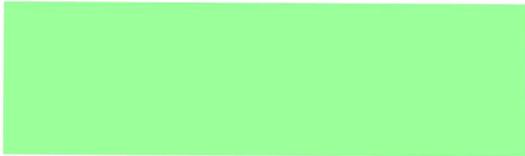




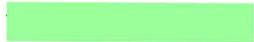
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 04 2013

OFFICE: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

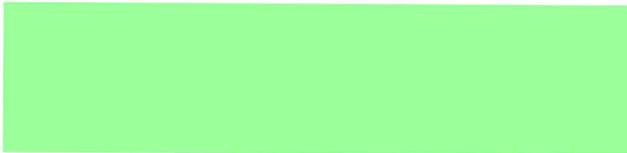
Petitioner:

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,

Michael T. Kelly

for

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 describes itself as a provider of home health nursing services established in 2008. In order to employ the beneficiary in what it designates as a medical and health services manager position,¹ the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

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

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

In his January 24, 2012 letter submitted in response to the director's RFE, counsel stated that the beneficiary would spend 35 percent of her time performing the following tasks:

- Managing the Nursing Department's activities and functions;
- Planning and implementing programs in the Nursing Department pursuant to office policies and legal requirements;
- Directing, supervising, and evaluating the work activities of nurses;
- Establishing work schedules and assignments for staff members according to the workload; and
- Observing nurses and ensuring that proper nursing care is provided.

Counsel stated that the beneficiary would spend 30 percent of her time performing the following tasks:

- Examining billing and regulatory documents in order to ensure compliance with Medicare and Medicaid;

¹ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 11-9111, and the associated Occupational Classification of "Medical and Health Services Managers."

- Preparing, organizing, and maintaining inspection records;
- Preparing written, oral, tabular, and graphic reports summarizing requirements and regulations;
- Interviewing caregivers and patients in order to determine whether errors in regulatory compliance have occurred;
- Monitoring follow-up actions in cases where errors were found; and
- Reviewing compliance monitoring reports.

Counsel stated that the beneficiary would spend ten percent of her time performing the following tasks:

- Training the petitioner's nursing staff in Medicare and Medicaid guidelines, standards, protocols, and compliance; and
- Preparing the Nursing Department's office budget and department reports as required by management.

Finally, counsel stated that the beneficiary would spend 25 percent of her time performing the following tasks:

- Developing quality assurance techniques in order to ensure safe, legal, and ethical practices;
- Monitoring the implementation quality improvement programs;
- Designing, reviewing, and recommending approaches to quality improvement;
- Designing, implementing, updating, and periodically reviewing the petitioner's quality assurance plan; and
- Identifying the general and specific needs of nursing staff, and making recommendations.

Both counsel and the petitioner claimed that the proffered position is that of a medical and health services manager.

The AAO will first address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one that requires:

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

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

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

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

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

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

regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (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), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

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

The AAO recognizes the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide

variety of occupations it addresses.² The AAO agrees with counsel and the petitioner that the duties of the proffered position generally align with those of the Medical and Health Services Managers occupational classification as such duties are described in the *Handbook*. The *Handbook* states the following with regard to the duties of medical and health services managers:

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

Medical and health services managers typically do the following:

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

* * *

Medical and health services managers' titles depend on the facility or area of expertise in which they work. . . .

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Medical and Health Services Managers," <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-2> (accessed May 28, 2013).

² The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/ocol/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

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

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

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.

* * *

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.

Id. at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-4>.

The information from the *Handbook* does not support a finding that a bachelor's degree or the equivalent, in a specific specialty, is the normal minimum entry requirement for this occupation. The *Handbook* states that "most" medical and health services managers possess at minimum a bachelor's degree before entering the field,³ that requirements vary by facility, and that some facilities hire those who have on-the-job experience instead of formal education. However, the *Handbook* does not report that a bachelor's degree *in a specific specialty*, or the equivalent, is normally required for entry into the occupational category. Accordingly, inclusion of the proffered position within this occupational category is not in itself sufficient to establish the position as one for which the normal minimum entry requirement is at least a bachelor's or higher degree, or the equivalent, in a specific specialty.

The information from O*NET OnLine submitted by counsel does not establish that the proffered position satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. The AAO finds that O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a

³ "Most" does not indicate that a medical and health services manager position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty. The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of medical and health services managers positions require at least a bachelor's degree in a specific specialty, it could be said that "most" medical and health services managers positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." Section 214(i)(1) of the Act.

specific specialty, or its equivalent, is a requirement for a given position, as its Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO 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 proposed position. Additionally, the Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O*NET OnLine excerpt is of little evidentiary value to this issue.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source⁴ establishing that the proffered position’s inclusion in this occupational category would be sufficient in and of itself to establish the proffered position as, in the words of this criterion, a “particular position” for which “[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry.”

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

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor’s degree in a specific specialty or its equivalent.

⁴ The highlighted excerpts that counsel submits from the website of the Association of University Programs in Health Administration (AUPHA) do not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Although these excerpts discuss the benefits conferred by a bachelor’s degree in healthcare management, they do not state that such a degree, or its equivalent, in a specific specialty, is normally required for a position such as the one proffered here.

As evidence that individuals employed in positions parallel to the one proffered here are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into this occupation the petitioner submits letters from [REDACTED] Administrator of Converge [REDACTED] and [REDACTED] President of the [REDACTED] LLC. Each individual state that her respective organization employs a health services manager, and that the individual occupying the position is required to possess a bachelor's degree, or the equivalent, in healthcare management, healthcare administration, health and rehabilitation services, or a related field. The AAO notes that neither the letters nor any evidence accompanying them or separately submitted into the record of proceeding establishes that the proffered position and the medical and health services manager positions within the authors' firms are so substantially similar that their performance requirements would necessitate the same educational credentials. In short, the evidence of record does not establish that the positions are parallel, as required by this criterion. Likewise, the record does not contain any evidence establishing that either Converge Home Health Care or the New Covenant Home Health Agency are "similar" to the petitioner, as required by 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). 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)). Accordingly, these two letters hold little probative value. Furthermore, neither these letters nor any other evidence in this record of proceeding establishes that these two organization's purported hiring policies are representative of an industry-wide recruiting and hiring practice for positions parallel to the proffered position in organizations similar to this petitioner.

As evidence of a professional association in the industry having made such a degree in a specific specialty a minimum requirement for entry, the petitioner submitted a printout from the website of the Association of University Health Programs in Health Administration (AUPHA). However, this evidence does not satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, the petitioner submits no evidence to establish that the AUPHA is a professional association consisting of professionals who perform duties similar to those proposed for the beneficiary. Again, simply 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. Moreover, the AUPHA printout does not state that a bachelor's degree, or the equivalent, in a specific specialty is common to the petitioner's industry in positions that are both parallel to the proffered position and located in organizations that are similar to the petitioner. Instead it discusses the merits of pursuing a bachelor's degree in healthcare management and healthcare administration, which are not in question here. Again, the issue at hand under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) is whether the petitioner has established that a bachelor's degree, or the equivalent, in a specific specialty is common to the petitioner's industry in positions that are both parallel to the proffered position and located in organizations that are similar to the petitioner. The AUPHA printout does not even address that question, let alone answer it. For all of these reasons, the AUPHA printout does not satisfy the first alternative prong described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor do the four job vacancy announcements contained in the record of proceeding satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner has not submitted any evidence

to demonstrate that any of these advertisements is from a company “similar” to the petitioner.⁵ The petitioner has submitted no evidence to establish that any of these advertisers are similar to the petitioner in size, scope, scale of operations, business efforts, expenditures, or other fundamental dimensions. Nor has the petitioner established that the job-vacancy announcements require a bachelor’s degree, or the equivalent, in a specific specialty.⁶ Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry’s usual recruiting and hiring practices with regard to the position advertised. Again, simply 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 165.⁷

⁵ The petitioner described itself on the Form I-129 as a provider of home health nursing services. However, Hearth Management appears to operate a chain of assisted living communities; [REDACTED] Hospital and [REDACTED] Hospital are hospitals; and [REDACTED] also appears to be a hospital.

The petitioner has not explained how it is similar to any of these organizations.

⁶ For example, although Hearth Management requires a degree, its advertisement does not specify that the degree must be a bachelor’s degree, and the fact that the company would find acceptable licensure as a licensed practical nurse indicates that it would accept an individual with less than a bachelor’s degree. See generally U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., “Licensed Practical and Licensed Vocational Nurses,” <http://www.bls.gov/ooh/healthcare/licensed-practical-and-licensed-vocational-nurses.htm#tab-4> (accessed May 28, 2013) (“Becoming a licensed practical [(LPN)] or licensed vocational nurse [(LVN)] requires completing an approved educational program . . . LPNs and LVNs must complete an accredited program, which takes about 1 year. These programs are commonly in technical schools and community colleges. They may occasionally be in high schools and hospitals as well.) Norwegian American Hospital specifically states that it would find acceptable a candidate with a two-year degree.

Nor does the position at [REDACTED] Hospital require a bachelor’s degree; the company mandates only that a successful candidate complete his or her bachelor’s degree within two years of accepting employment with the company.

Nor does [REDACTED] require a bachelor’s degree: its advertisement states only a “preference” for such a degree.

⁷ Furthermore, according to the *Handbook* there were approximately 303,000 persons employed as medical and health services managers in 2010. *Handbook* at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-6> (last accessed May 28, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the four submitted vacancy announcements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that “[r]andom selection is the key to [the] process [of probability sampling]” and that “random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error”).

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

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

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Rather, the AAO finds, that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic medical-and-health-services-management work, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore 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, or the equivalent, in a specific specialty.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

As such, even if these four job-vacancy announcements established that the employers that issued them routinely recruited and hired for the advertised positions only persons with at least a bachelor's degree in a specific specialty closely related to the positions, it cannot be found that these four job-vacancy announcements that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

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

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 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 actual performance requirements of the position necessitate a petitioner's history of requiring a particular degree in its recruiting and hiring for the position. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The record indicates that the petitioner has never employed a person in the proffered position. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

As the petitioner has not demonstrated a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The petitioner has failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As noted previously, the petitioner simply has not distinguished either the proposed duties, or the position that they comprise, from generic medical-and-health-services-management duties, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Accordingly, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). As evident in the earlier quoted duty descriptions from the petitioner's January 24, 2012 letter, the petitioner has not developed the proposed duties with sufficient detail and substantive information about what their performance would entail to establish the complexity and specialization required to satisfy this criterion.

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

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

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.