



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **OCT 28 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:  
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
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.

On the Form I-129 visa petition, the petitioner describes itself as a health care services provider established in 1972. In order to employ the beneficiary in what it designates as a health education manager 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, 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. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. 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's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the 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.

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), 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.

In the petition signed on September 17, 2012, the petitioner indicates that it is seeking the beneficiary's services as a health education manager on a full-time basis at the rate of pay of \$45,000 per year. According to the petitioner, the beneficiary will serve "as an H-1B nonimmigrant of distinguished merit and ability."<sup>1</sup> In the September 17, 2012 letter of support, the petitioner states that it "requires the services of a Health Education Manager to continue to oversee and ensure the quality of health care services offered by the staff members of the [petitioner's] clients." In addition, the petitioner states that the beneficiary will be responsible for the following duties:

The beneficiary will be responsible for the overall management, planning, development, implementation, evaluation, and improvement of health education programs for the [petitioner]. In connection therewith, the beneficiary will arrange and perform annual clinical assessments and evaluations of medical staff to ensure that all medical and paramedical staff are equipped with the requisite clinical skills necessary to carry out medical services and health education programs. The beneficiary will implement programs for continued training in clinical areas including education in state-of-the-art techniques, modern medical equipment, medical advances and medical technology.

The responsibilities of the proffered position will continue to include the following: directing member education, nursing placement services, and weight management programs; integrating services and programs with strategic organizational goals and objectives; directing the design, implementation, and evaluation of multi-disciplinary health education programs which improve accessibility, increase member satisfaction,

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<sup>1</sup> Prior to April 1, 1992, the H-1B category applied to persons of "distinguished merit and ability." The standard of "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions or who is prominent in his or her field." On October 1, 1991, the *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description; however, the implementation of this change was delayed until April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 12, 1991, restored the standard of "distinguished merit and ability" to the H-1B category, but only as the qualifying standard for fashion models. There is no evidence in the record of proceeding that the beneficiary will serve as a fashion model.

improve healthcare outcomes and control costs in alignment with the [petitioner's] strategic goals and objectives; ensuring that programs are consistently delivered across the client base; identifying health education strategies, interventions and resources allocation; defining, developing, and implementing measures for evaluating in-house and external intervention/education services; ensuring active dialogue between physicians and staff to facilitate program development; consulting with other health education staff and managers to assure education programs are consistent, high quality, and serve the needs of customers; and ensuring all programs comply with the requirements of regulatory agencies.

The beneficiary will design, plan, implement, and manage educational training programs to ensure that all employees of the [petitioner] are at an adequate level of competence and quality. In connection therewith, she will determine the need for educational and training programs, assess the optimal programs for the [petitioner], prepare curricula and access outside resources for training programs, and establish training programs at the [petitioner]. The beneficiary must ensure that all personnel of the [petitioner] are adequately trained in emergency care methods and procedures, state-of-the-art technologies, quality assurance, the use of cutting edge medical equipment, and procedures in accordance with regulatory requirements. The education and training programs must include courses in diet, first aid, modern medical technologies, nutrition, and emergency medical care.

In the proffered position, the beneficiary will continue to be responsible for managing the training of personnel and delivery of educational programs on health services issues. She will create and implement educational programs to train nurses, physical therapists, medical technicians, and other medical paraprofessionals. The educational programs will include vocational training for new nurses, physical therapists, medical technicians, occupational therapists, and continuing education modules on various health services issues for all of the medical professionals and paraprofessionals employed by the [petitioner]. In connection therewith, the beneficiary will devise curricula, write classroom and training sessions, and prepare examinations and practical tests of proficiency in health care, nursing, physical therapy, occupational therapy, exercise, nutrition, medical technology, and emergency care procedures and operations.

Further, the beneficiary will research, identify, and implement best practices; develop systems to identify, achieve and manage quality and performance improvements and evaluate programs and rapidly disseminate newly developed courses and successful existing programs; lead or make significant contributions to high level multidisciplinary work teams to achieve quality outcomes; direct the production, presentation and dissemination of proposals, reports and position papers; assure education interventions and programs comply with regulatory agency requirements; develop and manage budgets and resource allocations; and monitor financial performance and identify and implement strategies to reduce costs and improve quality of programs/service; determine the appropriate staff mix for the department and develop processes to screen, interview, hire, train and maintain the competency of medical staff.

Further, the petitioner states, "It is essential that the candidate for the position of Health Education Manager have a bachelor's degree in Health Education, Nursing, or a related discipline."

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcripts, as well as a credential evaluation from [REDACTED]. The evaluation states that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in nursing science.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Health Educators" – SOC (ONET/OES Code) 21-1091, at a Level II wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 4, 2012. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

On March 1, 2013, the petitioner responded to the RFE. In a letter dated February 18, 2013, the petitioner provided additional information regarding the proffered position, along with the percentage of time the beneficiary would spend performing the duties of the position, as follows:

**10%**            **observation and fact finding**    conduct observation to determine if staff has been adequately trained in emergency care methods and procedures, state-of-the-art technologies, quality assurance, the use of cutting edge medical equipment, and procedures in accordance with regulatory requirements. Collect data through her observation and through performance record review as well as appraisal and assessment tests to obtain grades or levels of staff understanding. Conduct fact finding of causes of the below/under standard results.

**25%**            **manage health education programs**    implement and manage health education programs; coordinate healthcare quality work of health services managers, clinical coordinators, registered nurses, license practical nurses, physical therapists, occupational therapists, dieticians and other medical professionals; record observations; prepare statistical surveys of medical/data; implement changes to healthcare programs; ensure quality levels of healthcare. Assist higher management in the interpretation, development and implementation of [the petitioner's] personnel and departmental policies and procedures. In the management of programs, always develop and maintain policies and procedures for departmental functions.

**15%**            **hiring and evaluation**    participate in the hiring, training and performance evaluation of assigned staff according to [the petitioner's] policies and procedures. Prepare performance evaluations and

recommends appropriate actions for staff relative to needs for general and specific training.

**15%**      **health education materials development**    devise curricula, write classroom and training sessions, and prepare examinations and practical tests of proficiency in health care, nursing, physical therapy, occupational therapy, exercise, nutrition, medical technology, and emergency care procedures and operations. The educational programs will include vocational training for new nurses, physical therapists, medical technicians, occupational therapists, and continuing education modules on various health services issues for all of the medical professionals and paraprofessional staff. Each performance appraisal, assessment, or proficiency test is customized for each department/unit requirement in line with the [petitioner's] unified standard.

**25%**      **education and training**    determine personnel requirements; review personnel training programs; train staff in health care quality assurance issues and procedures; participate in programs geared to new staff members and advanced classes in quality assurance matters; attend seminars and conferences in healthcare quality assurance; keep apprised of developments in the field of quality assurance management to maintain current; work in conjunction with Education Department to develop and present training programs and resource materials for staff development, provider education, and awareness. The education and training programs must include courses in diet, first aid, modern medical technologies, nutrition, and emergency medical care.

**10%**      **methodology and standard**    develop creative and innovative teaching methodologies and materials to improve effectiveness of trainings and assessment tests to obtain more optimum quantitative form to better reflect staff's understanding of the [petitioner's] policies, best practice, and technical standards in the delivery of medical services.

Elicit input from each department regarding specific requirement and educational need. Work together with health service manager in reviewing and improving unit and overall standards of services.

In addition, the petitioner submitted documents in support of the petition, including: (1) job vacancy announcements; (2) a copy of the Employment Contract between the petitioner and the beneficiary, effective February 26, 2013; (3) a Letter of Employment from the petitioner, dated February 22, 2013; (4) pay statements issued to the beneficiary; and (5) a Form W-2, Wage and Tax Statement, issued to the beneficiary for 2011 and for 2012.

The director reviewed the information provided by the petitioner to determine whether the petitioner had established eligibility for the benefit sought. 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 March 28, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a brief. In the brief, counsel references the preponderance of the evidence standard.

The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

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The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

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Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 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; *see e.g.*,

*Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look 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. 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 reviewed the record in its entirety and will make some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.<sup>2</sup>

Upon review of the record of proceeding, the AAO notes that the petitioner has provided inconsistent information regarding the requirements of the proffered position. Initially, the petitioner stated that "[i]t is essential that the candidate for the position of Health Education Manager have a bachelor's degree in Health Education, Nursing, or a related discipline." However, in the February 18, 2013 letter, submitted in response to the RFE, the petitioner stated, "The academic qualifications of these professionals and their employment as Health Education Managers with [the petitioner] confirm the [petitioner's] requirement that individuals serving as Health Education Managers should possess at least a bachelor's degree in Health Care Administration, Healthcare Management, or a related field." No explanation for the variance was provided by the petitioner.<sup>3</sup> Further, the record of proceeding does not indicate that the beneficiary possesses a bachelor's degree in health care administration or healthcare management. Accordingly, the beneficiary is not qualified to serve in the proffered position based upon these requirements.

Further, the AAO observes that a crucial aspect of this matter is whether the petitioner has sufficiently described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so. The petitioner has provided lists of general job duties, without detailing the actual work the beneficiary will perform on a day-to-day basis. That is, the descriptions fail to provide the beneficiary's specific job duties and responsibilities in the proffered position.

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<sup>2</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>3</sup> The petitioner has provided inconsistent information as to the academic 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).

The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will spend her time "observ[ing] and fact finding." For this duty, she will "conduct observation [sic]"; "collect data through her observation"; and "conduct fact finding." The petitioner's description is insufficient to convey the actual tasks involved in performing this duty. The words "conducting," "observing" and "fact finding" could cover a range of activities, and do not provide insight into the beneficiary's day-to-day work. This is also illustrated by the petitioner's statement that the beneficiary will "implement and manage health education programs." The statement fails to delineate the actual work the beneficiary will perform. Additionally, the petitioner claims the beneficiary will "participate in the hiring, training and performance evaluation of assigned staff according to [the petitioner's] policies and procedures." The petitioner did not sufficiently detail how the beneficiary will "participate" or describe her role in the process. The petitioner claims the beneficiary will "determine personnel requirements" but fails to describe how she will make such determinations. The petitioner also asserts that the beneficiary will "manage, plan, develop [sic], implement, evaluate, and improve health education programs for the [petitioner]," but fails to identify specific tasks related to these duties. Upon review, while the petitioner provides a litany of job duties, it must be noted that the petitioner fails to illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

That is, while the petitioner has identified its proffered position as that of a health education manager, the description of the beneficiary's duties, as provided by the petitioner, lacks the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. In the instant case, the petitioner has provided a long list of duties, however, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. The job descriptions fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

In the instant case, the petitioner has titled the proffered position as a health education manager and repeatedly states that the beneficiary will serve in a managerial role; however, the petitioner has not indicated who will relieve the beneficiary from performing non-qualifying duties (and the petitioner has not provided an explanation as to how the beneficiary will be relieved from performing non-qualifying duties). Thus, without further information, it appears that the beneficiary will perform all of the functions, including those that would be normally associated with subordinate workers, and that, in

the absence of such subordinates, would preclude the beneficiary from functioning in a primarily managerial role. Generally, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial capacity. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Moreover, based upon a review of the record of proceeding, the AAO finds that there are additional discrepancies and inconsistencies with regard to the proffered position that preclude the approval of the petition. For instance, there are discrepancies between what the petitioner claims about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

As previously stated, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Health Educators" - SOC (ONET/OES Code) 21-1091. The wage level for the proffered position in the LCA corresponds to a Level II (qualified). The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.<sup>4</sup> The LCA was certified on September 6, 2012. The petitioner signed the LCA on September 17, 2012. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (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.

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.<sup>5</sup> The U.S.

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<sup>4</sup> The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library (OWL) for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatabase.com/>.

<sup>5</sup> 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

Department of Labor (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.

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

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

The petitioner claims that the duties of the proffered position are complex, unique and/or specialized.<sup>6</sup>

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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.

<sup>6</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." Level III and a Level IV wage rates are described as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or

For instance, the petitioner states that the job duties of the proffered position require highly specialized knowledge. The petitioner further states that "the proffered position of Health Education Manager is complex and specialized." In addition, the petitioner claims that "the beneficiary will be responsible for the overall management, planning, development, implementation, evaluation, and improvement of health education programs for the [petitioner]." Moreover, the petitioner asserts that the beneficiary will "be responsible for managing the training of personnel and delivery of educational programs on health services issues." According to the petitioner, the beneficiary will bring "tremendous expertise in the management of healthcare education." The petitioner claims that "the beneficiary will be responsible for managing the training of personnel and delivery of educational programs" and that she will also create and implement programs. Additionally, the petitioner reports that the beneficiary will "lead or make significant contributions to high level multidisciplinary work teams." Moreover, the petitioner indicates that the proffered position "involves the analysis and application of advanced technical, quantitative, and analytical concepts." Additionally, the petitioner states that the beneficiary will be responsible for the "overall management, planning, development, implementation, evaluation, and improvement of health education programs for [the petitioner]." The petitioner continues by stating that "the beneficiary will continue to be responsible for handling the analytical, technical, quantitative, and managerial duties of a Health Education Manager."

The petitioner claims that the beneficiary "will continue to supervise the completion of documentation deficiencies and coordinate the assignment of appropriate clinician to cases" and "will continue to oversee records supervision and manage audits of charts to ensure completeness and compliance with Medicare guidelines." In addition, the petitioner asserts that the beneficiary "will also continue to direct the orientation of new field staff." The petitioner further states that the beneficiary will "participate in the hiring, training and performance evaluation of assigned staff according to [the petitioner's] policies and procedures." Moreover, the petitioner claims that the beneficiary "will prepare evaluations and recommends [sic] appropriate actions for staff relative to needs for general and specific training."

The petitioner also claims that "[t]he job duties of the proffered position are highly technical." In addition, the petitioner repeatedly claims the duties of the position are highly complex and highly specialized. According to the petitioner, the proffered position requires "expertise in healthcare services management, healthcare program planning, clinical medical care, health education, discharge planning, and the review and analysis of medical records and insurance requirements." Moreover, the petitioner claims that she "will provide medical and clinical expertise specifically for development of assessment tools."

The AAO notes that this characterization of the position and the claimed duties, responsibilities and requirements conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low-level position relative to others within the occupation. In

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supervisory responsibilities.

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have attained, either through education or experience, a good understanding of the occupation. Furthermore, she will be expected to perform moderately complex tasks that require limited judgment.

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) of the Act, 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.

Here, the prevailing wage on the LCA corresponds to a Level II for the occupational category of "Health Educators" for Queens County (Flushing, New York).<sup>7</sup> Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$48,235 per year for a Level III position, and \$56,680 per year for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct 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 wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, 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, even if it were determined that the petitioner overcame the director's ground for denying the petition (which it has not), for this reason also the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

The AAO notes that 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. 591-92.

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 of a labor condition application in an occupational classification does not constitute a determination by that agency that the

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<sup>7</sup> For additional information regarding the prevailing wage for health educators in Queens County, *see* the All Industries Database for 7/2012 - 6/2013 for Health Educators at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=21-1091&area=35644&year=13&source=1> (last visited October 23, 2013).

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 the content of 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 an LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to 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.

The statements regarding the claimed level of complexity, independent judgment and knowledge required for the proffered position, along with the petitioner's claimed requirements, are materially inconsistent with the certification of the LCA for a Level II position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided 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 a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved for this reason.

The AAO will now 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, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis into the record of

proceeding regarding the beneficiary's proposed employment.

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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>8</sup> As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Health Educators."

The AAO reviewed the chapter of the *Handbook* entitled "Health Educators" but is not persuaded that the duties of the proffered position are encompassed by the duties of this occupational classification.<sup>9</sup> The *Handbook* describes the duties of "Health Educators" in the subsection entitled "What Health Educators Do" and states, in part, the following about the duties of this occupation:

Health educators teach people about behaviors that promote wellness. They develop programs and materials to encourage people to make healthy decisions.

**Duties**

Health educators typically do the following:

- Assess the needs of the people they serve
- Develop programs and events to teach people about health topics

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<sup>8</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online. The AAO hereby incorporates the chapter of the *Handbook* regarding the occupational category "Health Educators" into the record of proceeding.

<sup>9</sup> For additional information regarding the occupational category "Health Educators," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Health Educators, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-1> (last visited October 23, 2013).

- Create and distribute health-related posters, pamphlets, and other educational materials
- Evaluate the effectiveness of programs and materials
- Help people find health services or information
- Supervise staff who implement health education programs
- Collect and analyze data to learn about their audience and improve programs
- Advocate for improved health resources and policies

The duties of health educators vary based on where they work. Most work in health care facilities, colleges, public health departments, nonprofits, and private businesses. Health educators who teach health classes in middle and high schools are considered teachers. For more information, see the profiles on middle school teachers and high school teachers.

In *health care facilities*, health educators often work one-on-one with patients and their families. They teach patients about their diagnoses and about necessary treatments or procedures. They direct people to outside resources, such as support groups and home health agencies. Health educators in health care facilities also help organize health screenings, such as blood pressure checks, and health classes on topics such as correctly installing a car seat. They also train medical staff to interact better with patients. For example, they may teach doctors how to explain complicated procedures to patients in simple language.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Health Educators, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-2> (last visited October 23, 2013).

In the section of the *Handbook* entitled "Work Environment," the *Handbook* states that health educators work in the following industries:

Health educators held about 63,400 jobs in 2010. Health educators work in a variety of settings, including hospitals, non-profit organizations, government, doctors' offices, private business, and colleges.

Although most health educators work in an office, they may spend a lot of time away from the office to carry out programs or attend meetings.

The following industries employed the most health educators in 2010:

Health care	37%
Government	21
Religious, grantmaking, civic, professional,	15

and similar  
organizations

Social  
assistance 12

Educational  
services;  
state, local,  
and private 9

*Handbook*, 2012-13 ed., Health Educators, on the Internet at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-3> (last visited October 23, 2013).

In the Form I-129 petition, the petitioner describes itself as a health care services provider with 350 employees. The AAO notes that in the Form I-129 the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 621610 – "Home Health Care Services."<sup>10</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments primarily engaged in providing skilled nursing services in the home, along with a range of the following: personal care services; homemaker and companion services; physical therapy; medical social services; medications; medical equipment and supplies; counseling; 24-hour home care; occupation and vocational therapy; dietary and nutritional services; speech therapy; audiology; and high-tech care, such as intravenous therapy.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 621610 – Home Health Care Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited October 23, 2013).

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category for health educator positions. The *Handbook* indicates that the academic background for this occupation is in health education or health promotion. Further, according to the *Handbook*, programs in health education and health promotion teach students theories and methods of health education and help students gain the knowledge and skills to develop health education materials and programs. The *Handbook* continues by stating that some employers hire only health educators who are Certified Health Education Specialists (CHES) and that such certification offered by the National Commission for Health Education Credentialing, Inc. There is no indication in the record of proceeding that the petitioner requires an individual to be certified under CHES. Moreover, although a beneficiary's credentials to perform a particular job are relevant only

<sup>10</sup> NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited October 23, 2013).

when the job is found to be a specialty occupation, the AAO notes that the beneficiary does not possess a degree in health education or health promotion.<sup>11</sup>

Upon review of the record of proceeding and the chapter regarding "Health Educators" in the *Handbook*, the AAO finds that the petitioner has not provided sufficient evidence to demonstrate that its health education manager position has the same or similar duties, tasks, knowledge, work activities, requirements, etc. that are generally associated with "Health Educators." For example, the petitioner does not claim that the beneficiary will assess the needs of the people the petitioner serves. In addition, the petitioner does not claim that the beneficiary will develop programs and events to teach people about health topics. Further, the petitioner does not assert that the beneficiary will create and distribute health-related posters, pamphlets, and other educational materials. The petitioner also does not claim that the beneficiary will help people find health services or information. Moreover, the petitioner does not claim that the beneficiary will work one-on-one with patients and their families, and teach patients about their diagnoses and about necessary treatments or procedures. Further, the duties of the proffered position do not indicate that the beneficiary will help organize health screenings, such as blood pressure checks, and health classes on topics such as correctly installing a car seat. The duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may perform a few tasks in common with this occupational group, but not that the beneficiary's duties would constitute a health educator position, and not that they would require the range of specialized knowledge that characterizes this occupational category.

As the petitioner has not demonstrated that the proffered position falls under the occupational category of "Health Educators," the AAO will not further address this occupational category as it is not relevant to this proceeding.

On appeal, counsel submitted an Occupational Information Network (O\*NET) OnLine Summary Report and a printout of the FLC Data Center, Online Wage Library for the occupational category "Health Educators." However, as discussed above, the petitioner has not sufficiently established that the duties and responsibilities of the proffered position fall under this occupational category. Nevertheless, the AAO reviewed the documentation in its entirety but finds that it is insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a

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<sup>11</sup> As previously discussed, the petitioner provided inconsistent information regarding its requirements for the proffered position. However, within the record of proceeding, the petitioner indicated that a degree in nursing is acceptable for the proffered position. Furthermore, the petitioner claims the beneficiary is qualified to serve in the proffered position because she possesses a degree in nursing. The narrative of the *Handbook* does not report that a degree in nursing prepares an individual for entry into the occupational category "Health Educators." Rather, the *Handbook* specifically states that a degree in health education or health promotion is acceptable for this occupational category.

Notably, the chapter of the *Handbook* regarding nurses indicates that "[s]ome nurses have jobs in which they do not work directly with patients . . . [f]or example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors." See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Registered Nurses, on the Internet at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-2> (last visited October 23, 2013).

bachelor's degree in specific specialty, or its equivalent, for entry into the occupation. The occupational category "Health Educators" has a designation of Job Zone 4. The O\*NET OnLine Help Center indicates that occupations with this designation require considerable preparation. See the O\*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>. It does not, however, demonstrate that a bachelor's degree in a *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). That is, the Help Center's discussion does not indicate that these occupations (designated as Job Zone 4) have any requirements for particular majors or academic concentrations. See *id.* Therefore, the O\*NET information is not probative of the proffered position qualifying as a specialty occupation.

The AAO observes that in the February 18, 2013 letter, submitted in response to the RFE, the petitioner claims that USCIS has previously approved H-1B cases for the proffered position of health education manager. Notably, the petitioner did not submit copies of the petitions and supporting documents. If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

As the record of proceeding does not contain copies of the petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, the AAO was not required to request and/or obtain a copy of the petitions cited by the petitioner.

Nevertheless, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. 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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will review 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 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1102).

Here and as already 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 of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement. The petitioner did not submit any letters or affidavits from firms or individuals in the industry.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided several job postings in response to the RFE. The AAO reviewed the evidence submitted, but finds that the documentation does not establish that the petitioner has met this prong of the regulations.

In the Form I-129 petition, the petitioner describes itself as a health care services provider established in 1972, with 350 employees. The petitioner claims that it has a gross annual income of \$10 million. Although requested in the Form I-129 petition, the petitioner did not state its net annual income. As previously discussed, the petitioner designated its business operations under the NAICS code 621610 – "Home Health Care Services."

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation 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 the advertising 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.

The AAO reviewed the job advertisements submitted by the petitioner. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

For instance, the petitioner submitted a job posting for [REDACTED] (a staffing and recruiting firm) for which little or no information regarding the actual employer is provided. Consequently, the record is devoid of sufficient information regarding the advertising employer to conduct a legitimate comparison of the organization to the petitioner. Furthermore, it is noted that in response to the RFE, the petitioner states that "[REDACTED] and [REDACTED] business is not identical to [the petitioner]."

Additionally, the petitioner has not established that all of the advertisements are for parallel positions. Notably, the duties of some of the advertised positions are described in brief, general terms. Thus, it is not possible to determine such aspects as the day-to-day responsibilities, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from similar job titles, it is unclear whether the duties and responsibilities of these positions are the same or parallel to the proffered position.

Moreover, the AAO notes that it appears that the advertised positions may be more senior positions. The petitioner provided a job posting for a clinical educator position with [REDACTED], which requires a degree, a license as a registered nurse, and "[a]t least 5+yrs RN experience." A posting for the [REDACTED] states a requirement of a degree, a license, and "[f]ive years [of] clinical experience including two in home health." In addition, the petitioner submitted a posting for a manager – nurse education position with [REDACTED], which states that a "BSN and MS required" plus "[a]t least three years of progressive leadership experience in a hospital setting" and "[a]t least 5 years of clinical acute care nursing." The AAO reiterates its earlier comments and findings regarding the implications of the designation of the proffered position in the LCA as a Level II position. After reviewing the job postings, the AAO notes that without further clarification, the petitioner has not sufficiently established that the duties and responsibilities of all of the advertised

positions are parallel to the proffered position.

The AAO reviewed all of the advertisements submitted in support of the petition.<sup>12</sup> However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

It must be noted that even if all of the job postings indicated that a requirement of 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. *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").

Thus, based upon a complete review of the record, 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 for 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.

In the instant case, the AAO acknowledges that the petitioner may believe that the duties of the proffered position are complex or unique. However, 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. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

More specifically, the petitioner failed to demonstrate how the duties described require the theoretical

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<sup>12</sup> 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.

and practical application of a body of highly specialized knowledge such that a bachelor's 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 of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a health education manager 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 petitioner's proffered position.

This is further evidenced by the petitioner's designation of the proffered position under the occupational category "Health Educators" as a Level II position on the LCA, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. 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 instance, 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."<sup>13</sup>

Moreover, 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. 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.

The AAO observes that the petitioner has indicated that the beneficiary's educational background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not sufficiently 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. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this 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.

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<sup>13</sup> For additional information regarding wage levels as defined by DOL, 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

To merit approval of the petition under 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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

As previously noted, the petitioner claims that USCIS has previously approved H-1B cases for the proffered position of health education manager. However, the petitioner did not submit copies of the prior H-1B petitions and the respective supporting documents. As the record of proceeding does not contain sufficient evidence of the prior petitions to determine whether they are the same position, there are no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approval of the prior H-1B petitions were not warranted. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

In response to the director's RFE, the petitioner states that "[i]n recent years the [petitioner] has employed [redacted] and [the beneficiary] as Health Education Managers." In addition, the petitioner states that it "has not obtained permission from the other Health Education Manager, [redacted], to rerelease her documents for the purpose other than of her own, and therefore is not providing [redacted] documents." The petitioner further states that it "certifies that [redacted] also holds the equivalent of a Bachelor of Science degree in Nursing and is employed with the [petitioner] in an [sic] valid H1B nonimmigrant visa." The AAO observes that the petitioner did not submit the academic credentials of [redacted] e.g., copies diplomas, transcripts. As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Moreover, the petitioner stated in the Form I-129 petition that it has 350 employees and that it was established in 1972 (approximately 40 years prior to the submission of the H-1B petition). The petitioner did not provide the total number of people it currently or in the past has employed to serve in the proffered position. Consequently, it cannot be determined how representative the petitioner's claim regarding *one individual over a 40 year period* is of the petitioner's normal recruiting and hiring practices. The petitioner has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

The AAO reviewed the record of proceeding but finds that the petitioner has not provided sufficient 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 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.

The petitioner asserts 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. However, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. Further, there is a lack of evidence substantiating the assertions.

Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position. This designation is only appropriate for positions for which the petitioner expects the beneficiary to have a good understanding of the occupation to perform moderately complex tasks that require limited judgment relative to others within the occupation. The designation of the proffered position as a Level II position is not consistent with claims that the nature of the specific duties of the proffered position is

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specialized and complex. Without further evidence, it is simply not credible that the petitioner's proffered position is specialized and complex 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. As previously discussed, 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."

Upon review of the record, the AAO finds that the petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. 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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 (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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.