the industry standard for the proffered position, that the degree requirement is common to the industry for parallel positions, and that the nature of the duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with a bachelor's degree.

In addition, counsel stated that "[i]t is obvious from the professional evaluation that the independent and supremely qualified evaluator believes that this is a specialty occupation position as she painstakingly documents same in Exhibit 'A' attached hereto." Pointing to the shortage of nurses in the United States, counsel also stated that "USCIS is stridently and diligently blocking Nurses in Specialty Occupations from entry to the United States to provide that care."

With respect to the supplemental criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), counsel stated that one position identical to that of the proffered position was filled by [REDACTED]. No evidence was submitted corroborating this claim.

The director denied the petition on September 9, 2010, finding that the proffered position of Assistant Director of Nursing Services, reflecting the duties of a "Registered Nurse" in the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not qualify as a specialty occupation by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty. More specifically, the director found that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel reiterated many of the arguments she made in her August 23, 2010 letter, submitted in response to the RFE.

The AAO will now discuss the application of the additional, supplemental standards at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

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

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The Labor Condition Application (LCA) submitted to support the instant visa petition is certified for a registered nurse position. As an initial matter, the AAO concurs with both the petitioner's and director's classification of the proffered position as one encompassing the characteristics of "Registered Nurses."² In the chapter entitled "Registered Nurses," the *Handbook* provides the following descriptions of the duties of those positions:

What Registered Nurses Do

Registered nurses (RNs) provide and coordinate patient care, educate patients and the public about various health conditions, and provide advice and emotional support to patients and their family members.

Duties

Registered nurses typically do the following:

- Record patients' medical histories and symptoms
- Give patients medicines and treatments
- Set up plans for patients' care or contribute to existing plans
- Observe patients and record the observations
- Consult with doctors and other healthcare professionals
- Operate and monitor medical equipment
- Help perform diagnostic tests and analyze results
- Teach patients and their families how to manage their illnesses or injuries
- Explain what to do at home after treatment

Some registered nurses oversee licensed practical nurses, nursing aides, and home care aides. For more information, see the profiles on licensed practical and licensed

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

² The AAO notes that if the proffered position is not a registered nurse position, that LCA would not correspond to the visa petition, and the LCA could not be used to support the visa petition. Under those circumstances, USCIS would be obliged to deny the visa petition as not supported by the required approved LCA. See generally 8 C.F.R. § 214.2(h)(4)(i)(B)(I) and 20 C.F.R. § 655.705(b).

vocational nurses; nursing aides, orderlies, and attendants; and home health and personal care aides.

Registered nurses sometimes work to promote general health by educating the public on warning signs and symptoms of disease. They might also run general health screenings or immunization clinics, blood drives, or other outreach programs.

Most registered nurses work as part of a team with physicians and other healthcare specialists.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

Registered nurses' duties and titles often depend on where they work and the patients they work with. They can focus on the following specialties:

- A specific health condition, such as a diabetes management nurse who helps patients with diabetes or an oncology nurse who helps cancer patients
- A specific part of the body, such as a dermatology nurse working with patients who have skin problems
- A specific group of people, such as a geriatric nurse who works with the elderly or a pediatric nurse who works with children and teens
- A specific workplace, such as an emergency or trauma nurse who works in a hospital or stand-alone emergency department or a school nurse working in an elementary, middle, or high school rather than in a hospital or doctor's office.

Some registered nurses combine one or more of these specialties. For example, a pediatric oncology nurse works with children and teens who have cancer.

Many possibilities for specializing exist. The following list includes just a few other examples of ways that some registered nurses specialize:

Addiction nurses care for patients who need help to overcome addictions to alcohol, drugs, tobacco, and other substances.

Cardiovascular nurses treat patients with heart disease and people who have had heart surgery.

Critical care nurses work in intensive care units in hospitals, providing care to patients with serious, complex, and acute illnesses and injuries that need very close monitoring and treatment.

- **Genetics nurses** provide screening, counseling, and treatment of patients with genetic disorders, such as cystic fibrosis and Huntington's disease.

Neonatology nurses take care of newborn babies.

Nephrology nurses treat patients who have kidney-related health issues that are attributable to diabetes, high blood pressure, substance abuse, or other causes.

Rehabilitation nurses care for patients with temporary or permanent disabilities.

Advanced practice registered nurses may provide primary and specialty care, and, in most states, they may prescribe medicines. All states specifically define requirements for registered nurses in these four advanced practice roles:

- **Clinical nurse specialists** provide direct patient care and expert consultations in one of many nursing specialties, such as psychiatric-mental health.
- **Nurse anesthetists** provide anesthesia and related care before and after surgical, therapeutic, diagnostic, and obstetrical procedures. They also provide pain management and emergency services.
- **Nurse-midwives** provide care to women, including gynecological exams, family planning advice, prenatal care, assistance in labor and delivery, and care of newborns.
- **Nurse practitioners** serve as primary and specialty care providers, providing a blend of nursing and primary care services to patients and families.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., *Registered Nurses*, <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm> (last visited January 29, 2013).

The *Handbook* states the following about the educational requirements of registered nurse positions:

How to Become a Registered Nurse

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.

Important Qualities

Critical-thinking skills. Registered nurses must be able to assess changes in the health state of patients, including when to take corrective action and when to make referrals.

Compassion. Registered nurses should be caring and sympathetic, characteristics that are valuable when treating patients.

Detail oriented. Registered nurses must be responsible and detail oriented because they must make sure that patients get the correct treatments and medicines at the right time.

Emotional stability. Registered nurses need emotional stability to cope with human suffering, emergencies, and other stresses.

Organizational skills. Nurses often work with multiple patients with various health needs, and organizational skills are critical to ensure the patient is given proper care.

Patience. Registered nurses should be patient so they can provide quality care under stressful or hectic circumstances.

Speaking skills. Registered nurses must be able to talk effectively with patients to correctly assess their health conditions. Nurses need to clearly explain how to take medication or give other instructions. They must be able to work in teams with other health professionals and communicate the patients' needs.

Licenses

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

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

Other requirements for licensing vary by state. Each state's board of nursing can give details. (For more on the NCLEX-RN examination and a list of state boards of nursing visit the National Council of State Boards of Nursing.)

Certification

Nurses may become credentialed through professional associations in specialties such as ambulatory care, gerontology, and pediatrics, among others. Although certification is usually voluntary, it demonstrates adherence to a higher standard, and some employers may require it. Certification is required for all registered nurses serving in any of the four advanced practice registered nurse roles.

Advancement

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

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

Some RNs choose to become advanced practice registered nurses (APRNs). APRNs work independently or in collaboration with physicians. They may provide primary care, and, in most states, they may prescribe medications. APRNs require at least a

master's degree. Each state's board of nursing can provide the specific regulations regarding APRNs.

Some nurses move into the business side of healthcare. Their nursing expertise and experience on a healthcare team equip them to manage ambulatory, acute, home-based, and chronic care businesses.

Employers—including hospitals, insurance companies, pharmaceutical manufacturers, and managed care organizations, among others—need registered nurses for jobs in health planning and development, marketing, consulting, policy development, and quality assurance.

Other nurses work as postsecondary teachers in colleges and universities. For more information, see the profile on postsecondary teachers.

Id. at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4>.

The *Handbook's* information on the educational requirements for the occupational classification "Registered Nurses" indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or any other authoritative, objective, and reliable resource, reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the

petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO acknowledges counsel's reliance on the Memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (Nov. 27, 2002) (hereinafter referred to as the Williams Memo), which states that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical RN or staff position. However, the AAO finds that, as described in the record of proceeding, the proffered position and the duties comprising it do not fit any type of direct-care RN position that the Williams Memo indicates to be a specialty occupation.³ Rather, the proffered position appears to fit within the range of RN specialty positions described at section E of the Memo as those for which qualification as a specialty occupation would depend upon the extent and weight of the evidence presented in the petition.⁴ Thus, while the Williams Memo summarizes the statutory and regulatory standards for establishing an H-1B specialty occupation, it is not evidence that the particular position that is the subject of this petition is a specialty occupation. Here, neither counsel nor the petitioner has presented letters, affidavits, or job postings from firms or individuals *in the industry* attesting that such firms "routinely employ and recruit only degreed individuals." Thus, the petitioner has not established that a degree requirement in a specific discipline is common to the industry in parallel positions among similar organizations. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

³ The four types of RN positions that the Williams Memo recognizes as categorically requiring at least a specialty-occupation level of education are Clinical Nurse Specialists; Nurse Practitioners; Certified Registered Nurse Anesthetists; and Certified Nurse-Midwife. The AAO finds these categories to be the same as the four APN specialties that the *Handbook* identifies as requiring at least a master's degree in nursing. The record of proceeding establishes that the proffered position does not fit within any of these APN specialties.

⁴ Whether the proffered position is truly one that should be classified as a nursing specialty is in doubt, however, given the petitioner's classification of this position on the submitted LCA as a Level II registered nurse position indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. 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. In other words, if the proffered position were to require "a higher degree of knowledge and skill" versus "a typical RN or staff nurse position" as described in the Williams Memo, it would have been classified as a higher level position on the certified LCA submitted in support of the petition.

The AAO will next review the record regarding the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." Although evidence of record does not refute the *Handbook's* information to the effect that registered nurse positions are available to people who do not have a minimum of a bachelor's degree or the equivalent in a specific specialty, and does not refute that the duties of the proffered position are within the ambit of registered nurse duties, the petitioner is permitted to satisfy this alternative requirement by showing that the proffered position is sufficiently complex or unique that it does, in fact, require such a degree.

As evident in the earlier discussion about the descriptions of the proffered position and its duties, however, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than registered nurse positions that can be performed by persons without a specialty degree or its equivalent.

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

The description of the proffered position, however, contains no indication of complexity or uniqueness that would require a specialized degree. The duties of the proffered position, such as planning, implementing, directing and evaluating the functions of the nursing department; completing medical forms and reports; serving on committees and implementing their recommendations; assisting in recruiting and selecting nurses; scheduling and supervising nurses; etc., have not been shown to be more complex or unique than the duties of other registered nurse positions which, the *Handbook* indicates, do not even require a minimum of a bachelor's degree. Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As mentioned earlier, the record contains an evaluation of the proffered position to demonstrate that the degree requirement is common to the petitioner's industry. The evaluator claims that the petitioner's claimed "Bachelor's degree requirement is necessary because a university Bachelor's degree graduate obtains specific knowledge needed for the complex duties required of this particular position."

For reasons discussed below, the AAO accords no probative weight to the opinion from the evaluator as the evidence of record does not establish that she is an expert in the area in which she is opining. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Despite counsel's description of the evaluator as a "highly experienced educator and evaluator," neither the evaluation, the evaluator's résumé, nor any other evidence of record demonstrates that she is qualified as an expert in the field of nursing. The résumé shows that the evaluator has no background in the nursing field and is the recipient of the following non-nursing related degrees: (1) a Bachelor of Arts in Psychology; (2) a Master of Education in Guidance and Counseling; and (3) a Doctorate in Adult Education. It is not evident in the evaluation or anywhere else in the record of proceeding what experience the evaluator may have had that is relevant to, or equipped her with expert-level knowledge regarding the type of position upon which she is opining. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Furthermore, the record also does not provide a factual foundation for the evaluator's claims. She did not provide copies of the job advertisements that she based her opinion on to support her findings. Therefore, the evaluator's opinion in this area merits no special weight and is not persuasive. As such, neither the evaluator's findings nor her ultimate conclusions are worthy of any evidentiary weight in this proceeding and, therefore, her evaluation is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the petitioner failed to demonstrate that it meets the requirements of the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence pertinent to anyone the petitioner has previously hired to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). As noted earlier, counsel claims that USCIS approved a petition that had been previously filed by the petitioner on behalf of [REDACTED] however, no documentary evidence corroborating this claim was submitted in the instant matter. In any event, previously hiring only one employee with the requisite bachelor's or higher degree in the specific specialty does not establish a pattern that the petitioner normally requires, as opposed to simply prefers to hire, someone with at least a bachelor's degree or the equivalent in a specific specialty for the proffered position.⁵

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the

⁵ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, the petitioner has not satisfied the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Participating in developing and conducting orientation and training classes, attending continuing education classes, monitoring nurses for compliance with dress code and appropriate participation in fire and disaster drills, maintaining patient confidentiality, and monitoring patient treatment for instance, contain no indication of such specialization and complexity.

The proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than registered nursing positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.⁶ Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

The record suggests an additional issue that was not addressed in the decision of denial but that, nonetheless, also precludes approval of this position. As was noted above, the record contains evidence that the beneficiary received a bachelor's degree in nursing from the [REDACTED] in the Philippines.

⁶ Counsel argues on appeal that the proffered position qualifies as a specialty occupation on the basis that its duties are so specialized and complex. However, the duties as described lack sufficient specificity to distinguish the proffered position from other positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties.

Moreover, as noted above, the petitioner has designated the proffered position as a Level II registered nurse position on the submitted LCA, indicating that it is a position for qualified registered nurses who have attained a good understanding of the field and are capable of performing moderately complex tasks that require limited judgment. 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. Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. 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).

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have [(a)] education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and [(b)] have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary does not have a U.S. bachelor's degree. The record does not contain an evaluation stating the equivalence of the beneficiary's degree earned in the Philippines to any level of U.S. education. The record does not show that the beneficiary is currently licensed to work as a registered nurse in New Mexico, which is the state of intended employment. Counsel did not assert, and the record does not support, that the beneficiary has recognition of expertise in nursing through progressively responsible positions directly related to the specialty.

The evidence submitted does not, therefore, demonstrate that the beneficiary is qualified to hold a specialty occupation position. The appeal must be dismissed for this additional reason.

On a final note, the AAO does not disagree that there is a professional nursing shortage in the United States. The U.S. Department of Labor's own regulations recognize this shortage by virtue of its inclusion of professional nurses under Group I of Schedule A, which is essentially a blanket certification that an alien filling such a position will not adversely affect the U.S. labor force. *See* 20 C.F.R. § 656.15(c)(2). In other words, the labor shortage of professional nurses is recognized, and the law currently provides a means by which an employer may directly petition an alien to permanently fill a professional nursing position without the need to first demonstrate to the U.S. Department of Labor that no U.S. workers are able and/or willing to fill this position. *See id.* In any event, such a determination is irrelevant to the instant temporary H-1B nonimmigrant petition. First, the law does not require that a labor shortage be shown in order to establish eligibility for an H-1B visa. Second, the law does not provide for an exception, such as a labor shortage, to the statutory definition of specialty occupation that requires a petitioner to demonstrate, in part, that "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) [is] a minimum for entry into the occupation in the United States." § 214(i)(1)(B) of the Act.

Moreover, Congress specifically created two nonimmigrant visa categories for nurses, i.e., H-1A and H-1C nursing classifications, that either no longer exist or have any effect as a matter of law. More specifically, section 101(a)(15)(H)(i)(a) of the Act, relating to H-1A visas, was repealed by Sec. 2(c) of the Nursing Relief for Disadvantaged Areas Act of 1999, Act of Nov. 12, 1999, Pub. L. No. 106-95, 113 Stat. 1312. In addition, the H-1C visa classification, pursuant to section 101(a)(15)(H)(i)(c) of the Act, expired on December 20, 2009 and has not been renewed. Therefore, while certain nursing positions may qualify as H-1B specialty occupations, it is clear based on the foregoing that Congress does not currently intend to specifically provide a means by which temporary, nonimmigrant nurses may enter the United States to perform the duties of this occupation, regardless of any shortages that may exist.

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

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

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

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