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U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **JUL 03 2014** 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 (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,

Handwritten signature of Ron Rosenberg in black ink.

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a community-based Chinese American health and human services organization with 85 full time equivalent employees,¹ established in 1975. In order to employ the beneficiary in what it designates as a full-time community health education coordinator position at a salary of \$52,000 per year,² 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 beneficiary earned a bachelor's degree in nursing from [REDACTED] in 2012, and she has been working for the petitioner in a period of "Optional Practical Training" granted pursuant to the F-1 nonimmigrant student status she was granted to undertake her studies in nursing.

The director denied the petition, concluding that the evidence of record fails to establish that the proffered position qualifies for classification as a specialty occupation.

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

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

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 624190, "Other Individual and Family Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, 624190 "Other Individual and Family Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> NAICS Search (last visited June 17, 2014).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Health Educators" occupational classification, SOC (O*NET/OES) Code 21-1091, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

II. THE PROFFERED POSITION AND ITS CONSTITUENT DUTIES

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Community Health Education Coordinator" on a full-time basis, with a focus on preventive and lifestyle-enhancing education, including a proper diet, healthy lifestyle choices, and disease prevention. In the initial support letter, the petitioner stated that the duties of the proffered position would include the following:

1. Develop and present health education and promotion programs, such as training workshops, conferences, and school presentations; organize community outreach activities to promote CSCLA Community Health Center's health campaigns, medical and general services.
2. Develop and maintain cooperative working relationships with other agencies and organizations interested in public health care.
3. Develop and oversee distribution of educational materials (*e.g.* reports, bulletins, articles and multimedia presentations) to address key health issues such as smoking, vaccines, proper diet, healthy lifestyle, behaviors that promote wellness, and other public health concerns, and programs, in Chinese and English, for CSCLA and partnering agencies.
4. Implement culturally and linguistically competent health education services to Chinese-speaking target population.
5. Work collaboratively with CSCLA departments and its partnering agencies to strategize and implement effective outreach methods targeting Chinese-speaking populations, and conduct outreach to and health workshops targeting mainly Chinese-speaking communities. Participate in and organize external outreach activities at local schools, health fairs, community festivals, local social service agencies, and other identified target areas.
6. Participate in and organize internal CSCLA outreach activities, and supervise staff in implementing health programs, objectives, and goals.
7. Provide counseling and support during health education and screening activities as needed. Assist in providing education, counseling, and support to direct patient care.
8. Collaborate with health specialists and civic groups to determine community health needs and the availability of services and to develop goals for meeting needs.

9. Conduct research, evaluations and studies to assess the quality and performance of health education programs, report to senior management, and refine programs and materials accordingly.
10. Maintain detailed records to facilitate functioning of health education programs, including extensive documentation of activities, contacts, presentations and programs conducted, persons and groups assisted, etc.³

The petitioner stated in the initial support letter that the position entails a "complex and highly sophisticated and specialized set of duties" that are normally performed by individuals with at least a bachelor's degree or equivalent in an appropriate health care field. In response to the RFE, counsel noted that the proffered duties correspond to the Occupational Information Network (O*NET) "Health Educators" occupational classification.⁴ Counsel also provided a contextual narrative of the duties organized differently in the response when compared to the duties as presented in the initial support letter and presented on appeal. Although these duties had been organized differently in the response, we note that the core duties are consistent with those the petitioner presented initially and on appeal. In addition, counsel provided a breakdown of percentage of time spent on the following broad tasks:

- (i) Develop health education and promotion programs
(Approximately 8 hours per week = 20% of time)
- (ii) Present and oversee presentation of health education and promotion programs
(Approximately 10 hours per week = 25% of time)
- (iii) Collaborate with health specialists and civic groups to determine community health needs and the availability of services and to develop goals for meeting needs
(Approximately 6 hours per week = 15% of time)
- (iv) Develop health education materials for distribution and presentation
(Approximately 8 hours per week = 20% of time)
- (v) Conduct staff training and education and evaluation sessions
(Approximately 6 hours per week = 15% of time)
- (vi) Miscellaneous

³ The same duties in the initial support letter are presented in the appeal brief.

⁴ The 2014-2015 edition of the *Occupational Outlook Handbook (Handbook)* contains a chapter entitled "Health Educators and Community Healthcare Workers." We note that prior editions of the *Handbook* contained chapters devoted solely to the "Health Educators" occupational category. Even though the current *Handbook* edition combines Health Educators with Community Healthcare Workers, it separates out information pertinent to each separate occupational classification.

(Approximately 2 hours per week = 5% of time)

Counsel submits that the above listed duties are significantly complex and sophisticated, and require a body of knowledge and skill that can only be, and normally is learned from university level studies leading to a bachelor's degree, including a bachelor's degree in nursing.

III. ANALYSIS

We will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, we agree with the director that the evidence does not establish that the position as described constitutes a specialty occupation.

A. Law

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the 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 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.

B. The Letters Submitted as Expert Testimony

We will next discuss why we accord no probative value to the letters from Professor [REDACTED] and [REDACTED]

In their letters, Professor [REDACTED] and Mr. [REDACTED] (1) describe the credentials they assert qualify them to discuss the nature of the proffered position; (2) claim that the beneficiary's educational background prepares her to perform the duties of the position; and (3) claim an industry standard for hiring individuals possessing such credentials. In addition, Professor [REDACTED] briefly lists the duties proposed for the beneficiary.

Upon review, we find that neither letter constitutes probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Neither author provided detailed information with regard to studies, treatises, statistical surveys, authoritative industry sources, or any other relevant and authoritative sources of which they may have specialized knowledge that would merit deference or special weight to the particular opinions they offer.

Nor is either letter accompanied by, and neither expressly states the full content of, whatever documentation and/or oral transmissions upon which it may have been based. For instance, neither Professor [REDACTED] nor Mr. [REDACTED] indicate whether they visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties cited would actually require. Nor does either author articulate whatever familiarity they may have obtained regarding the particular content of the work product that the petitioner would require of the beneficiary. Nor did either author discuss the duties of the proffered position in meaningful detail. In short, while there is no standard formula or "bright line" rule for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than Professor [REDACTED] and Mr. [REDACTED] have done here.

Furthermore, neither author indicates whether they considered, or were even aware of, the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as discussed above, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, neither individual discusses this aspect of the proffered position. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for their ultimate conclusions as to the educational requirements of the position at issue.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Market Research Analysts and Marketing Specialists" occupational category, SOC (O*NET/OES) Code 13-1161, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.⁵

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Their omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of the assertions of Professor [REDACTED] and Mr. [REDACTED].

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, we find that these letters are not probative evidence towards satisfying any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). For the sake of economy, the AAO hereby incorporates the above discussion and findings into its analysis of each of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

⁵ 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 (last visited July 2, 2014).

C. Review of the Director's Decision Denying the Petition

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

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the instant petition.

We recognize DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁶

On appeal, counsel for the petitioner contends that the director erred in determining that the proffered position's proposed duties reflect the duties of a Registered Nurse, as described in the *Handbook*. Counsel asserts that the proffered position's duties are reflected in the *Handbook's* description of Health Educators and that the O*NET description for health educators "match and are compatible with the actual duties for the position of Community Health Education Coordinator, stated in the [p]etition." Counsel also states that the tasks associated with the O*NET Registered Nurse occupational classification bear no resemblance to the duties as stated in the petition for the proffered position. We do not agree.

In relevant part, the *Handbook* summarizes the duties typically performed by Health Educators as follows:

Health Educators teach people about behaviors that promote wellness. They develop and implement strategies to improve the health of individuals and communities.

Duties

Health Educators typically do the following:

- Assess the needs of the people and communities they serve
- Develop programs and events to teach people about health topics
- Teach people how to cope with or manage existing health conditions
- Evaluate the effectiveness of programs and educational materials
- Help people find health services or information
- Provide training programs for other health professionals or community health workers

- Supervise staff who implement health education programs
- Collect and analyze data to learn about their audience and improve programs and services
- Advocate for improved health resources and policies that promote health

The duties of health educators, who are sometimes called health education specialists, vary with their work settings. 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 may work one-on-one with patients and their families. They teach patients about their diagnoses and about any necessary treatments or procedures. They may be called patient navigators because they help consumers find out about their health insurance options and direct people to outside resources, such as support groups and home health agencies. They lead hospital efforts in community health improvement. Health educators in health care facilities also help organize health screenings, such as blood pressure checks, and health classes on topics such as installing a car seat correctly. They also create programs to train medical staff to interact better with patients. For example, they may teach doctors how to explain complicated procedures to patients in simple language.

In *colleges*, health educators create programs and materials on topics that affect young adults, such as smoking and alcohol use. They may train students to be peer educators and supervise the students' delivery of health information in person or through social media. Health educators also advocate for campus wide policies to promote health.

In *public health departments*, health educators administer public health campaigns on topics such as emergency preparedness, immunizations, proper nutrition or stress management. They develop materials to be used by other public health officials. During emergencies, they may provide safety information to the public and the media. Some health educators work with other professionals to create public policies that support healthy behaviors and environments. They may also oversee grants and grant-funded programs to improve the health of the public. Some participate in statewide and local committees dealing with topics such as aging.

In *nonprofits* (including community health organizations), health educators create programs and materials about health issues for the community that their organization

⁶ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

serves. They help organizations obtain funding and other resources. Many nonprofits focus on a particular disease or audience, so health educators in these organizations limit programs to that specific topic or audience. For example, a health educator may design a program to teach people with diabetes how to better manage their condition or a program for teen mothers on how to care for their newborns. In addition, health educators may educate policymakers about ways to improve public health and work on securing grant funding for programs to promote health and disease awareness.

In *private businesses*, health educators identify common health problems among employees and create programs to improve health. They work with management to develop incentives for employees to adopt healthy behaviors, such as losing weight or controlling cholesterol. Health educators recommend changes to the workplace, such as creating smoke-free areas, to improve employee health.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Health Educators and Community Health Workers," <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-2> (last visited June 17, 2014).

The *Handbook* indicates that the normal minimum requirement for entry into health educator positions is at least a bachelor's degree in health education or health promotion. This is evident from the discussion in the subchapter of the *Handbook* entitled "How to Become a Health Educator or Community Health Worker," which states the following about health educators:

Education

Entry-level health educator positions require a bachelor's degree in health education or health promotion. These programs teach students theories and methods of health education and help students gain the knowledge and skills they need to develop health education materials and programs. Most programs include an internship.

Some positions, such as those in the federal government or in state public health agencies, require a master's or doctoral degree. Graduate programs are commonly in community health education, school health education, public health education, or health promotion. Entering a master's degree program requires a bachelor's degree, but a variety of undergraduate majors may be acceptable.

Id. at <http://www.bls.gov/ooh/community-and-social-service/health-educators.htm#tab-4> (last visited June 17, 2014).

Although the *Handbook* states that entry level positions require a bachelor's degree in health education or health promotion, we note that the beneficiary possesses neither credential.

Upon review, we find that the proffered position as described by the petitioner is best classified as a nurse educator within the occupation of registered nurses. The *Handbook's* section on "Registered Nurses," states the following:

Registered nurses (RNs) provide and coordinate patient care, educate patients and the public about various health conditions, and provide advice and emotional support to patients and their family members.

Duties

Registered nurses typically do the following:

- Record patients' medical histories and symptoms
- Administer patients' medicines and treatments
- Set up plans for patients' care or contribute to existing plans
- Observe patients and record observations
- Consult with doctors and other healthcare professionals
- Operate and monitor medical equipment
- Help perform diagnostic tests and analyze results
- Teach patients and their families how to manage illnesses or injuries
- Explain what to do at home after treatment

Most registered nurses work as part of a team with physicians and other healthcare specialists. Some registered nurses oversee licensed practical nurses, nursing assistants, and home health aides.

Registered nurses' duties and titles often depend on where they work and the patients they work with. They can focus in the following areas:

- A specific health condition, such as a diabetes management nurse who helps patients with diabetes or an oncology nurse who helps cancer patients
- A specific part of the body, such as a dermatology nurse working with patients who have skin problems
- A specific group of people, such as a geriatric nurse who works with the elderly or a pediatric nurse who works with children and teens
- A specific workplace, such as an emergency or trauma nurse who works in a hospital or stand-alone emergency department or a school nurse working in an elementary, middle, or high school

Some registered nurses combine one or more of these specific areas. For example, a pediatric oncology nurse works with children and teens who have cancer.

Many possibilities for working with specific patient groups exist. The following list includes just a few other examples:

Addiction nurses care for patients who need help to overcome addictions to alcohol, drugs, tobacco, and other substances.

Cardiovascular nurses care for patients with heart disease and people who have had heart surgery.

Critical care nurses work in intensive care units in hospitals, providing care to patients with serious, complex, and acute illnesses and injuries that need very close monitoring and treatment.

Genetics nurses provide screening, counseling, and treatment of patients with genetic disorders, such as cystic fibrosis.

Neonatology nurses take care of newborn babies.

Nephrology nurses care for patients who have kidney-related health issues stemming from diabetes, high blood pressure, substance abuse, or other causes.

Rehabilitation nurses care for patients with temporary or permanent disabilities.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For 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.

Registered nurses may work to promote general health, by educating the public on warning signs and symptoms of disease. They may also run general health screenings or immunization clinics, blood drives, or other outreach programs.

Clinical nurse specialists (CNSs) are a type of advanced practice registered nurse (APRN). They provide direct patient care in one of many nursing specialties, such as psychiatric-mental health or pediatrics. CNSs also provide indirect care, by working with other nurses and various other staff to improve the quality of care that patients receive. They often serve in leadership roles and may advise other nursing staff. CNSs also may conduct research and may advocate for certain policies.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Registered Nurses," <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-2> (last visited June 17, 2014). The petitioner claims that the proffered position is distinguished from the occupation of registered nurse because the tasks listed in the registered nurses occupational classification bear no resemblance to the tasks of the Community Health Education Coordinator. On the contrary, the *Handbook* indicates that "[s]ome nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as . . . nurse educators" In addition, the *Handbook* lists "educat[ing] patients and the public about various health conditions" and "promot[ing] general health by educating the public" as among the duties normally performed by registered nurses. *Id.* We will analyze the proffered

position as that of a registered nurse.⁷

As indicated in the following excerpt from the *Handbook's* chapter on "Registered Nurses," a Bachelor of Science degree in Nursing (BSN) is neither required for licensure as an RN nor normally required for the general range of RN jobs. In pertinent part, this section reads as follows:

How to Become a Registered Nurse

Registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. Registered nurses also must be licensed.

Education

In all nursing education programs, students take courses in anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take 4 years to complete; ADN and diploma programs usually take 2 to 3 years to complete. All programs also include supervised clinical experience.

Bachelor's degree programs usually include additional education in the physical and social sciences, communication, leadership, and critical thinking. These programs also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse. However, some employers may require a bachelor's degree.

Many registered nurses with an ADN or diploma choose to go back to school to earn a bachelor's degree through an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field. Some employers offer tuition reimbursement.

⁷ As noted, the *Handbook* states that entry-level health educator positions "require" a bachelor's degree in health education or health promotion. The beneficiary possesses neither credential, and DOL lists no alternative educational paths. As such, if we were to agree that this is a health educator position, the petition would still be denied over the failure of the evidence of record to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

In addition, while neither a decisive nor material factor in our decision, the beneficiary's lack of qualifications listed by DOL as among those normally possessed by health educators strengthens further the AAO's determination that the proffered position is not actually that of a health educator.

Certified nurse specialists (CNSs) must earn a master's degree in nursing. CNSs who conduct research typically need a doctoral degree.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Registered Nurses," <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4> (last visited June 17, 2014).

At the outset of our analysis under this criterion, we note again that the petitioner designated the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of this occupation.

The *Handbook* does not support the assertion that a bachelor's degree in a specific specialty, or the equivalent, is normally required for positions within this occupational category. Rather, the *Handbook* states that there are three general paths for becoming a registered nurse, i.e., a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program. The *Handbook* states that associate's degrees and diploma programs for this occupation usually take two to three years to complete. The narrative of the *Handbook* indicates that, generally, licensed graduates of any of the three types of educational programs (bachelor's, associate's, or diploma) qualify for entry-level positions. Nor does the *Handbook* state a minimum requirement for at least a bachelor's degree in nursing, or its equivalent for nurse management positions; instead, it indicates only that graduate degrees are increasingly required. An increasing preference for a graduate degree does not equate to a normal minimum hiring requirement for a graduate degree, or even a bachelor's degree, in a specific specialty or the equivalent. For all of these reasons, the *Handbook* does not indicate that the proffered position falls under an occupational group for which inclusion is limited to positions which normally require at least a bachelor's degree in a specific specialty, or the equivalent.

The materials from DOL's Occupational Information Network (O*NET OnLine) do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. 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 designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O*NET OnLine information is of little evidentiary value to the issue presented on appeal.

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the

particular position that is the subject of this petition, the petitioner has not satisfied the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Finally, for the reasons discussed below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of job vacancy advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in its industry. These advertisements, however, do not all require at least a bachelor's degree in a *specific specialty* or its equivalent. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the record of proceeding is insufficient to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations (nonprofit community healthcare organizations) in the same industry.

We agree with the director's assessment that none of the job postings showed that the advertisements were from similar organizations, i.e. community health care organizations offering programs similar to the petitioner, as specified in the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), and thus we will not analyze each of the job postings herein. Correctly, the director found that the job vacancy advertisements demonstrate that the collective employers did not limit the field of study to a particular field, but allow for a wide variety of backgrounds, including Health, Community Health, Nursing, Education, Social, Environmental, or Behavioral Sciences. As a result, the petitioner has not

established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.⁸

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)).

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

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

In the instant case, the evidence of record does not credibly demonstrate relative complexity or uniqueness as aspects of the proffered position. Specifically, it is unclear how the community health education coordinator position, as described, necessitates the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Rather, we find, that the evidence does not distinguish the proffered position from other positions falling within the "Registered Nurses" occupational category, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

We observe that the petitioner has indicated that the incumbent would communicate in the Chinese language with the target Chinese communities about medical and public health matters. However, the record of evidence does not sufficiently establish that 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. Although the petitioner states that the position "requires a command of knowledge of a complex area," it does not establish relative unique specialization and complexity as distinguishing dimensions of this particular position, let alone as dimensions elevating the position above registered nurse positions that can be performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

⁸ USCIS "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." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner has not demonstrated what inferences, if any, can be drawn from these job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

The statements of record with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, those assertions are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

Accordingly, given the *Handbook's* indication that typical positions located within the "Registered Nurses" occupational category do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.

The evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as the evidence of record does not demonstrate how the proffered position is so complex or unique relative to other registered nurse positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 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 in a specific specialty or its equivalent for the position.

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

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific

specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

Upon review of the record, we find that the petitioner has not provided any 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).

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

The AAO finds that the petitioner has not sufficiently developed the relative specialization and complexity as aspects of the proffered position's duties. In other words, the proposed duties have not been described with sufficient specificity to show that their nature is more specialized and complex than registered positions whose duties are not of a nature so specialized and complex that their performance requires knowledge usually associated with a degree in a specific specialty.

Upon review of the record, we find there to be insufficient evidence to establish that the duties of the proffered position require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. Counsel asserted in response to the RFE that the duties are specialized and complex because it combines educational activities involving complex medical and public health issues with distilling the information for a target community that tends to be less-educated and less-English proficient. Within the record of proceeding, counsel did not take the opportunity to evidence that accomplishing duties involving culturally competent public and preventive health care materials, is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, we find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

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

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 (last visited July 2, 2014).

The pertinent guidance from DOL, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level 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.

Id.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of the petitioner's Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation 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. . . .

Id.

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

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 supervisory responsibilities.

Id.

Here we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

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

Nor do we find the case law counsel cited on appeal persuasive. We note that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio

2012), for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the evidence of record does not establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties. *See also Health Carousel, LLC v. U.S. Citizenship & Immigration Services*, ___ F. Supp. 2d ___ (S.D. Ohio 2014) (agreeing with AAO's analysis of *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*).

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.⁹ We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Nor are the unpublished AAO decisions persuasive. 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.

⁹ It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by our *de novo* review of the matter.

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

IV. CONCLUSION AND ORDER

As set forth above, we agree with the director's findings that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation. Accordingly, the director's decision will not be disturbed.

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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