



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 18 2013 OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on October 11, 2011. In the Form I-129 visa petition, the petitioner describes itself as a specialty health care services business specializing in fertility and vein disease treatments that was established in 1984. In order to employ the beneficiary in what it designates as a clinical research RN specialist position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on February 2, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions and that the beneficiary is qualified to perform service in a specialty occupation position. On appeal, counsel asserts that the director's bases for denial of the petition were erroneous and contends that all evidentiary requirements were satisfied. In support of this assertion, counsel submitted a brief and additional evidence.

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

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

Later in this decision, the AAO will also address several additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that it would pay the beneficiary an adequate salary for her work if the petition were granted; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. For these additional reasons, the petition may not be approved, with each considered as an independent and alternative basis for denial.¹

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a clinical research RN specialist to work on a full-time basis at a rate of pay of \$68,952 per year. In a support letter dated September 15, 2011, the petitioner stated the following regarding the duties and responsibilities of the proffered position:

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

The Clinical Research RN Specialist will participate in the recruitment and coordination of trial subject/patients. The Clinical RN Specialist will explain to the patients about the purpose of the study and the diagnostic procedures to be conducted and thereafter obtain the patients' informed consent. The duties include performing clinical and technical duties such as administration of medication; patient assessment; assisting the physicians with procedures and exams; documenting patient care services using the ARTWorks Clinical [REDACTED] coordinating patient treatment plans in conjunction with established clinical protocols; monitoring cycling visits including medication instruction; and anticipatory guidance, and clarification of physician instructions. The job duties also include communicating laboratory results with appropriate interpretation and explanation. The job duties include patient monitoring and preparing data reports.

The Clinical Research RN Specialist will also provide patient and couple counseling and will be responsible for patient education relating to various infertility treatments, Ovulation Induction "OI" and In Vitro Fertilization "IVF" procedures and medications. The duties include providing pre and post op education and utilizing the Patient Tracking Tool module in ARTWorks to provide consistent and timely patient follow up and management of testing and cycles.

In its letter of support accompanying the Form I-129 petition, the petitioner described the requirements for the proffered position as "at least a Bachelor's degree in the medical, health or life sciences field, a Maryland RN license and related professional experience." The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her degrees, license, and prior experience. The petitioner provided diplomas and transcripts in the name of the beneficiary, along with an evaluation of the beneficiary's credentials prepared by the American Evaluation and Translation Service, which indicates that the beneficiary has been awarded "the equivalent of the U.S. degrees of Bachelor of Science in Nursing and Master of Science in Health Systems Management."

The petitioner also provided evidence in support of the H-1B petition, including (1) an unsigned position description for a position entitled "Fertility RN Clinical Research Coordinator," which indicates that a "BS required; Master's in relevant field strongly preferred"; (2) a copy of the beneficiary's application for a certificate from the [REDACTED] (3) the beneficiary's resume; and (4) documents regarding the petitioner's business operations (including investor fact sheets, a quarterly report, printouts from the petitioner's website, and printouts of a PowerPoint presentation entitled "Investor Presentation").

In addition, the petitioner submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Biological Scientists, All Other" - SOC (ONET/OES Code) 19-1029, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 25, 2011. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the request, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, the educational requirements for the specific duties, etc. The director also requested further evidence regarding the beneficiary's qualifications and outlined the evidence to be submitted.

On January 20, 2012, the petitioner and counsel responded to the director's RFE by providing a revised description of the duties of the proffered position and additional evidence. Specifically, in a letter dated January 16, 2012, the petitioner provided the following description of its clinical research RN specialist position, along with the percentage of time that the beneficiary would spend performing each of the duties:

1. Clinical Trial preparation, involving planning, development and evaluation of patient information, recruitment and coordination of trial study and patients and informed consent forms and coordination of source documents – 15%

- [Participate] in coordination of patients for the various clinical research studies.
 - [Ensure] the documents for patient information and health questionnaires are up to date and acceptable for the clinical trial.
 - [Explain] to the patients about the purpose of the study and the diagnostic procedures to be conducted and thereafter obtain the patients' informed consent.
- [Ensure] that the informed consent is approved by the Institutional Review Board.
 - [Review] the informed consent, ensuring validity and accuracy and that the language is understandable to the patients and that it contains all required information.
- Evaluate and analyze data from the patients' charts, medical records, interviews, questionnaires, and diagnostic tests, and coordinate and implement procedures to collect data from these and other approved sources.
- [Assist] the team with the logistics, flow, and organization of research protocols and [establish] and [maintain] a current knowledge base of policies and procedures for ordering and coordinating clinical tests and procedures integral to the clinical research studies.
- [Demonstrate] leadership in ensuring patient comprehension and safety during the initial and ongoing informed consent discussions, demonstrate leadership in ensuring adherence to ethical practices during the conduct of research in order to protect the rights and well-

being of patients and the collection of quality data.

2. Clinical research analysis, data retrieval, retrospective review of clinical data and preparation of detailed research reports – 40%

- Work under the direction of the IVF Research Physician Director and in conjunction with the Research Scientist to gather and retrieve data from the clinical database.
- [Review] clinical data for completeness, accuracy and consistency and [correct] as necessary for research and quality purposes.
- Evaluate and interpret collected clinical data.
- [Conduct] retrospective reviews of clinical data and [prepare] detailed reports and comprehensive presentations for the IVF Research Physician Director.
- [Ensure] the collection of source data and completion of documentation that validate the integrity of the research.
- [Perform] clinical activities and administrative work in the support of various research studies.
 - [Ensure] compliance with research protocol procedures, assessments and reporting requirements, as well as compliance with good clinical research practice with remaining cognizant of the needs of the diverse patient population.
 - Identify, observe, document and report adverse events to maintain the patient's safety and act on the physician's recommendation for adverse event intervention (stop medication, call patient, retest, treat, etc.) as well as maintain follow up and communication with the patient.

3. Education and training related to the clinical trials – 25%

- [Work] with the Clinical Research Coordinator, and the Resource/Application RN Specialist to provide training, support, and information to Nurses, Medical Assistants, Sonographers and other clinical and administrative staff on how to handle each specific clinical trial and what to expect from all phases as well as how to provide individualized attention to each patient.
- [Promote] education about the clinical trial to the physician groups and nursing staff.
- [Educate] the patients about the process of the study and [provide] educational materials to patients.
- Provide patient and couples counseling and . . . be responsible for patient education relating to various infertility treatments, Ovulation Induction "OI" and In Vitro Fertilization "IVF" procedures and medications.

- [Provide] pre and post op education and [utilize] the Patient Tracking Tool module in ARTWorks to provide consistent and timely patient follow up and management of testing cycles.
- Educate the patients of their duties and responsibilities, the restrictions and the lifestyle modifications needed.
- [Conduct] patient interviews and assessments and [transfer] information to case report forms and [document] progress.
- [Educate] patients and families about the clinical trials and potential benefits and goals of clinical research.
- [Participate] in sponsor audits, and/or regulatory inspections of records and documents, including the FDA.

4. Clinical and technical duties – 20%

- Administration of medication.
- Patient assessment (phlebotomy, vital signs, height, weight).
- [Assist] physicians with procedures and exams.
- [Document] patient care services, by charting in patient and department records, using the ARTWorks Clinical Information System.
- Coordinate patient treatment plans in conjunction with established clinical protocols
 - [Monitor] cycling visits including medication instruction
 - [Provide] anticipatory guidance (schedule, dosage and administration), and clarification of physician instructions.
 - [Communicate] physician orders and instructions and [communicate] laboratory results with appropriate interpretation and explanation.
 - [Monitor patients] and [prepare] data reports.
- Responsible for the "close-out" process at the end of each study.

(In the interest of clarity, the AAO has slightly changed the format of the above description of the duties of the proffered position as provided by the petitioner into the above bullet list. The AAO considered the description of duties as provided by the petitioner in its entirety prior to issuing this decision.)

In its January 16, 2012 letter, the petitioner stated that it "require[s] a Bachelor's degree as a minimum" for the proffered position. The petitioner further asserted that "[t]his position requires a Bachelor's degree, although [it] prefer[s] a Master's degree in a relevant field." The petitioner also indicated that it "require[s] a minimum of two years of nursing practice in the areas of reproductive endocrinology/fertility and prior clinical research experience," as well as an "unrestricted state RN license." The petitioner later stated that "a Bachelor's degree is the minimum entry level requirement." In addition, the petitioner indicated that it "do[es] not require an advanced certificate, however, this position is in an advanced nursing field" The petitioner indicated that a

"Bachelor's degree in a medical/health sciences field" is required.

Included with the submission is what appears to be the third page of an unsigned, three-page job description, which states "Education/Experience Requirements: BSN required; Master's in relevant field strongly preferred[;] Current state RN license without limitations required[;] Minimum two (2) years [of] experience in women's health & infertility."

In addition, the petitioner stated that "[t]he duties are akin to those of a Clinical Research Coordinator (Clinical Research Nurse Coordinator) – O*NET [Occupational Information Network] – 11-9121." In support of this assertion, the petitioner provided a copy of the O*NET OnLine Summary Report for the occupation "11-9121.01- Clinical Research Coordinators."

The petitioner also submitted the following additional evidence in response to the RFE, including: (1) a document indicating that it contains "a list of [redacted] research publications"; (2) a printout from [redacted]; (3) printouts of several job advertisements; (4) a certificate in the name of the beneficiary from the State of Maryland, Maryland Board of Nursing publications with an expiration date of February 28, 2009 indicating that the beneficiary is a registered nurse; (5) a printout from the Maryland Board of Nursing Web Lookup License Verification which indicates that the beneficiary's registered nurse license expires on February 28, 2012; (6) an [redacted] Oral Proficiency Score Report in the name of the beneficiary, dated June 28, 2007; (7) a letter from [redacted] or [redacted], dated December 16, 2011, regarding the beneficiary's medical condition; and (8) copies of previously submitted documents.

The director reviewed the information provided by the petitioner. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on February 2, 2012. Counsel submitted an appeal of the denial of the H-1B petition.

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

Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

The petitioner stated that the beneficiary would be employed in a clinical research RN specialist position. However, to determine whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not simply rely on a position's title. When

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

The AAO observes that the petitioner has provided inconsistent information regarding the requirements of the proffered position. In its letter of support accompanying the Form I-129 petition, the petitioner described the minimum education required for the proffered position as "at least a Bachelor's degree in the medical, health or life sciences field." However, a position description for a "Fertility RN Clinical Research Coordinator," which was also included in the initial submission, lists the education requirement as "BS required; Master's in relevant field strongly preferred."² In its January 16, 2012 letter, submitted in response to the RFE, the petitioner stated that it "require[s] a Bachelor's degree as a minimum" for the proffered position. The petitioner further asserted that "[t]his position requires a Bachelor's degree, although [it] prefer[s] a Master's degree in a relevant field." The petitioner later stated that "a Bachelor's degree is the minimum entry level requirement." The petitioner also stated that a "Bachelor's degree in a medical/health sciences field" is required. Included with the letter is what appears to be the third page of an unsigned, three-page job description, which states, in part, "Education/Experience Requirements: BSN required; Master's in relevant field strongly preferred." On appeal, a copy of the position description for "Fertility RN Clinical Research Coordinator" is identified on the exhibit list as "Job posting for this position from Petitioner." Unlike the version submitted with the initial Form I-129 petition, the version submitted on appeal states the educational requirement as "BSN required; Master's in relevant field strongly preferred." Throughout the appeal, counsel also claims that a bachelor's degree (no specific specialty) is required for the proffered position.

The petitioner did not provide an explanation for the discrepancies in the requirements for the position. The AAO observes that the minimum educational requirements stated by the petitioner for the proffered position (i.e., a bachelor's degree (no specific specialty), a Bachelor of Science degree, a Bachelor of Science in Nursing, and bachelor's degree in the medical, health or life sciences field) are not all adequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

² Obviously, a preference for a particular degree is not evidence of a requirement for such a degree.

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).³

Again, the petitioner in this matter has provided inconsistent information as to the requirements for the proffered position of clinical research RN specialist. Within the record of proceeding, the petitioner claims that the duties of the proffered position can be performed by an individual who possess (1) a bachelor's degree; (2) a Bachelor of Science degree; (3) a Bachelor of Science in Nursing; or (4) possesses a bachelor's degree in the medical, health or life sciences field. No explanation for the inconsistent information was provided. However, the AAO notes that the petitioner's assertions that the duties of the proffered position can be performed with only a general-purpose bachelor's or Bachelor of Science degree are tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Further, in the instant case, the petitioner has characterized the duties of the proffered position as pertaining to at multiple occupational categories. As previously stated, the petitioner submitted an LCA in support of the instant petition designating the proffered position under the occupational classification "Biological Scientists, All Other" - SOC (ONET/OES Code) 19-1029. The petitioner stated in the LCA that the wage level for the proffered position was Level I and claimed that the prevailing wage in Maryland for the proffered position was \$63,856 per year. The LCA was certified on September 13, 2011 and signed by the petitioner on September 20, 2011.

Notably, in response to the RFE, the petitioner stated that "[t]he duties are akin to those of a Clinical Research Coordinator (Clinical Research Nurse Coordinator) – O*NET [Occupational Information

³ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

Network] – 11-9121." In support of this assertion, the petitioner provided a copy of the O*NET OnLine Summary Report for the occupation "11-9121.01- Clinical Research Coordinators."

When the duties of the proffered position involve more than one occupational category, U.S. Department of Labor (DOL) provides clear guidance for selecting the most relevant O*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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.

Thus, if the petitioner believed its position was described as a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation. Notably, the prevailing wage for "Biological Scientists, All Other" is significantly lower than the prevailing wage for "Clinical Research Coordinators."

The Online Wage Library lists the prevailing wage for "Biological Scientists, All Others" as \$63,856 per year at the time the petition was filed in this matter, for a Level I position in the area of intended employment. The prevailing wage for "Clinical Research Coordinators" SOC (ONET/OES Code) 11-9121.01" (which falls under the major group of "Natural Sciences Managers" SOC (ONET/OES) Code 11-9121) is listed as \$98,883 per year.⁴ Thus, according to DOL guidance, if the petitioner believed its position was a combination of the occupations, then it should have chosen the relevant occupational code for the highest paying occupation. However, the petitioner selected the occupational category for the lowest paying occupational category for the proffered position on the LCA.

⁴ For additional information regarding the prevailing wage for this occupation in [REDACTED] (MD), see the All Industries Database for 7/2011 - 6/2012 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?> [REDACTED] last visited June 17, 2013). [REDACTED] see <http://www.flcdatabase.com/OesQuickResults.aspx?>

Moreover, the AAO observes that the LCA was certified at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁵

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁶ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

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

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy*

⁵ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁶ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

Guidance, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The AAO observes that the petitioner designated the proffered position as a Level I entry-level position. However, the petitioner has also represented that the proffered position requires a degree, prior experience, and RN licensure without limitations is required. Specifically, in the position description entitled "Fertility RN Clinical Research Coordinator" provided with the initial Form I-129 petitioner, in response to the RFE, and again on appeal, the petitioner states that in addition to a bachelor's degree, the position requires a "[m]inimum of two (2) years [of] experience in women's health and infertility."⁷ In its letter dated January 16, 2012 submitted in response to the RFE, the petitioner stated that it required a degree and "a minimum of two years of nursing practice in the areas of reproductive endocrinology/fertility and prior clinical research experience" for the proffered position." The petitioner further asserted that "[the proffered] position requires . . . extensive experience in the very specialized and complex field of reproductive endocrinology." On appeal, counsel states that the "majority of the duties [of the proffered position] are clinical research duties requiring advanced skills and knowledge to complete." Thus, it appears that the petitioner requires the individual employed in the proffered position to possess more than "a basic understanding of the occupation," which would be expected of a "worker in training" or an individual performing an "internship," as indicated by a Level I wage.

In addition, in its letter dated September 15, 2011, the petitioner has represented that the beneficiary will be involved in "pharma-sponsored clinical trials investigating the efficacy and safety of new medications, therapeutic devices, and treatment protocols in the field of reproductive endocrinology, IVF, and infertility." The petitioner indicated that the duties of the proffered position involve "the collection, compilation, and documentation of clinical research data." Specifically, the petitioner stated that the beneficiary will "evaluate and analyze data from the patients' charts, medical records, interviews, questionnaires, and diagnostic tests," and "prepare reports and presentations for the IVF Research Physician Director." The petitioner designated the proffered position as a Level I position, which indicates that the beneficiary will "perform routine tasks that require limited, if any, exercise of judgment." However, in its letter dated January 16, 2012, the petitioner indicated that in the proffered position, the beneficiary will "identify, observe, document and report adverse events to maintain the patient's safety," and that such duties require the beneficiary to demonstrate "autonomy in judgment, decision-making and interventions."

Further, in its letter dated January 16, 2012, the petitioner asserted that the beneficiary will "[ensure] that the informed consent [of study participants] is approved by the Institutional Review Board," which includes "ensuring its validity and accuracy." The petitioner also stated that the duties of the proffered position include "reviewing clinical data for completeness, accuracy and consistency and correcting as necessary for research and quality purposes." Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, in

⁷ The AAO notes that the in support of the initial Form I-129 petition and on appeal, the petitioner and counsel provided the full document. In response to the RFE, only the third page containing the education and experience requirements for the position was submitted. Notably, the educational requirements have not remained consistent in the petitioner's submissions.

which the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," the petitioner claims it is relying on the accuracy of the beneficiary's work product to ensure the validity of its research studies.

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

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The AAO notes that the prevailing wage of \$63,856 per year on the LCA corresponds to a Level I position for the occupational category of "Biological Scientists, All Others" for Maryland.⁸ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been \$79,539 per year for a Level II position, \$95,202 per year for a Level III position, and \$110,885 per hour for a Level IV position.⁹

⁸ For additional information regarding the prevailing wage for Biological Scientists, All Others in see the All Industries Database for 7/2011 - 6/2012 for Biological Scientists, All Others at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?> (last visited June 17, 2013).

⁹ The AAO here reiterates that the prevailing wage for "Biological Scientists, All Others" at a Level I wage rate is inconsistent with the petitioner's claims regarding the nature and requirements for the proffered position as the petitioner has represented that the position includes duties that pertain to a higher-paying occupation, i.e., clinical research coordinators.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the *correct occupational category and wage level* in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category and wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. Thus, for this reason, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

Moreover, this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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

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

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the proper occupational category, as well as the level of work,

responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such higher level work and responsibilities, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for these additional reasons.¹⁰

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

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

¹⁰ It appears that the petitioner may have claimed to DOL that the proffered position is a Level I, entry-level position under the occupational category "Biological Scientists, All Other" to obtain a lower required wage.

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its

equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). In the interest of efficiency, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into the analysis of each criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which follows below.

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

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

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹¹ In the instant case, the petitioner provided an LCA in support of the petition that indicates the occupational classification for the proffered position is "Biological Scientists, All Others." The AAO reviewed the *Handbook* regarding the occupational category "Biological Scientists, All Others." However, the *Handbook* simply describes this category as "[a]ll biological scientists not listed separately." The AAO also reviewed the *Handbook* regarding the occupational category "Clinical Research Coordinators." However, the AAO notes that the *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational categories "Biological Scientists, All Others" and "Clinical Research Coordinators." Accordingly, the *Handbook* lacks sufficient information regarding the occupational categories (e.g., duties, academic requirements) to be deemed probative evidence in this matter.

The AAO notes there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

¹¹ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

Data for Occupations Not Covered in Detail

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. [The *Handbook*] presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Data for Occupations Not Covered in Detail, on the Internet at <http://www.bls.gov/ooH/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited June 17, 2013).

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these 160+ occupations are not developed.) The *Handbook* continues by stating that approximately five percent of all employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that indicates whether the position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether a beneficiary qualifies to perform in a specialty occupation. The petitioner has failed to do so in the instant case. That is, the petitioner has failed to submit probative evidence that normally the minimum requirement for positions falling under the occupational categories "Biological Scientists, All Others" and/or "Clinical Research Coordinators" is at least a bachelor's degree in a specific specialty, or its equivalent.

As previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other

required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

Next, the AAO reviews the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

As previously mentioned, in the Form I-129, the petitioner stated that it is provider of specialty health care services (specializing in fertility and vein disease treatments) established in 1984. The petitioner further stated that it has 1,495 employees. The petitioner listed its gross annual income as \$243 million. Although requested on the Form I-129 petition, the petitioner failed to provide its net annual income. The petitioner designated its business operations under the NAICS code 621498 - "All Other Outpatient Care Centers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This U.S. industry comprises establishments with medical staff primarily engaged in providing general or specialized outpatient care (except family planning centers, outpatient mental health and substance abuse centers, HMO medical centers, kidney dialysis centers, and freestanding ambulatory surgical and emergency centers). Centers or clinics of health practitioners with different degrees from more than one industry practicing within the same establishment (i.e., Doctor of medicine and Doctor of dental medicine) are included in this industry.

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 621498 – All Other Outpatient Care Centers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 17, 2013).

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions among similar organizations.*" (Emphasis added.) That is, this prong requires the petitioner to establish that a requirement of a bachelor's 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 the instant case, the petitioner submitted several job postings in support of this criterion of the regulations. The AAO reviewed the job announcements submitted by the petitioner; however, the petitioner's reliance on the job postings is misplaced.

Specifically, the AAO notes that, contrary to the purpose for which they were submitted, some of the job postings do not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is required. The posting for an office nurse coordinator at "RSC" seeks a candidate with a bachelor's degree (no specific specialty). Similarly, the posting for a clinical research coordinator position at [REDACTED] requires a "[b]achelor's degree" and expresses a preference for a bachelor's degree in a "scientific discipline." As previously noted, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

Several of the job postings do not appear to advertise positions that are parallel to the proffered position. As noted earlier, the petitioner designated the proffered position as a low, entry level position in the LCA. Notably, some of the postings appear to be for more senior jobs than the proffered position. For example, the [REDACTED] posting from [REDACTED] indicates that the advertised position is an "experienced" position, and seeks an individual who will perform duties "[u]nder limited supervision." The AAO notes that in a Level I positions (such as the proffered position), "employees work under close supervision and receive specific instructions on required tasks." Further, this advertised position requires a "[m]inimum [of] 5 years clinical research and regulatory experience." Similarly, the Clinical Research Nurse Manager at [REDACTED] is described as an "experienced" position in which {t}he

incumbent will provide consistent leadership of the day-to-day operations of the clinical research program." The AAO notes that an employee in a Level I entry level position "perform[s] routine tasks that require limited, if any, exercise of judgment." This advertised position also requires six years of experience *in addition to* a bachelor's degree. Thus, these advertised positions do not appear parallel to the proffered position, which the petitioner designated as a Level I entry level position on the LCA.

In addition, the AAO notes that none of the postings contain sufficient information regarding the advertising entities such that the AAO can ascertain if they are similar to the petitioner. For the petitioner to establish that organizations are similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. As previously discussed, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). In the instant case, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

The AAO reviewed all of the advertisements submitted by the petitioner in response to the RFE.¹² However, as the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹³

¹² The AAO notes that the petitioner submitted additional job postings on appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for failing to previously provide the documentation. Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal.

¹³ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is

Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO acknowledges that the petitioner and counsel may believe that the proffered position is so complex and/or unique that it can be performed only by an individual with at least a bachelor's degree. However, under the petitioner's own standards (although stated inconsistently), the petitioner does not claim that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent. In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted an investor fact sheet; a quarterly report; printouts from its website; printouts of an investor presentation; a list of the petitioner's publications; and a list of its clinical research team personnel. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of clinical research RN specialist.

More specifically, the petitioner fails to demonstrate how the duties of the proffered position as described in the record of proceeding require the theoretical and practical application of a body of highly specialized knowledge such that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties that it may believe are so complex or unique. While related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here. The petitioner makes various claims about the duties of the proffered position, but fails to explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment.

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").

The AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level at a Level I (entry level) wage. The wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Thus, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. In other words, the record lacks sufficiently detailed information to discern the proffered position as unique from or more complex than similar positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and prior experience working for the petitioner will assist her in carrying out the duties of the proffered position, and takes particular note of her academic degrees and professional experience. 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. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. 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 in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

On the Form I-129, the petitioner indicated that it was established in 1984 (approximately 27 years prior to the submission of the H-1B petition) and has 1,495 employees. In response to the RFE, and again on appeal, the petitioner stated it requires a bachelor's degree for the proffered position. In support of the assertion that the proffered position qualifies as a specialty occupation under this prong of the regulations, the petitioner submitted a list of its current clinical research team personnel, a position description of the proffered position,¹⁴ and a position description for a "Clinical Research Coordinator-FCI." The AAO first notes that evidence regarding *other positions* cannot be considered probative with regard to the issue of whether a bachelor's degree in a specific specialty is required for the *proffered position*. Further, the AAO notes that the position description for "Clinical Research Coordinator-FCI" states that a "Bachelor's degree or higher degree [is] required." The AAO observes that the position description does not state that a bachelor's degree in a *specific specialty* is required.

The AAO notes that the list of the petitioner's clinical research team personnel indicates that there are four Registered Nurses (including the beneficiary) serving on the team, all of whom hold bachelor's degrees. However, the list indicates that these positions are not the same position as the proffered position, and further, it does not state that any of these individuals hold degrees in a specific specialty.

In addition, the list includes an individual serving in the position of "Clinical Research Coordinator." The petitioner has not indicated the degree held by this individual. The AAO notes that although the proffered position was titled "Clinical Research RN Specialist" on the Form I-129,

¹⁴ The AAO again notes that the petitioner has provided various versions of the position description entitled "Fertility RN Clinical Research Coordinator," which counsel describes on appeal as "Job positing for this position from Petitioner." The AAO notes that the first version of this document stated the requirements for the position as "BS required." The second version submitted states "BSN required." No explanation for the discrepancy was provided.

the position description submitted in support of the instant petition is titled "Fertility RN Clinical Research Coordinator." The petitioner has not provided job descriptions for the various positions on its clinical research team such that the AAO can ascertain how the "Clinical Research Coordinator" differs from the proffered position.

The petitioner has not indicated that the proffered position is a new position, and has suggested that there are other similar positions in its organization, such as the "Clinical Research Coordinator-FCI." However, the petitioner has not established the similarities and differences in the position.

Moreover, the petitioner did not submit any documentation regarding its recruitment and hiring practices for the proffered position. The AAO again notes that the petitioner has been in business for over 25 years and has a staff of 1,495 employees. The petitioner did not provide an explanation as to why it declined to submit documentation of its hiring history. The limited evidence submitted is not persuasive in establishing that the proffered position qualifies as a specialty occupation under this criterion of the regulations.

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

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

The AAO acknowledges that the petitioner and counsel may believe that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. In support of the petition, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted investor fact sheets; a quarterly report; printouts from its website; printouts of an investor presentation; a list of the petitioner's publications; and a list of its clinical research team personnel. The AAO reviewed the documentation submitted by the petitioner but finds that it fails to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Biological Scientists, All Others," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is

simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

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

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