



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 21 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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.

Thank you,

Michael T. Kelly

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked approval of the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the matter will be remanded for further action consistent with the content of this AAO decision.

On the Form I-129 visa petition, the petitioner describes itself as a home health care company established in 2003. The H-1B petition approval that is the subject of the revocation action at issue had been granted for the petitioner to employ the beneficiary in a position to which it assigned the job title "director of clinical services," as a person classified as a nonimmigrant worker in an H-1B 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 revoked approval of the petition on the bases of her conclusions that the petitioner had failed to demonstrate: (1) that the position for which the petition was filed was actually other than a nursing position that does not qualify as an H-1B specialty occupation, and (2) that the petitioner submitted a valid labor condition application (LCA) when it filed the petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to revoke approval of the petition (NOIR); (3) counsel's response to the NOIR; (4) the director's letter revoking approval of the petition; and (5) the Form I-290B and supporting documentation. The AAO bases its decision upon its review and consideration of the totality of the record of proceeding as it is now constituted on appeal.

In general, the authority to revoke approval of an H-1B petition is found at 8 C.F.R. § 214.2(h)(11), which states, in pertinent part, the following:

Revocation of approval of petition.

(i) *General.*

(A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. . . .

(B) The director may revoke a petition at any time, even after expiration of the petition.

* * *

(iii) *Revocation on notice—*

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition. . . .; or
 - (2) The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section [that is, the regulations at 8 C.F.R. § 214.2(h)] or involved gross error.
- (B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. . . .

The Director's Revocation Decision Must Be Withdrawn, Because the NOIR was Inadequate

The AAO will now discuss its determination that the decision to revoke the approval of the petition must be withdrawn.

The record reflects that the director issued the NOIR, and ultimately revoked the petition's approval, on the basis of a memorandum sent by the United States Embassy in the Philippines to request initiation of petition-approval-revocation proceedings because of information gathered at a visa-application interview of the beneficiary on or around September 22, 2012. The record also reflects that, on the basis of that interview, the Embassy declined to approve the visa application and sent the aforementioned memorandum to U.S. Citizenship and Immigration Services (USCIS) informing USCIS of the Embassy's action and the underlying reasons for it.

However, the NOIR did not communicate whatever particular information in the Embassy's letter led the service center to generate the NOIR. Further, the NOIR does not indicate any other grounds for its issue other than the aforementioned Embassy letter, the contents of which were not revealed to the petitioner in any substantive detail.

The director did not communicate any details regarding how the Embassy had arrived at the conclusions that the NOIR attributed to the Embassy's letter. Additionally, the AAO notes that the record indicates that a copy of the Embassy letter was not provided to the petitioner.

The AAO finds that the bases stated in the NOIR for initiating the revocation proceedings – and, therefore, that were noticed to the petitioner as the negative information which it would have to overcome – were no more than generalized statements of the adverse conclusions that the NOIR attributed to the U.S. Embassy memorandum (no copy of which was provided with the NOIR).

The AAO further finds that the NOIR also did not convey the particular facts that the Embassy's letter stated as the reasons for its request for approval-revocation action.

Also, the AAO finds that, in the response to the NOIR, both counsel and the petitioner asserted, correctly, that the NOIR did not inform the petitioner as to whatever specific adverse information the Embassy alleged as having arisen during the Embassy interview with the beneficiary.

The AAO notes that the revocation-on-notice regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B) contemplates that the NOIR initiating approval-revocation procedures “shall contain a detailed statement of the grounds for the revocation.” It should be sufficiently factual to put the petitioner on notice as to what it must rebut.

The AAO finds that the NOIR failed to “contain a detailed statement of the grounds for the revocation.” Consequently, the director's decision to revoke the approval of the petition will be withdrawn for this reason.

The AAO also finds that the documentation submitted on appeal (and in particular the statement submitted by the beneficiary with regard to the Embassy interview and also the statement submitted by the petitioner's Executive Vice president) sufficiently addressed and rebutted the cursory and superficial extent to which the content of the Embassy letter – specifically identified by USCIS as the only grounds for the revocation action – was conveyed to the petitioner. Accordingly, the grounds of the revocation – to the extent that notice of them was provided to the petitioner - were overcome.

The Director Should Issue a New NOIR

However, approval of the petition cannot be reinstated at this time, because the issuance of new NOIR is in order.

As it appears that the grounds so generally and inadequately stated in the initial, defective NOIR may constitute grounds for revocation-on-notice proceedings - that is, if they are communicated in “detailed statement of the grounds for the revocation” - it behooves the director to issue a new NOIR that would, this time, “contain a detailed statement of the grounds for the revocation” that will allow the petitioner a reasonably informed opportunity to rebut them. The new NOIR should,

therefore, communicate to the petitioner the basic factual information that leads the director to issue the NOIR.

Thus, the AAO is remanding the petition for the service center director to again initiate revocation-upon-notice proceedings, by issuing an appropriately drafted NOIR.

As will be discussed below, the new NOIR should also include notice of an additional ground for revocation, namely, that it appears that the petition was approved in violation of the H-1B specialty occupation requirements at 8 C.F.R. § 214.2(h), as it appears that the evidence of record before the director when the petition was approved was not sufficient to establish the proffered position as a specialty occupation.

Grounds to be Specified in the New NOIR

A. The Adverse Information in the Embassy Memorandum

As already noted above, the NOIR should be framed so as to “contain a detailed statement of the grounds for revocation” that are stated in the aforementioned Embassy letter. In this regard, the AAO sees no prohibition against the NOIR’s closely paraphrasing, or even directly quoting, whatever statements in this particular Embassy letter the director considers as bases for revocation action.

B. Apparent Failure to Establish the Proffered Position as a Specialty Occupation.

As will be discussed below, the new NOIR should note that the director and the petitioner each erred to the extent that they assumed that Medical and Health Services Managers comprise an occupational group for which entry normally requires at least a bachelor’s degree, or the equivalent, in a specific specialty.

It appears that the petition was approved on an erroneous basis, namely, that the proffered position’s inclusion within the Medical and Health Services Managers occupational classification was, in itself, sufficient to establish that particular position as one that normally requires at least a bachelor’s degree, or the equivalent, in nursing or another specific specialty.

Thus, as the petition characterized the proffered position as a Medical and Health Services Managers position it behooved the petitioner to establish that actual performance of the proffered position required the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty, as is required by the statutory and regulatory definitions of “specialty occupation” at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). However, it appears that the director approved the petition on the erroneous basis that a position’s inclusion within the Medical and Health Services Managers occupational category was sufficient in itself to establish it as a specialty occupation position.

Accordingly, as is discussed below, it appears also that the petition's approval should be subject to revocation-on-notice action because it appears that the evidence of record at the time of the petition's approval did not establish the proffered position as a specialty occupation.

Thus, this aspect of the record of proceeding indicates that the new NOIR should also include as a ground for revocation that the petition appears to have been approved without sufficient evidence to establish the proffered position as a specialty occupation. Such an erroneous approval would be a basis for revocation-on-notice under the provision at 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), that is, as an instance where "approval of the petition violated paragraph h of this section [(that is, the regulations at 8 C.F.R. § 214.2(h) governing H-1B specialty occupation positions)]."

The AAO will now discuss why it appears that the evidence in the record of proceeding at the time of the petition's approval actually was not sufficient to establish the proffered position as a specialty occupation.

To meet its burden of proof with regard to establishing the proffered position as a specialty occupation, the petitioner had to establish that the employment it was offering to the beneficiary met 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 stating additional requirements that a position must meet, supplementing 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 simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty

occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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.¹

The petitioner has tried to align the proffered position with the Medical and Health Services Managers occupational classification as it is discussed in the "Medical and Health Services Managers" chapter as they are outlined in the *Handbook*. In relevant part, the *Handbook* summarizes the duties typically performed by medical and health services managers as follows:

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

¹ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are from the 2012-13 edition available online.

- 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. The following are some examples of types of medical and health services managers:

* * *

Clinical managers manage a specific department, such as nursing, surgery, or physical therapy and have responsibilities based on that specialty. Clinical managers set and carry out policies, goals, and procedures for their departments; evaluate the quality of the staff’s work; and develop reports and budgets.

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 June 10, 2013). The *Handbook* states the following with regard to the educational requirements necessary for entrance into the 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.

* * *

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 *Handbook* specifically states that although most² medical and health services managers possess at least a bachelor’s degree, requirements vary by facility, and that in some facilities on-the-job

² 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 manager positions require at least a bachelor’s degree, it could be said that “most” medical and health services manager 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.

experience is an acceptable substitute for formal education. Such findings do not lead to a conclusion that a bachelor's degree, or equivalent, in a specific specialty, is a normal minimum entry requirement.

Next, the AAO finds that DOL's Occupational Information Network (O*NET OnLine) also does not establish that the proffered position satisfies the first criterion 8 C.F.R. § 214.2(h)(4)(iii)(A). O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O*NET OnLine's Job Zone assignments 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. Also, the Specialized Vocational Preparation 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 the issue presented on appeal.

Nor is the AAO persuaded by the petitioner's citation to the DOL's *Dictionary of Occupational Titles* (the *DOT*) and its assignment of an SVP rating of 8 to medical and health services managers. The *DOT* does not support the assertion that assignment of an SVP rating of 8 is indicative of a specialty occupation, which is obvious upon reading Section II of the *DOT*'s Appendix C, Components of the Definition Trailer, which addresses the Specialized Vocational Preparation (SVP) rating system,³ and which states, in pertinent part, the following:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around

³ U.S. Department of Labor, Office of Administrative Law Judges, OALJ Law Library, *Dictionary of Occupational Titles*, <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM>.

- a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: **The levels of this scale are mutually exclusive and do not overlap.**

Thus, an SVP rating of 8 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *DOT* information is not probative of the proffered position being a specialty occupation.

The AAO also notes that the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that a position's inclusion within the Medical and Health Services Managers occupational category is 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."

Thus, as it appears that the evidence in the record of proceeding at the time of the petition's approval did not establish that a baccalaureate degree, or its equivalent, in a specific specialty was normally the minimum requirement for entry into the particular position that was the subject of this

petition, it appears that the petitioner had not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, it appears that the petitioner had 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)).

As already discussed, the petitioner had not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Nor had the petitioner submitted evidence that an industry's professional associations have made such a degree in a specific specialty a minimum requirement for entry. Nor had the petitioner submitted letters or affidavits from firms or individuals in the industry attesting that they routinely employ and recruit only degreed individuals.

The job vacancy announcements submitted by counsel also did not satisfy the first alternative prong described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, counsel did not submit any evidence to demonstrate that these advertisements were from companies "similar" to the petitioner in any substantial sense, such as size, scope, and scale of operations, business efforts, and expenditures, or other fundamental characteristics.

Nor did the petitioner submit any evidence regarding how representative these advertisements were of their firms' usual recruiting and hiring practices. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).⁴

⁴ 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> (accessed June 10, 2013). Based upon the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the few vacancy announcements it submits 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, it also appears that the petitioner had 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 observes that it appears that the evidence in the record of proceeding at the time of the petition's approval 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."

It appears that, to the extent to which they were described and developed in the record of proceeding upon which the petition's approval was based, both the proposed duties and the proffered position that they comprised were presented in relatively abstract terms of generalized functions that did not establish how, if at all, the proffered position exceeded in complexity or uniqueness medical and health services manager positions which were held by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

Further, the descriptions of the proffered position and its constituent duties did not specifically identify and persuasively establish any aspects of this particular proffered position that would invest it with the relative level of complexity or uniqueness required to satisfy this criterion. Again, then, it appears that the record before the director at the time that the petition was approved lacked sufficiently detailed information to distinguish the proposed position as more complex or unique than other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

For the reasons discussed above, it appears that, at the time the petition was approved, the petitioner had not established that the particular position for which it filed this petition was so complex or unique that it could only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. Consequently, it appears that the petitioner had not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn 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 the job announcements supported the finding that the job of a medical and health services manager (or, as titled by the petitioner, director of clinical services) for a 21-employee home health care company required a bachelor's or higher degree *in a specific specialty* or its equivalent, it cannot be found that such a limited number of postings 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 normally require at least a baccalaureate degree *in a specific specialty* for entry into the occupation in the United States.

To merit approval of a petition under 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 proposed position. In the instant case, the record does not establish a prior history of the petitioner limiting recruiting and hiring for the proposed position to only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

While a petitioner may believe and 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 actual performance of the proffered position does not in fact require such a specialty degree or its equivalent, the position 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").

In any event, as the record of proceeding upon which the approval of the petition was based contained no evidence of the petitioner having an established 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, it appears that there was no basis for finding, at the time of the petition's approval, that the petitioner had satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, it appears that the evidence in the record of proceeding upon which the petition was approved had not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

This particular criterion requires the petitioner to establish that the nature of its proposed 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 the specialty.

It appears that the record of proceeding before the director at the time that the petition was approved did not contain evidence establishing the substantive nature of the proposed duties as they would actually be performed, any particular relative level of complexity or specialization inherent in that nature, or any particular level of knowledge in any specific specialty that the nature of the duties would require for the performance of the position.

Accordingly, it appears that the evidence in the record of proceeding before the director at the time of the petition's approval also did not establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Thus, the new NOIR should also notify the petitioner that it appears that the petitioner had not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A); that, therefore, it appears that there was no basis in the record of proceeding for finding that the proffered position was a specialty occupation; and that, consequently, it also appears that the approval of this petition violated the specialty occupation regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A) and therefore should be revoked pursuant to the provision at 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

The NOIR should, of course, include an explanation, such as the AAO provided above, that will be sufficient to apprehend the director's substantive foundation for contemplating revocation of the petition's approval on the ground that the petition had been approved despite insufficient evidence to establish the proffered position as a specialty occupation.

C. Any Other Grounds that the Director May Determine Appropriate

Of course, nothing in this decision should be construed as constraining the director's independent discretion and latitude in determining additional grounds for initiating revocation-on-notice proceedings that are conducted in accordance with the provisions at 8 C.F.R. § 214.2(h)(11).

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 been met in part. Accordingly, the director's decision will be withdrawn, and the matter will be remanded for entry of a new decision, after action consistent with the content of this AAO decision.

ORDER: The director's revocation decision dated June 14, 2010 is withdrawn, and the matter is remanded to the director for further action consistent with the content of this AAO decision.

**FURTHER
ORDER:**

On remand, therefore, the director shall issue a new decision - to revoke or to not revoke approval of this petition - upon considering all relevant evidence that is before him or her after issuing a new NOIR that contains a detailed statement of each of the grounds for the intended revocation, and after affording the petitioner 30 days in which to submit evidence in rebuttal, all in compliance with the revocation-on-notice provisions at 8 C.F.R. § 214.2(h)(11).