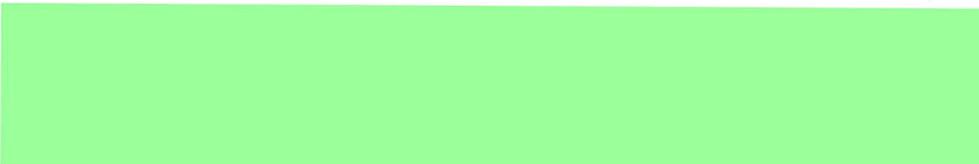




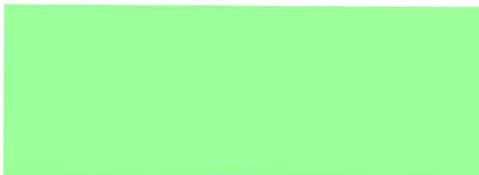
U.S. Citizenship
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Services

(b)(6)



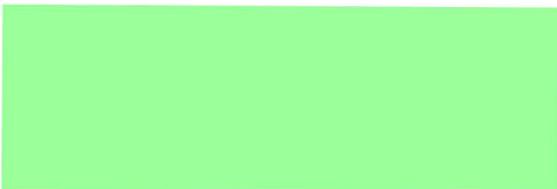
Date: **JAN 11 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

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 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.

On the Form I-129 petition, the petitioner claims to be a home health company, and it seeks to employ the beneficiary in what it designates as a registered nurse case manager position. The petitioner, therefore, endeavors to classify the beneficiary 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 proffered position was not a specialty occupation. On appeal, counsel for the petitioner contends that the director's findings were erroneous, and submits a brief and additional evidence in support of this contention.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(b)(6)

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

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

In a letter dated August 8, 2011, former counsel for the petitioner claims that the petitioner provides skilled nursing care, physical and occupational therapy, speech language therapy, medical social services, and certified home health care services. Counsel further claimed that the petitioner employs approximately 36 persons and has a gross annual income of approximately \$1.2 million,

Regarding the proffered position, counsel claimed that the petitioner required the services of the beneficiary as a registered nurse case manager. A separate statement of duties which accompanied the petition indicated that her duties would be as follows:

1. Responsible for coordinating the care between patients and their families and healthcare personnel.
2. Responsible for ensuring efficient, smooth, and prompt healthcare services.
3. Make health care plans that include processes like patient admission, administering medication doses, therapies and treatments, evaluation of test results and an evaluation of the plan's effectiveness.
4. Completes an initial assessment of patient and family to determine home care needs. Provides a complete physical assessment and history of current and previous illness(es).
5. Regularly re-evaluates patient nursing needs.
6. Provide emotional support to the patients, their relatives and also give medical advice to them.
7. Supervise teams of license[d] vocational nurses and certified home health care aides and allot responsibilities to them.
8. File reports and update the database about the condition and progress of the patient.
9. Assist physicians and all healthcare professionals caring for patient, always giving a complete and thorough report on patient status.
10. Monitor the patient progress and identifies any changes in status, acting on those changes to insure patient comfort and safety.
11. Initiates appropriate preventative and rehabilitative nursing procedures. Administers medications and treatments as prescribed by the physician.
12. Practice patient teaching/training for patients and families.
13. Identifies discharge planning needs as part of the care plan development and implements prior to discharge of the patient.
14. Assumes responsibility to coordinate patient care for assigned caseload.

Counsel concluded by stating that a bachelor's degree in nursing from an accredited program, along with licensure and six months of experience, was required for entry into the proffered position.

On August 18, 2011, the director issued an RFE, which requested a more detailed description of the work to be performed by the beneficiary as well as information pertaining to the petitioner's

organizational and business structure. The director also requested evidence demonstrating that the beneficiary possessed the appropriate licensure for the position.

The petitioner submitted two responses. On August 29, 2011, the petitioner submitted a copy of the beneficiary's California nursing license. On September 6, 2011, the petitioner submitted a second response, which included an organizational chart for the petitioner, a more detailed description of the duties of the proffered position which is part of the record and will not be restated herein, and a list of employees that the beneficiary would supervise in her position as case manager.

On September 8, 2011, the director denied the petition. Specifically, the director concluded that the record did not establish that the proffered position met any of the four supplemental criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director acknowledged that the duties of the proffered position appeared akin to those of a registered nurse as described by the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*, but concluded that the *Handbook*, upon which USCIS routinely relies in determining whether a position qualifies as a specialty occupation, indicated that there were three alternative ways to become a registered nurse, two of which did not include at least a bachelor's degree in a specific specialty.

On appeal, newly-retained counsel for the petitioner contends that the director's findings were erroneous. Preliminarily, counsel asserts that the director erroneously issued the decision without providing the petitioner an opportunity to respond to the RFE. Specifically, counsel states that the first response, submitted on August 29, 2011 and which included the beneficiary's nursing license, was erroneously filed by the beneficiary who has no standing in the proceeding. Counsel contends that, immediately upon receiving notice of this unauthorized action by the beneficiary, the petitioner sent a letter to the service center requesting additional time to submit its response to the RFE. Counsel concludes that the director erred by rendering a final decision in this matter on September 8, 2011 prior to affording the petitioner an opportunity to supplement the record.

The AAO will first address counsel's arguments regarding the documents filed in response to the RFE. The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. In this matter, however, the director issued an RFE and two responses were submitted into the record. It is noted that neither response included a cover letter or other document identifying the person submitting the evidence. Rather, the record contains envelopes identifying the first submission as being mailed from the petitioner's office, and the second submission being mailed from counsel's office. Therefore, counsel's assertion on appeal that the beneficiary erroneously filed the first response to the RFE, and that it therefore should have been rejected by the director, is not supported by any evidence in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*,

19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, counsel's further assertion that additional time was requested to submit a full response to the RFE after discovering the alleged submission by the beneficiary is also not supported by the record, since there is no record of any letter attesting to such facts being submitted to USCIS prior to the issuance of the denial in this matter.¹ Two responses to the director's RFE were submitted prior to final adjudication in this matter. Consequently, the AAO finds no error on the part of the director with regard to this issue, except that she should not have considered the evidence submitted with the second response. Title 8 C.F.R. § 103.2(b)(11) requires all requested evidence to "be submitted together at one time, along with the original USCIS request for evidence." Therefore the submission of the initial, incomplete response should have been "considered a request for a decision on the record." *Id.* In any event, as this error was harmless to the petitioner, it need not be further discussed and, while it is not required to do so, the AAO will nevertheless also consider this evidence as it was considered by the director and has already been incorporated into the record of proceeding.

The AAO now turns to the issue of whether the proffered position is a specialty occupation, and will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The *Handbook* describes the occupation of registered nurse in relevant part as follows:

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

¹ It is noted that, even if such a request for additional time to respond to the RFE had been submitted, the regulations prohibit the granting of such a request. Specifically, 8 C.F.R. § 103.2(b)(8)(iv) states in pertinent part that "[a]dditional time to respond to a request for evidence or notice of intent to deny may not be granted."

- Teach patients and their families how to manage their illnesses or injuries
- Explain what to do at home after treatment

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#tab-2> (last visited January 8, 2013). The AAO agrees with the classification of the proffered position into this occupational category by counsel and the director.

A review of the *Handbook's* education and training requirements for this occupation, however, indicates that it does not require a bachelor's degree in a specific specialty or its equivalent for entry into the position:

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.

Handbook, 2012-13 ed., "Registered Nurses," <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4> (last visited January 8, 2013).

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1). The *Handbook*, which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations, indicates that the position of registered nurse can be filled by RNs with associate degrees or two or three-year hospital diplomas, as well as BSNs, and indicates that any of these three educational backgrounds would prepare a candidate for an entry-level position as a registered nurse. Based on this evidence, the petitioner has failed to establish that a minimum of a baccalaureate or higher degree, or the equivalent, in a specific specialty, is normally required for entry into this occupational category. The petitioner, therefore, has failed to satisfy 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 such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Neither the petitioner nor counsel submitted evidence that responds to this criterion. Prior to adjudication, the record did not contain any documentation establishing that a degree requirement is common for parallel positions within the petitioner's industry. Moreover, the record contained no evidence, such as letters from organizations within the petitioner's industry attesting to general hiring standards for registered nurses, to establish that a degree requirement is common in the industry. Therefore, the petitioner has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).²

² The petitioner was put on notice of required evidence, and for the reasons set forth above, the AAO finds that the petitioner was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it for the first time on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty or its equivalent can perform the duties associated with the position. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry 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. Counsel addresses this prong on appeal, arguing that the proffered position is specialized and complex by virtue of the fact that the majority of the beneficiary's time will be devoted to tasks such as determining what care is to be provided and what staff members will provide such care. However, counsel submits no additional evidence to support these contentions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Moreover, it is noted that for the first time on appeal, counsel asserts that the proffered position is actually akin to that of a medical and health services manager. This assertion, however, is not persuasive. The petition in this matter was filed to classify the beneficiary as a registered nurse under SOC (ONET/OES) Code 29-1111. The occupation of medical and health services manager is a separate and distinct occupation classified under SOC (ONET/OES) Code 11-9111. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *Cf. Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Neither the petitioner nor counsel explain or clarify at any time in the record which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but associate-degreed or hospital diploma employment. The petitioner has thus failed to establish that it has satisfied either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner provides no evidence and makes no claims with regard to its past hiring practices for registered nurses. Instead, in the response to the RFE received on September 6, 2011, the petitioner indicated that “[redacted] was a Case Manager who has his bachelor's degree in Nursing, now he is a Clinical Supervisor.” The petitioner suggests that the beneficiary is assuming the position that Mr. [redacted] previously held, but fails to submit any evidence establishing that it repeatedly and routinely hires individuals with bachelor's or higher degrees in a directly related specialty to perform the duties of the proffered

position. Although counsel indicates that this criterion is satisfied by virtue of the petitioner's allegation in its petition that it requires someone with at least a baccalaureate degree to perform the duties of the position, this assertion alone is not sufficient to meet the petitioner's burden of proof in this matter.

Counsel claims that the proffered position requires the incumbent to possess at least a bachelor's degree in nursing. In addition to conflicting with the statement on appeal that the petitioner requires the person performing the duties of case manager to simply have a bachelor of science degree without denoting a specialty, this claim is not persuasive, since the record does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them. Although the petitioner may believe or otherwise assert that a proffered position requires a specialty degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's or higher degree in a specific specialty or its equivalent could be brought to the United States to perform any occupation as long as the employer required the individual to have such a degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the petitioner has not satisfied the fourth criterion of 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. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than registered nurse positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. Moreover, counsel for the petitioner simply provides his own unsupported opinions with regard to the qualifications necessary for an individual to perform the duties of the proffered position. Finally, the description of the duties of the proffered position does not specifically identify any tasks that are so specialized or complex that only at least a baccalaureate, specialty-degreed individual could perform them. The fact that the beneficiary has worked in various nursing positions and gained experience in the field does not establish that the position is inherently more specialized or complex than other similar but non-specialty-degreed baccalaureate employment.³

³ Moreover, the petitioner has designated the proffered position as a Level II position on the submitted Labor Condition Application (LCA), indicating that it is a "qualified" position for an employee who has obtained a good understanding of the field but who will only perform moderately complex tasks. *See Employment and Training Administration (ETA), Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs (Rev. Nov. 2009)*. 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

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

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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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

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).