

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: JUL 10 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:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center (the "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 Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Skilled Nursing Facility" established in 2000, with 50 employees. In order to employ the beneficiary in what it designates as a "Director of Nursing/Patient Care Services" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

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

Upon review of the entire record of proceeding, we find that the petitioner has failed to overcome the director's grounds for denying this petition.<sup>1</sup> Accordingly, the appeal will be dismissed and the petition will remain denied.

## I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a Director of Nursing/Patient Care Services, to work on a part-time basis at a salary of \$777.80 per week. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2013 to September 17, 2016.

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the position is [REDACTED] Managers" SOC (ONET/OES) Code 11-9111, at a Level I (entry-level) wage. The LCA was certified for a validity period beginning September 18, 2013 to September 17, 2016.

In a letter of support, dated March 26, 2013 the petitioner identified itself as a 45-bed skilled

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

nursing facility d/b/a [REDACTED] The petitioner stated that the position of Director of Nursing/Patient Care Services is necessary to "deal" with the company's growing needs. The position will report directly to the President. As the Director of Nursing/Patient Care Services, the petitioner indicated that the beneficiary's duties will be as follows:

- Conduct and administer fiscal operations, including accounting, planning budgets, authorizing expenditures, establishing rates for services, and coordinating financial reporting.
- Direct, supervise and evaluate work activities of medical, nursing, technical, clerical, service, maintenance, and other personnel.
- Maintain communication between governing boards, medical staff, and department heads by attending board meetings and coordinating interdepartmental functioning.
- Review and analyze facility activities and data to aid planning and cash and risk management and to improve service utilization.
- Plan, implement and administer programs and services in a health care or medical facility, including personnel administration, training, and coordination of medical, nursing, and physical plant staff.
- Direct or conduct recruitment, hiring and training of personnel.
- Establish work schedules and assignments for staff, according to workload, space and equipment availability.
- Maintain awareness of advances in medicine, computerized diagnostic and treatment equipment, data processing technology, government regulations, health insurances changes, and financing options.
- Monitor the use of diagnostic services, inpatient beds, facilities, and staff to ensure effective use of resources and assess the need for additional staff, equipment, and services.
- Develop and maintain computerized record management system to store and process data such as personnel activities and information to produce reports.

Notably, the job description duplicates virtually verbatim the tasks from the occupational category "Medical and Health Services Managers" as described in the O\*NET Online Summary Report. See O\*NET Online Summary Report for "Medical and Health Services Managers" <http://www.onetonline.org/link/summary/11-9111.00>. That is, all of the duties provided by the petitioner have been taken from the description in the O\*NET Online Summary Report for the occupational category "Medical and Health Services Managers."

The petitioner stated that the position of Director of Nursing/Patient Care Service requires a Bachelor's degree, or its foreign equivalent, in Business Management, Nursing or related field or related experience. In support of the petition, the petitioner also provided: an itinerary showing that the beneficiary would be working at [REDACTED] for the duration of the period requested; a copy of the beneficiary's degree evaluation; and a copy of the employment offer letter. The degree evaluation stated that the beneficiary attained the equivalent of a four-year Bachelor of Science Degree in Nursing.

The director issued an RFE on June 17, 2013. The petitioner was asked to submit evidence to establish, in part, that the beneficiary was properly licensed.

In response to the director's RFE, counsel for the petitioner submitted a letter dated July 29, 2013. The petitioner provided information to show that the beneficiary is not required to obtain a license in the State of California, unless the position is a histocompatibility laboratory director or a nursing care facility administrator. The petitioner also submitted a letter dated July 26, 2013 providing the same job duties for the proffered position as submitted with the initial petition and a statement that the beneficiary does not need to pass a licensure examination.

Upon review, the director denied the petition determining that the petitioner had not established that the proffered position is a specialty occupation within the meaning of the applicable statute and regulations.

On appeal, counsel for the petitioner submits a brief and additional evidence. Counsel claims that the director's denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submits an opinion prepared by Dr. [REDACTED] dated November 24, 2012, asserting the position proffered here requires a minimum of a bachelor's degree or equivalent in nursing, business management or a related field. Counsel also included four advertisements for various medical-related positions, as well as the petitioner's advertisements for the proffered position.

The sole issue on appeal is whether the petitioner has established that the duties of the proffered position comprise a specialty occupation.

## II. STANDARD OF REVIEW

In the exercise of our administrative review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states 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" 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.

*Id.* at 375-76.

Again, we conduct our review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determination in this matter was correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

### III. Law

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.

#### IV. ANALYSIS

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

Thus, a crucial aspect of this matter is whether the petitioner has adequately 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 at least a baccalaureate degree in a specific discipline. In the matter here, we find that the petitioner has failed to provide a detailed description.

As previously mentioned, the description of the proffered position as provided by the petitioner and counsel is taken directly from the occupational category "Medical and Health Services Managers" as described in the O\*NET Online Summary Report. We note that simply copying a job description from O\*NET (or other source) is not sufficient for establishing H-1B eligibility. That is, while this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. That is, the description for an occupational category fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment. More specifically, 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 its business operations, as well as demonstrate a legitimate need for such an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Additionally, the proffered position is labeled Director of Nursing/Patient Care and a number of the duties described involve the supervision of other medical, nursing, and technical staff. The petitioner has not provided any names, titles, or job descriptions of the beneficiary's subordinates. Similarly, the petitioner did not provide an organizational chart showing the beneficiary's place in the organization's hierarchy.

In the instant case, 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, we find that 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, or its equivalent. The job description fails 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.

The description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's assertion that the position is a specialty occupation. 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 "plan, implement and administer programs and services in a healthcare or medical facility" and "establish work schedules and assignments for staff." The petitioner's statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. In addition, the petitioner claims that the beneficiary will "monitor the use of diagnostic services, inpatient beds, facilities, and staff to ensure effective use of resources and assess the need for additional staff, equipment, and services." This statement also fails to provide any particular details regarding the demands, level of responsibilities and requirements necessary for the performance of these duties.

On appeal, counsel asserted that "the requirement that the degree must be in a specific academic major has recently been explicitly rejected by a United States District Court." 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." On appeal, counsel asserts that it is "impossible to allocate a single degree major that all Medical & Health Service Manager[s] should have" because "the requirements of a particular job vary depending on the nature of the duties in light of the company's business."

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).<sup>2</sup>

Counsel, however, in this matter 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*.<sup>3</sup> 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 the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Regarding counsel's assertion on appeal, that it is "impossible to allocate a single degree major that all Medical & Health Service Manager[s] should have" because "the requirements of a particular job vary depending on the nature of the duties in light of the company's business," we find that the petitioner has not submitted the requisite evidence establishing its requirements for the position proffered here. Rather, as indicated above, the petitioner recites and paraphrases the broad occupational description found in the O\*NET Online Summary Report and does not identify or

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<sup>2</sup> While the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

<sup>3</sup> 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, the AAO 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 the AAO in its *de novo* review of the matter.

further detail the specific duties the beneficiary will be required to perform in light of the petitioner's business operations.

Moreover, upon review of the record, we note that there are discrepancies in the record of proceeding with regard to the proffered position. The petitioner's claims regarding the responsibility inherent in the proffered position is contrary to the petitioner's attestation on the LCA that the appropriate wage level for the proffered position is a Level I (entry-level) wage. That is, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Medical and Health Services Managers" at a Level I (entry) wage.

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

Prevailing wage determinations start with an entry-level wage (Level I) 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>4</sup> The U.S. 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 as indicated by the job description.

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

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform

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<sup>4</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 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.

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

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

In the instant case, the petitioner claims that the duties of the proffered position are complex, unique and/or specialized. Additionally, the petitioner relies upon an opinion letter from [REDACTED] PhD. In the letter, Dr. [REDACTED] states that "in terms of complexity" the proffered position is "considered the 'Unit Chief or Nursing Supervisor' and has the respect of all of his or her peers as that person, by definition, which functions at a highly functional level in a very specialized area." She claims that "[i]t takes years of education and experience to be competent at this level" and again references the "complexity of the position." Thus, according to Dr. [REDACTED] the ability to perform the "complex tasks" of the position "is very difficult to achieve." She continues by asserting that the duties of the position are specialized and complex.

Furthermore, it appears that the proposed duties involve managerial and supervisory duties. For example, the beneficiary will "direct, supervise and evaluate work activities" of its employees, "plan, implement and administer programs and services," "direct or conduct recruitment, hiring and training of personnel," and "develop and maintain computerized record management systems." Further, in response to the RFE, counsel claims that the proffered position "plays a key role in delivery of healthcare services to the clients," and that the beneficiary will "work closely with medical staff to plan, direct, and coordinate the delivery of healthcare." Counsel further asserts that "this role is at the heart of the company's business development model." Dr. [REDACTED] claims that the position "denotes supervising healthcare personnel and assuming a managerial role." She asserts that the position is "responsible for supervising direct and indirect healthcare to an identified population."

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

closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

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. Given that the LCA submitted in support of the petition is for a Level I wage, it must therefore be concluded that either (1) the position is a low-level, entry position relative to other Medical & Health Service Manager positions and, thus, based on the findings of the DOL's *Occupational Outlook Handbook (Handbook)*, the proffered position is not a specialty occupation;<sup>5</sup> or (2) the LCA does not correspond to the petition.<sup>6</sup> In other words, even if it were determined that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to a Level III (experienced) or Level IV (fully competent) wage level position.<sup>7</sup> See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing*

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<sup>5</sup> All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. We hereby incorporate into the record the excerpt of the *Handbook* regarding the occupational category "Medical and Health Services Managers."

<sup>6</sup> As will be discussed in further detail below, as the *Handbook* reports that "Medical & Health Services Manager" positions do not normally 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. It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Medical & Health Services Managers," <http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-9111&area=41940&year=13&source=1> (last accessed June 27, 2014).

<sup>7</sup> While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. 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.

*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).

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

Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the 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 understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. We find 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.

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 (which it has not), the petition could still not be approved.

The material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in that record that would also require dismissal of the appeal.

Assuming for the sake of argument that the proffered duties as generally described by the petitioner in its initial letter and reiterated on appeal would in fact be the duties to be performed by the beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.

Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation. It

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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.

should be noted that, for efficiency's sake, we hereby incorporate the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

To make its determination whether the proffered position qualifies as a specialty occupation, we turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The petitioner indicated that the beneficiary would be employed as a medical and health services manager. Again, however, 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.

We recognize the DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The petitioner attests in the submitted LCA that the proffered position falls under the occupational category "Medical and Health Services Managers."

We have reviewed the chapter of the *Handbook* entitled "Medical and Health Services Managers," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Medical and Health Services Managers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become a Medical and Health Services Manager" states, in pertinent part, the following about this occupational category:

**Education**

Medical and health services managers typically need at least a bachelor's degree to enter the occupation. However, master's degrees in health services, long-term care administration, public health, public administration, or business administration also are common.

Prospective medical and health services managers should have a bachelor's degree in health administration. These programs prepare students for higher level management jobs than programs that graduate students with other degrees. Courses needed for a degree in health administration often include hospital organization and management, accounting and budgeting, human resources administration, strategic planning, law and ethics, health economics, and health information systems. Some programs allow students to specialize in a particular type of facility, such as a hospital, a nursing care home, a mental health facility, or a group medical practice. Graduate programs often last between 2 and 3 years and may include up to 1 year of supervised administrative experience.

### **Work Experience**

Some facilities may hire those with specialized experience in a healthcare occupation in addition to administrative experience. For example, nursing service administrators usually are supervisory registered nurses with administrative experience and graduate degrees in nursing or health administration.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Medical and Health Services Managers, on the Internet at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-4> (last visited June 27, 2014).

When reviewing the *Handbook*, we must note again that the petitioner designated the wage level of 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 the occupation and will perform routine tasks that require limited, if any, exercise of judgment. Thus, the petitioner's designation of the proffered position as a Level I (entry) position strongly suggests that the beneficiary will not serve in a high-level or senior position in the occupation.

Although the *Handbook* states that medical and health services managers typically need at least a bachelor's degree to enter the occupation, the *Handbook* does not indicate that such a degree must be in a specific specialty. The narrative of the *Handbook* reports that a degree in health services, long-term care administration, public health, public administration, or business administration are common for entry into the occupation. Notably, a degree in nursing requires further administrative experience and graduate degrees in nursing or health administration.

The *Handbook* indicates that degrees in disparate fields (e.g., health services, long-term care administration, public health, public administration, and business administration) are acceptable for entry into the occupation. Absent evidence to the contrary, the fields of health services and business administration are not closely related specialties. Accordingly, as such evidence fails to establish a minimum requirement of at least a bachelor's degree *in a specific specialty* or its

equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Notably, the *Handbook* states that a degree in business administration may also be acceptable to perform the duties of the occupation. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation.<sup>8</sup> See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty degree in business administration is sufficient for entry into the occupation also strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum entry requirement for this occupation.

For the reasons discussed above, we do not find that the *Handbook* supports a claim that "Medical and Health Services Managers" comprise an occupational group for which at least a bachelor's degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation.

In addition, we find that the Occupational Information Network (O\*NET) Summary Reports, referenced by counsel, are insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. On June 27, 2014, we accessed the pertinent section of the O\*NET OnLine Internet site relevant to 11-9111.00, Medical and Health Services Managers. O\*NET OnLine assigns this occupation a Job Zone "Five" rating, which groups it among occupations requiring graduate school. O\*NET OnLine does not, however, indicate degrees required by Job Zone Five occupations must be in a specific specialty directly related to the occupation. Therefore, O\*NET OnLine information is not probative of the proffered position being a specialty occupation.

On appeal, counsel submitted a letter from Dr. [REDACTED]. The letter is dated November 24, 2012. We reviewed the letter but, for the reasons discussed below, find that it is not persuasive in establishing the proffered position qualifies as a specialty occupation position.

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<sup>8</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Dr. [REDACTED] describes her educational credentials, teaching experience, information regarding grants she has received, as well as publications she has written. She claims that her opinion in this matter is "largely based on [her] 25 years of experience as a nurse and [her] ten years of teaching nursing students at all levels." She claims that she is an authority in the field of public health, addiction and nursing. She states that, she "now lives in Las Vegas working as a psychiatric nurse practitioner since 2008."

Based upon a complete review of Dr. [REDACTED] letter, we observe that Dr. [REDACTED] may, in fact, be a recognized authority on various topics; however, she has failed to provide sufficient information regarding the basis of her claimed expertise on this particular issue. That is, she has not established her expertise pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how her education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of for-profit skilled nursing facilities (as designated by the petitioner in the Form I-129 and with the NAICS code) or similar organizations for medical and health services manager positions (or parallel positions). Dr. [REDACTED] opinion letter does not cite specific instances in which her past opinions have been accepted or recognized as authoritative *on this particular issue*. There is no indication that she has published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements.

Dr. [REDACTED] states that she has been "provided documents that [she has] reviewed and which were used to assist in forming [her] opinion," including the petitioner's letter and a job description. Dr. [REDACTED] provides the same job duties that counsel submitted in response to the RFE. As previously noted, the duties are recited from the O\*NET Online Summary Report for the occupational category "Medical and Health Services Manager." Thus, the tasks are general to the occupation rather than specific to the petitioner and its business operations. We hereby incorporate our previous discussion on the matter.

Dr. [REDACTED] provides information regarding the petitioner based upon a website, [www.Hospital-Data.com](http://www.Hospital-Data.com). The website contains a disclaimer that it does not guarantee the accuracy or timeliness of any information, and that it should be used "at your own risk." Upon review of the opinion letter, there is no indication that Dr. [REDACTED] possesses any knowledge of the petitioner's proffered position beyond this information. She does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise.

In the letter, Dr. [REDACTED] states her opinion on the educational requirements for the proffered position. For example, on page 5 of the letter, Dr. [REDACTED] states that "the requirements for the Medical and Health Services Manager (for this particular job position) is a baccalaureate prepared-registered professional nurse." She further asserts that "a minimum of a bachelor's degree in nursing, business management or a related field is the minimal qualification for **Medical and Health Service Manager** (emphasis in the original) by industry standards because of the

complexity of the position."

Further, Dr. [REDACTED] claims in "terms of complexity, the term **Medical and Health Service Manager** is considered the 'Unit Chief or Nursing Supervisor'" and "functions at a highly functional level in a very specialized area." She further asserts that the "term '**Medical and Health Service Manager**' denotes supervising healthcare personnel and assuming a managerial role." (All emphasis in the original). However, it must be noted that there is no indication that the petitioner and counsel advised Dr. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level medical and health services manager, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. It appears that Dr. [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that Dr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

Dr. [REDACTED] also did not provide any documentation to establish her credentials as a recognized authority on the relevant industry-hiring standards. She claims to possess expertise in the field of public health, addictions, and nursing, but she did not identify the specific elements of her knowledge and experience that she may have applied in reaching her conclusions here. For example, the opinion letter contains no evidence that it was based on scholarly research conducted by Dr. [REDACTED] in the specific area upon which she is opining. She states that her opinion regarding the proffered position is "largely based on my 25 years of experience as a nurse and my ten years of teaching nursing students at all levels." However, her research and experience are largely related to substance abuse and nursing and, thus, she has not established her authority on the industry hiring standards for a medical and health services manager for a skilled nursing facility.

Dr. [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, she does not provide a substantive, analytical basis for her opinion and ultimate conclusion. Her opinion does not relate her conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Accordingly, the very fact that she attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of her opinion. There is no evidence that Dr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. She has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. Dr. [REDACTED] does not provide a sufficiently substantive and analytical basis for her opinion.

In summary, and for each and all of the reasons discussed above, we conclude that the opinion letter rendered by Dr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Dr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. There is an inadequate factual foundation established to support the opinion and we find that the opinion is not in accord with other information in the record. Therefore, we find that the letter from Dr. [REDACTED] does not establish that the proffered position is a specialty occupation. As such, neither Dr. [REDACTED] findings nor her ultimate conclusions are worthy of any deference, and her opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We may, in our 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, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we again incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

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

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

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Further, incorporating our previous

discussion, Dr. [REDACTED] letter is not probative in establishing that organizations similar to the petitioner routinely employ and recruit only degreed individuals.

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. We have reviewed the evidence submitted, but find 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 skilled nursing home, established in 2000, with 50 employees. The petitioner indicated that the gross annual income is \$2.1 million. Although requested, the petitioner did not provide its net annual income on the Form I-129. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 623110.<sup>9</sup> According to the U.S. Department of Commerce, Census Bureau website, the NAICS code 623110 is for nursing care facilities. The NAICS website describes this industry as follows:

[T]his industry comprises establishments primarily engaged in providing inpatient nursing and rehabilitative services. The care is generally provided for an extended period of time to individuals requiring nursing care. These establishments have a permanent core staff of registered or licensed practical nurses who, along with other staff, provide nursing and continuous personal care services.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 623110-Nursing Care Facilities, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 27, 2014).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are 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 and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Moreover, upon review of the job advertisements submitted by the petitioner, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are

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<sup>9</sup> According to the U.S. Census Bureau, the North American Industry Classification System (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 <http://www.census.gov/eos/www/naics/> (last visited June 27, 2014).

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.

First, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, the petitioner submitted postings in which a graduate degree from an accredited school or program of nursing is required and a bachelor's degree is only preferred;

. A *preference* for a degreed individual is not an indication of a *requirement* for the position. Therefore, three of the four ads submitted do not even require a bachelor's degree in any field.

Furthermore, the advertisements include positions with three home healthcare services: (medical staffing and home health operating in 44 states and the District of Columbia). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise.

The petitioner provided advertisements for positions with the that only identifies the business as being in the healthcare services industry with no further information. Consequently, the record lacks sufficient information regarding the advertising employer to conduct a legitimate comparison of the organization to the petitioner. The petitioner has not provided information regarding which aspects or traits (if any) it shares with the advertising organization. Moreover, we observe that it appears that the advertised position may be for a more senior position. Specifically, the position required a Master's of Science Degree in Nursing and eight years of post registered nurse experience. The petitioner, however, designated the proffered position in the LCA as a Level I (entry-level) position. Thus, the petitioner effectively attests that the proffered position is not a senior position. After reviewing the job posting, we find that without further clarification, the petitioner has not sufficiently established that the duties and responsibilities of the advertised position are parallel to the proffered position.

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. The evidence does not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions to the proffered position, among similar organizations to the petitioner.

Again, we acknowledge that the record of proceeding on appeal contains an opinion letter from Dr. However, as previously discussed, the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

Thus, based upon a complete review of the record, 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 industry for positions that are both (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. 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).

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

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>10</sup>

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties require the theoretical 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. That is, the record of proceeding does not establish that the requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or its equivalent. 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 it claims are so complex or unique. While a few related courses may be beneficial, or even required, in performing certain duties of the 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 proffered

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<sup>10</sup> For additional information regarding the prevailing wage level, 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).

position.

As previously discussed, the description of duties for the proffered position was copied verbatim from the O\*NET Online Summary Report, and is generic to the occupational category. The description for the proffered position does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. In fact, the record of proceeding fails to adequately establish that the job duties described relate any dimensions of complexity and uniqueness such that a bachelor's degree in a specific specialty would be required.

Therefore, the evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of educational backgrounds that is suitable for entry into such positions. The record lacks sufficiently detailed information 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.

While the petitioner has indicated that the beneficiary is "well qualified for this position" and noted "the beneficiary's academic accomplishments and experience in the field ensure that she possesses the academic foundation essential to successfully perform the duties of [the proffered position]," the test to establish a position as a specialty occupation is not the experience or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), to determine whether the evidence establishes that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position. In that regard we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. To satisfy this criterion, it should be noted that 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.

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").

Moreover, to satisfy this criterion, the record must establish 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 or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation 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 specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has 50 employees and that it was established in 2000 (approximately thirteen years prior to the submission of the H-1B petition). The petitioner did not provide the total number of people it has employed to serve in the proffered position. Furthermore, the petitioner did not provide the job title, duties or day-to-day responsibilities of the position and it did not indicate the knowledge and skills required for the job or provide any information regarding the complexity of the job duties, independent judgment required or the amount of supervision received.

On appeal, the petitioner submits three job postings placed by the petitioner. One posting is for a marketing development manager position; however, the petitioner has not provided evidence to establish that the marketing development manager position is similar to the proffered position at hand. Thus, this posting will not be discussed. The two other postings are for a medical and health services manager, part-time. We have reviewed the documents, but find that the postings are insufficient to establish eligibility under this criterion of the regulations. For example, the posting on [www.jobvertise.com](http://www.jobvertise.com) does not indicate that the position for medical and health services manager requires a bachelor's degree; instead, it states that the ideal candidate "should have a four-year degree, Bachelor's degree highly desirable." Likewise, the petitioner also states in the advertisement posted on [www.sfbay.craigslist.org](http://www.sfbay.craigslist.org) that a "4 year degree, Bachelor's degree [is] highly desirable." As discussed, a *preference* for a degree does not indicate a *requirement* for such

a degree. Furthermore, the petitioner does not indicate that it requires a degree *in a specific specialty*, or its equivalent.

The evidence submitted by the petitioner is insufficient to satisfy this criterion of the regulations. The record does not establish that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position. Therefore, 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.

Upon review of the record of the proceeding, the petitioner has not provided probative evidence to satisfy this criterion of the regulations. As reflected in this decision's earlier comments and findings with regard to the generalized level at which the proposed duties are described, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to even establish relative specialization and complexity as distinguishing characteristics of those duties, let alone that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

We again incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Medical and Health Services Managers." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Again, the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Accordingly, 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.

#### V. CONCLUSION

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; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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