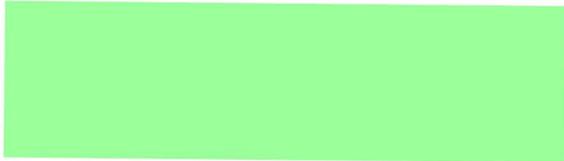
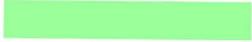




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 28 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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:

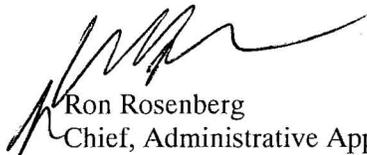


INSTRUCTIONS:

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,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 8, 2013. In the Form I-129 visa petition, the petitioner describes itself as a healthcare services business established in 2008. In order to employ the beneficiary in what it designates as a director of 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 November 6, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief in support of this assertion.

The record of proceeding before us 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 denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation. We reviewed the record in its entirety before issuing this decision.¹

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

We will also discuss additional, independent grounds, not identified by the director's decision, that also preclude approval of this petition. Specifically, beyond the decision of the director, the petitioner (1) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner stated in the Form I-129 petition that it seeks the beneficiary's services as a director of patient care services to work on a part-time basis. In a support letter dated March 1, 2013, the petitioner stated the following regarding the duties and requirements for the proffered position:

In this position, [the beneficiary] will direct the clinical activities of the company, will plan and evaluate professional health services, and will confer with other administrative staff to assure that services are provided at quality level consistent with professional standards and goals. Specifically, [the beneficiary] will direct the staff

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

responsible for clinical programs. She will oversee the admission process and will ensure the accurate maintenance of all clients' charts. She will plan and coordinate the delivery of care to clients and their families and will assign the appropriate staff and team members. She will be responsible for scheduling, maintaining and facilitating of interdisciplinary team meetings for continual updating of clients' care plans, exchange of information, and problem solving. Additionally, [the beneficiary] will participate in the interviewing, hiring and providing orientation and training to newly hired personnel. She will also be responsible for developing, implementing, and evaluating the orientation program for new personnel as well as for planning and implementing in-service and continuing education programs for existing personnel. She will also provide staff performance reviews. Moreover, she will ensure growth and profitability of the company, monitor direct client care costs, and implement staff education to deliver cost-effective, high-quality, and appropriate care to clients' families. Further, [the beneficiary] will assist with the evaluation of organization performance via performance improvement program and productivity, quarterly and annual reviews. She will assist in the development of organization goals, as well as develop, recommend, and administer organization policies and procedures. Finally, [the beneficiary] will assure compliance with all local, state and federal laws regarding licensure and certification of organization personnel and, maintain compliance to CHAP Home Care standards. She will also promote [the petitioner's] referrals in the health care community.

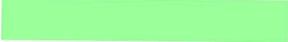
Due to the complex nature of these job duties, [the petitioner] require[s] a minimum of a Bachelor's Degree in Health Care Administration or a related field.

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her education and licenses. The petitioner provided a copy of the beneficiary's diploma and transcript from [REDACTED] indicating that she was granted a Master of Science degree in Health Care Administration in March 2012. The petitioner also submitted a foreign diploma and transcripts in the name of the beneficiary, and the beneficiary's resume.

The petitioner provided an LCA in support of the instant H-1B petition. We note that the LCA designation for the proffered position corresponds to the occupational classification "Medical and Health Services Managers" - SOC (ONET/OES) code 11-9111, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 29, 2013. The director requested that the petitioner submit probative evidence to establish eligibility for the benefit sought, and outlined the evidence to be submitted.

On July 8, 2013, the director received the petitioner's counsel response to the RFE which included a letter and additional evidence. Among the evidence provided was an organizational chart; licenses, certifications and clearances related to the petitioner; excerpts from California codes and regulations related to the management of hospice facilities; documents related to another employee; job postings for the proffered position and positions with other employers; and documents related to the beneficiary's qualifications and maintenance of status.



The director reviewed the information provided in the initial H-1B petition and in response to the RFE. Although the petitioner and counsel claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish eligibility for the benefit sought and denied the petition. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief.

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, we agree with the director that the petitioner has not established eligibility for the benefit sought.

II. LAW AND ANALYSIS

A. Standard of Proof

In light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). 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.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

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.

As footnoted above, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 counsel'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 were 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.

B. The LCA Wage Level Does Not Correspond to the Petition

Preliminarily, we find beyond the decision of the director, that the petitioner has not submitted an LCA that supports its claims in the petition. That is, we observe that the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition. As previously noted, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Medical and Health Services Managers" - SOC (ONET/OES) code 11-9111. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.² The LCA was certified on February 28, 2013 and signed by the petitioner on March 5, 2013. By completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant 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

² The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.³

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position 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.⁴ The Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in the DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

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.

³ For additional information regarding prevailing wage determinations, 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.

⁴ 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.

The petitioner has represented in the LCA that the proffered position is a Level I (entry level) position. As described above, a Level I designation is appropriate for employees who have only a basic understanding of the occupation and perform tasks that require "limited, if any" exercise of judgment. However, in its support letter dated March 1, 2013, the petitioner indicated that the beneficiary will "develop, recommend, and administer organization policies and procedures." She will also "assure compliance with all local, state and federal laws regarding licensure and certification" of personnel and maintain compliance with state regulatory standards. In a letter dated July 2, 2013, counsel states that the duties of the proffered position require the application of highly specialized knowledge, ranging from "an overall understanding of the U.S. Health Care system, its principles and organization to complex licensure and certification requirements, complicated health care regulations, legal and ethical issues of health care, human resource management in health care facilities, and health care financing and budgeting." Thus, it appears that the proffered position requires extensive knowledge of the occupation, and the exercise of substantial independent judgment. The petitioner's expectations for the proffered position are inconsistent with those appropriate for a position certified at a Level I wage.

In addition, the petitioner has stated that the beneficiary will be responsible for the accurate maintenance of all clients' charts. She is expected to direct the petitioner's clinical activities, and ensure the petitioner's growth and profitability. Thus, although employees in positions designated at a Level I wage are to work under close supervision, and their work is to be closely monitored and reviewed for accuracy, the petitioner has indicated that it will rely on the accuracy of the beneficiary's work for both client care and growth and profitability. The petitioner's reliance on the beneficiary for the functioning of its operations and its profitability far exceed an appropriate reliance on a Level I position that would be consistent with a "research fellow, a worker in training, or an internship."

Thus, upon review of the assertions made by the petitioner and counsel, we must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described in the record of proceeding 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, in comparison to others in the occupation, 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. As noted above, a job offer for a research fellow, a worker in training, or an internship is an indicator that a Level I wage should be considered.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information

available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The prevailing wage of \$31.40 per hour on the LCA corresponds to a Level I for the occupational category of "Medical and Health Services Managers" for [REDACTED] County ([REDACTED] California).⁵ The petitioner stated in the Form I-129 petition and LCA that the offered salary for the proffered position was \$31.40 per hour. Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$43.32 per hour for a Level II position, \$55.24 per hour for a Level III position, and \$67.16 per hour for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act. As such, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. Thus, even if it were determined that the petitioner overcame the director's ground for denying the petition (which it has not), for this reason the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

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

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

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

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits

⁵ For additional information regarding the prevailing wage for medical and health services managers in [REDACTED] County, see the All Industries Database for 7/2012 - 6/2013 for Medical and Health Services Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=11-9111&area=36084&year=13&source=1> (last visited July 25, 2014).

branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and knowledge required for the proffered position, along with the petitioner's claimed requirements, are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. Accordingly, the petitioner has failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As found above, as a result, even if it were determined that the petitioner overcame the basis for the director's for denial of the petition, the petition could still not be approved.

C. Specialty Occupation

We will now address the director's basis for denial of the petition, namely that the petitioner did not establish that it would employ the beneficiary in a specialty occupation position. For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

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), 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 at 147 (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.

We will first address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). This criterion requires that the petitioner establish that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

We usually consult DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ However, the proffered position in the instant matter, "Director of Patient Care Services" in a California hospice facility, is a position whose minimum requirements are defined by state regulation. Accordingly, we must review the state regulation to determine whether the state regulation's minimum requirements to perform the duties of the proffered position is a baccalaureate or higher degree in a specific specialty. Hospice services in California must be provided in compliance with the "Standards for Quality Hospice Care, 2005" (SQHC) from the California Hospice and Palliative Care Association.⁷ Section 5.3(D) of the SQHC indicates that a hospice facility must have an available Director of Patient Care Services, and states that an individual shall qualify for the position by fulfilling the requirements under one of the following categories:

⁶ The 2014-2015 edition of the *Handbook*, may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁷ Standards of Quality Hospice Care, 2005 from the California Hospice & Palliative Care Association is available at http://www.calhospice.org/included/docs/regulatory/Standards_of_Quality_Hospice_Care.pdf on the Internet.

1. A Registered Nurse with a baccalaureate or higher degree in nursing or another health-related field with three years of experience within the last five years in a hospice or home health agency, primary care clinic or health facility, at least one year of which was in a supervisory or administrative capacity.
2. A Registered Nurse with four years [of] experience within the last five years in a hospice, home health agency, primary care clinic or health facility, at least one year of which was in a supervisory or administrative capacity.

The state-defined requirements for this position indicate that a person licensed as a registered nurse with four years of experience may be employed in the position of "Director of Patient Care Services." California regulations do not require a bachelor's degree for licensure as a registered nurse. *See* Cal. Code Regs. tit. 16 § 1426 (prescribing the required curriculum for nursing programs as consisting of "not less than fifty-eight (58) semester units, or eighty-seven (87) quarter units").

Thus, it is apparent that a two-year associate's degree and four years of experience are sufficient preparation for entry into the occupation of "Director of Patient Care Services," as regulated by the State of California. Such preparation is not equivalent to a bachelor's degree in a specific specialty under USCIS regulations.⁸

We further note that as the petitioner has characterized the proffered position as a Level I (entry level) position on the LCA, it is not apparent that preparation beyond the minimum required by the state is actually required for the proffered position. As previously discussed, a designation of Level I 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. In accordance with the relevant DOL explanatory information on wage levels, the beneficiary will be closely supervised and her work closely monitored and reviewed for accuracy. Furthermore, she will receive specific instructions on required tasks and expected results.

In response to the RFE and again on appeal, counsel asserts that the O*NET summary report regarding the occupational category of "Medical and Health Services Managers," which shows a Job Zone of 5 and an SVP of 8.0 for the occupation, supports the petitioner's claim that the proffered position qualifies as a specialty occupation. We reviewed the printout of this report.

⁸ In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty.

We first note that the information in the report is ascribed to an occupational category as opposed to a particular position. The report states: "[m]ost of these occupations require graduate school." While this statement may apply to an occupational category generally, it is not probative with regard to the minimum entry requirements for a particular position.⁹ Notably, the minimum requirements for the particular position at issue here are proscribed by the State of California, and are inconsistent with the generalizations provided in the report.¹⁰

In regard to the SVP range, we observe that an SVP rating of 8 does not indicate that at least a four-year bachelor's degree is required for an occupational category that has been assigned such a rating or, more importantly, that such a degree must be in a specific specialty directly related to the occupation. Rather, the SVP rating indicates that the occupation requires over four years up to and including ten years of training.¹¹ This training may be acquired in a school, work, military, institutional, or vocational environment. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs. Upon review of the O*NET summary report, the printout is not probative evidence to establish that the proffered position qualifies as a specialty occupation.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158,

⁹ The term "most" is not indicative of a minimum entry requirement. For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least an advanced degree, it could be said that "most" positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner, which has been designated as Level I (entry-level) position in the LCA. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

¹⁰ The report also indicates that 51 percent of "respondents" stated that a bachelor's degree, not a graduate degree, is required. The internal inconsistency of the report undermines its utility. We further note that the respondents did not indicate that the degree must be in a *specific specialty*.

¹¹ For more information on SVP ratings, see National Center for O*NET Development, *Stratifying Occupational Units by Specific Vocational Preparation (SVP)* (1999), available on the Internet at http://www.onetcenter.org/dl_files/SVP.pdf.

165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner has not established that the proffered position, a Director of Patient Care Services in California, is an occupation in which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not explained how or why its particular proffered position which has normal minimum requirements established by the State of California is a position that must be evaluated according to the *Handbook's* or any other authoritative source's overview of a general occupation. That is, we emphasize that the normal minimum requirements for entry into the proffered position has been established by the State of California. Further, upon review of the duties and requirements of the proffered position as described in the record of proceeding by the petitioner, the duties and requirements 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 discussed above, the petitioner has not established that its proffered position is one for which an authoritative source reports an industry-wide requirement in conjunction with the laws and regulations in California, for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement.¹² The petitioner did not submit any letters or affidavits from firms or individuals in the industry.

The record establishes that the petitioner is a provider of hospice services. In the Form I-129, the petitioner stated that it was established in 2008, and has 15 employees. The petitioner stated its gross annual income as approximately \$3 million. Although requested on the Form I-129, the petitioner did not provide its net annual income. The petitioner did not provide an explanation for

¹² Rather, the SQHC from the California Hospice and Palliative Care Association indicates that a bachelor's degree in a specific specialty or its equivalent is not the minimum entry requirement for the position.

failing to provide this information. In response to the RFE, the petitioner provided tax returns indicating that the petitioner is operated as a sole proprietorship by owner and president, [REDACTED], and in 2012 generated a net profit of \$117,573.

The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 621610. According to the U.S. Census Bureau, 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 July 25, 2014). The NAICS code specified by the petitioner is designated for "Home Health Care Services," and is defined by U.S. Department of Commerce, Census Bureau as follows:

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

Illustrative Examples:

- Home health care agencies
- Visiting nurse associations
- In-home hospice care services

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 621610 – Home Health Care Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 25, 2014).

In response to the RFE and on appeal, the petitioner and counsel submitted several job announcements. However, the documentation does not establish the proffered position qualifies as specialty occupation. For instance, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the announcements, we observe that the petitioner has not established that the advertising organizations are similar to it. The record of proceeding contains job postings for [REDACTED] government agencies); [REDACTED] (an organization to assist troubled youth); [REDACTED] (an oncology medical practice); [REDACTED] (provider of community-based mental health services to 17 to 25 year-olds); [REDACTED] (a clinic); [REDACTED] (a private practice of physicians); and [REDACTED] (a residential facility for adolescents). None of the postings appear to be for organizations similar to the petitioner.

When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. 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.

In response to the RFE, counsel states that "the nature of the duties and the services provided to the clients/patients – management of a clinical program and/or clinical staff of patient care services – is what makes the organizations in this industry 'similar' and not the number of employees. The nature of the work and duties performed by these positions are similar notwithstanding the size of the company." Contrary to counsel's assertion, we note that it is reasonable to assume that the size of an employer's business may impact the claimed duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the actual duties of a particular position.

However, beyond the issue of the size of the advertising organizations, we observe that none of the job advertisements provided involve organizations from the petitioner's industry. That is, the petitioner has not provided job postings from organizations of any size that provide in-home hospice care. As previously discussed, California's hospice care industry is subject to specific regulations, which do not require a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation at issue here. Thus, persuasive evidence under this criterion should demonstrate that although a bachelor's degree is not required by regulation for entry into the occupation, such a degree 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. Here, no job postings from the petitioner's industry were provided.

Additionally, some of the advertisements appear to be for dissimilar positions and/or for more senior positions.¹³ For example, the posting for public health program specialist at [REDACTED] indicates that the advertised position involves implementing a community health assessment, and a countywide children's oral health initiative. The duties of the proffered position do not appear to involve implementation of large-scale public health initiatives. The clinical supervisor at [REDACTED] will supervise mental health clinicians. It is not apparent that proffered position involves clinical mental health expertise. The practice manager at [REDACTED]

¹³ As previously discussed, the petitioner has classified the proffered position as a Level I (entry level) position, the lowest of four possible designations. According to DOL guidance, 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. Furthermore, a Level I wage is appropriate for a worker in training or an internship.

will be responsible for "supervising the daily operational, human resource, administrative and business functions" of the practice. Thus, the level of independence and exercise of judgment involved in this advertised position appears to exceed the expectations of a Level I position, at which the proffered position was certified.

Further, contrary to the purpose for which they were submitted, the advertisements do not demonstrate that a bachelor's degree in a *specific specialty* (or its equivalent) is common in the petitioner's industry in parallel positions among similar organizations. Some positions do not require a degree in a specific specialty. For example, the [redacted] seeks a candidate with a bachelor's degree or equivalent, but does not require the degree to be in a specific specialty. Other positions, such as those from [redacted] indicate that a general-purpose bachelor's degree, such as a degree in business or business administration, is acceptable preparation for the advertised positions. While a general-purpose degree (including a degree in business) may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here.¹⁴ That is, the petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

Thus, based upon a complete review of the record of proceeding, the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is (1) common to the petitioner's industry (2) in parallel positions (3) among organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

¹⁴ 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted tax documents, a county business license, Medicare compliance and certification letters, a Medi-Cal provider letter, laboratory certificates, permits, articles of organization, a brochure regarding its services, an organizational chart, and printouts from the petitioner's website. However, upon review of the record, we find that the evidence submitted does not establish relative complexity or uniqueness as an aspect of the proffered position.

In addition, as previously discussed, the petitioner designated the position at a Level I (entry level) wage on the LCA. 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."¹⁵

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or is equivalent. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner fails to demonstrate how the duties of the position as described 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.

In response to the RFE, the petitioner and counsel provided a chart correlating some duties of the proffered positions to "relevant courses" completed by the beneficiary. 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 position. 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.

We observe that the petitioner has indicated that the beneficiary's educational background and prior nursing experience will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of

¹⁵ For additional information regarding prevailing wage determinations, 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.

the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, 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).

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

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding

certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the director's RFE, the petitioner submitted documents related to the petitioner's president, who currently holds the proffered position. The petitioner also provided copies of postings from [REDACTED] for the proffered position.¹⁶ The documents related to the petitioner's president include a California nursing license, a [REDACTED] certificate, a resume, and documents related to her foreign education. An evaluation of foreign credentials was not provided. These documents do not establish that the petitioner's president has a bachelor's degree in a specific specialty or its equivalent. As previously noted, the State of California does not require a bachelor's degree as a prerequisite to become a licensed RN. Without an evaluation of the foreign credentials, we are unable to conclude that the petitioner's president's foreign education is equivalent to a bachelor's degree in a specific specialty. The craigslist postings state: "JOB REQUIREMENT BACCALAUREATE DEGREE IN NURSING OR HIGHER MASTERS DEGREE PREFERRED." It is not apparent from the wording of the announcement whether the petitioner *requires* a bachelor's degree for this position or *prefers* such a degree. A preference for a particular level of education is not necessarily a requirement for the same. Notably, the petitioner did not provide details regarding the individuals that were interviewed or hired for the position, besides the petitioner's president who is also the petitioner's proprietor.

The petitioner stated in the Form I-129 petition that it has 15 employees and was established in 2008 (approximately five years prior to the filing of the H-1B petition). The petitioner did not specify the total number of individuals that have held the proffered position and how many of them had a bachelor's degree in a specific specialty, or its equivalent. Without further information, the evidence provided is not persuasive to establish the petitioner's normal hiring practices.

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

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

Counsel asserts that the nature of the specific duties of the position in the context of its business operations 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

¹⁶ The petitioner provided two postings. One was posted on January 7, 2011 and updated on February 7, 2011, and the other was posted on December 26, 2012 and updated on January 26, 2013.

equivalent. We reviewed all of the evidence in the record, including the job description and the evidence regarding the petitioner's business operations, tax documents, a county business license, Medicare compliance and certification letters, a Medi-Cal provider letter, laboratory certificates, permits, articles of organization, a brochure regarding its services, an organizational chart, and printouts from the petitioner's website. However, we find that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

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

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

D. Relevance of *Tapis Int'l v. INS*, *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, and Unpublished Decisions

We have also reviewed counsel's assertions regarding *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). Specifically, counsel sets out a portion of the court's analysis as follows:

Defendant argues that Plaintiff is attempting to read out of the statutory and regulation requirements the "specific specialty" component. But Defendant's approach is too narrow. ... **Defendant's implicit premise that the title of a field of study controls ignores the realities of the statutory language involved and the**

obvious intent behind them. The 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.

(Emphasis in counsel's brief on appeal.)

Counsel also claimed that the U.S. district court in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), took the same position and cited the court's reasoning in *Tapis Int'l v. INS*.

Upon review, we note that in *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

We agree with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. 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) (emphasis added).

Moreover, we also agree that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. We do not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, 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, again we note that 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 a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, we do not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

For the aforementioned reasons, we also find that *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, does not stand for the proposition that either (1) a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

In any event, we observe that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS* or *Residential Fin. Corp. v. U.S.*

Citizenship & Immigration Services.¹⁷ 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.

We also note that counsel refers to several unpublished decisions and asserts that in those decisions we focused on the substantive knowledge imparted through coursework and not the label affixed to the degree or academic major. In regard to counsel's assertion, we reiterate that there must be a close correlation between the required "body of highly specialized knowledge" and the position, and that the petitioner must establish that the 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 a specific specialty as the minimum for entry into the occupation as required by the Act.

We also find that in this matter as the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. 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.

III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

¹⁷ It is noted that the district judge's decision in the *Residential Fin. Corp. v. USCIS* 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 own *de novo* review of the matter.

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.