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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: JUN 02 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:  
[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

*for Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a home health care agency services and staffing company provider established in 2006. In order to employ the beneficiary in what it designates as a nurse manager position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation. On appeal, counsel for the petitioner submits a brief and additional evidence, asserting that the director's findings with regard to the proffered position were erroneous and contending that the petitioner met its burden of proof in this matter.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and additional documents in support of the appeal.

The AAO reviewed the record in its entirety before issuing its decision.<sup>1</sup> For the reasons that will be discussed below, the AAO agrees with the director that the record as currently constituted does not establish eligibility for the benefit sought. Accordingly, the appeal will be dismissed, and the petition will be denied.

## I. THE LAW

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

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires both 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. See section 214(i)(1) of the Act.

## II. FACTUAL AND PROCEDURAL HISTORY

On the Form I-129 petition, the petitioner indicates that it is seeking the beneficiary's services as a nurse manager on a part-time basis at a weekly salary of \$600. In its March 27, 2013 letter of support, the petitioner provided the following overview of the beneficiary's proposed duties:

The position offered is Nurse Manager, and Beneficiary will supervise and evaluate the work performance of almost thirty nursing workers. The main responsibilities of the position include:

- Supervise and evaluate the work performance of nursing workers;
- Conduct training of nursing workers;
- Direct and coordinate work schedules and assignments for nursing workers;
- Analyze and develop patient, nursing, and health information system data;
- Plan, develop and administer home health care programs; and
- Monitor advances in medicine, computerized diagnostic and treatment equipment, government regulations, and health insurance changes that are relevant to the nursing care[.]

The petitioner also stated that the candidate for the proffered position must have at least a bachelor's degree in nursing or a closely related field of study, and claimed that the beneficiary was qualified to perform the duties of the proffered position by virtue of her Bachelor of Science degree in Nursing from the [REDACTED].

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Medical and Health Services Manager" – SOC (ONET/OES) Code 11-9111, at a Level I (entry level) wage.

Furthermore, in support of the petition, the petitioner submitted: (1) a copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation; (2) a printout of the prevailing-wage levels for Medical and Health Services Managers from the Foreign Labor Certification Data Center Online Wage Library; (3) a copy of the petitioner's offer-of-employment letter to the beneficiary, dated February 25, 2013; (4) copies of corporate documents pertaining to the petitioner; (5) a copy of the petitioner's promotional brochure; (6) a copy of the petitioner's organizational chart; and (7) copies of the beneficiary's diploma, transcript, and resume.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 4, 2013. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary, as well as evidence clarifying the nature of the petitioner's business. The director outlined the specific evidence to be submitted.

On August 16, 2013, counsel for the petitioner submitted a letter in response to the director's RFE accompanied by additional evidence. In the letter, counsel provided a revised job-description, which we will address in the next section of this decision.<sup>2</sup>

Counsel also submitted additional documents in support of the petition, including: (1) an updated organizational chart for the petitioner; (2) a printout from the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* pertaining to Medical and Health Services Managers; (3) a Summary Report for Medical and Health Services Managers from O\*NET Online; (4) copies of two job advertisements for positions counsel claims are similar to the proffered position; and (4) copies of the beneficiary's nursing licenses.

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<sup>2</sup> The response to the RFE and the updated description of duties is printed on counsel's letterhead. It is noted that this revised description of the duties and the requirements of the proffered position is not probative evidence as the information was provided by counsel, not the petitioner. Counsel's submission was not endorsed by the petitioner and the record of proceeding does not indicate the source of the revised duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director denied the petition on September 16, 2013, finding that the petitioner had failed to establish that the proffered position was a specialty occupation. On appeal, counsel for the petitioner submits a brief and additional evidence, asserting that the proffered position does in fact qualify as a specialty occupation.

### III. ANALYSIS

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

The evidence of record presents the proffered position in terms of multiple functions which the petitioner correctly asserts align the proffered position with the Medical and Health Services Managers occupational group. However, as we shall discuss in our analysis of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the proffered position's inclusion within the Medical and Health Services Managers occupational group is not sufficient in itself to establish the position as one for which a bachelor's or higher degree, or the equivalent, in a specific specialty is normally required.

The letter of response to the RFE provided the following expanded description of the proffered Nurse Manager position and its duties:

#### I. The Job Description

1. The proffered position is a Part-time "Nurse Manager", working 20 hours a week. As stated in the cover letter in the petition packet, Beneficiary is responsible for supervising and evaluating the work performance of almost thirty nursing workers. More specifically, her duties include:
  - Meet and direct subordinate Rehab Coordinator, Service Coordinator, Quality Assurance/Referral Intake Coordinator, and DME/Referral Intake Coordinator (3 hours, 15.00%);
  - Supervise the work performance of field nurses (3 hours, 15.00%);
  - Evaluate the work performance of field nurses (3 hours, 15.00%);
  - Conduct training of nursing workers (4 hours, 20.00%)

- Direct and coordinate work schedules and assignments for field nurses (2 hours, 10.00%);
- Plan, develop and administer home health care programs (2 hour[s], 10.00%); and
- Monitor advances in medicine, computerized diagnostic and treatment equipment, government regulations, and health insurance changes that are relevant to the nursing care (1 hour, 5.00%)

With respect to the level of responsibility, Beneficiary, as Nurse Manager, will work on a broad range of complex activities, takes initiative, and schedules own works, with minimal supervision or under general direction of the organization. The job duties require both a theoretical and practical application of body of highly specialized knowledge and attainment of at least a Bachelor's degree in Nursing or closely related field of study as minimum entry into the occupation among parallel employers.

While the supervision, training, and evaluation of nursing personnel would likely require a Registered Nurse license, generally such licensure does not require a Bachelor of Science degree in Nursing (BSN).<sup>3</sup> However, the record of proceeding contains no probative evidence that the generally stated responsibility of "supervising and evaluating the work performance of almost thirty nursing workers" would require at least a BSN or, for that matter, at least a bachelor's degree in any other specific specialty.

There is also no evidentiary basis in the record for us to determine that at least a bachelor's degree in Nursing or any other closely related specialty would be required for any of the "more specifically" described duties, that is, those listed as bullet-points (such as, supervising and evaluating the work performance of field nurses, training nursing workers, and "plan[ning], develop[ing], and administer[ing] home health care programs.") Described as they are in terms of general functions without explanation of what substantive work and associated applications of bachelor's degree level of highly specialized knowledge in a specific specialty would be required to perform them, the record's descriptions of the proffered position and its duties are not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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<sup>3</sup> In pertinent part, the "Registered Nurses" chapter of the Department of Labor's *Occupational Outlook Handbook* notes:

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Registered Nurses," <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4> (last visited May 29, 2014).

Likewise, as generally described as the duties of the proffered position are, they lack the substantive details necessary to establish them as so specialized, complex, and/or unique as to elevate the proffered position or its duties above nurse manager positions and associated duties that neither require the services of a person with at least a bachelor's degree, or the equivalent, in Nursing or some other specialty nor require the application of knowledge usually associated with such credentials.

Accordingly, we find that the extent to which the proposed position and its constituent duties are described in this record of proceeding do not convey, either alone or in the aggregate, an inherent need for the theoretical and practical application of at least a bachelor's degree-level of a body of highly specialized knowledge in a specific specialty.

Although the petitioner asserts many functional components for its proposed position, it does not, however, explain and document them in any substantially specific detail that conveys the methodologies, analytical processes, and other substantive aspects of the position; what performance of those job aspects would require in theoretical and practical applications of highly specialized knowledge; or any correlation between such applications and the claimed necessity of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

As such, we find that the evidence in the record of proceeding does not distinguish the proposed duties or the position they collectively comprise as more unique, specialized, and/or complex than positions which may share those same generalized functions and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, which requirement is essential for a specialty occupation as defined at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

The AAO also observes that the petitioner has not supplemented the position and duty descriptions with persuasive evidence that their actual performance in the particular context of the petitioner's business operations would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

As the above evidentiary assessments and findings are critical to our analysis of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), we deem them incorporated into our analysis of each of those criteria, which will follow below.

Having made these preliminary findings, the AAO we will now discuss application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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 that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a nurse manager position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup>

The AAO reviewed the chapter of the *Handbook* entitled "Medical and Health Services Managers," and concurs that the duties of the proffered position, as described, correspond with this occupational category.<sup>5</sup> The *Handbook* describes the duties of "Medical and Health Services Managers" in the subsection entitled "What "Medical and Health Services Managers Do" and states, in part, the following about the duties of this occupation:

Medical and health services managers, also called healthcare executives or healthcare administrators, plan, direct, and coordinate medical and health services. They might manage an entire facility or specialize in managing a specific clinical area or department, or manage a medical practice for a group of physicians. Medical and health services managers must be able to adapt to changes in healthcare laws, regulations, and technology.

#### **Duties**

Medical and health services managers typically do the following:

- Work to improve efficiency and quality in delivering healthcare services
- Keep up to date on new laws and regulations so that the facility in which they work complies with them
- Supervise assistant administrators in facilities that are large enough to need them

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<sup>4</sup> All of the AAO's references are to the 2014-15 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>.

<sup>5</sup> For additional information regarding the occupational category "Medical and Health Services Managers," see 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-2> (last visited April 29, 2014).

- Manage the finances of the facility, such as patient fees and billing
- Create work schedules
- Represent the facility at investor meetings or on governing boards
- Keep and organize records of the facility's services, such as the number of inpatient beds used
- Communicate with members of the medical staff and department heads

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

U.S. 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-2> (last visited April 29, 2014).

According to the *Handbook*, medical and health services managers plan, direct, coordinate, and supervise the delivery of healthcare, and are either specialists in charge of a specific clinical department or generalists who manage an entire facility or system. In this matter, the description of the proffered position indicates that the beneficiary will be responsible for various management activities with regard to the petitioner's nursing personnel. We therefore find that the proffered position falls within the Medical and Health Services Managers occupational group.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), it must be established that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The *Handbook's* information about the education and training requirements for this occupational category, however, indicates that entry into the Medical and Health Services Managers occupational group does not normally require at least a bachelor's degree in a specific specialty or its equivalent.

According to the *Handbook*, the educational requirements of a medical and health services manager are as follows:

Most medical and health services managers have at least a bachelor's degree before entering the field; however, master's degrees also are common. Requirements vary by facility.

**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.

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 April 29, 2014).

The *Handbook* does not report that a medical and health services manager needs, as a standard entry requirement, at least a bachelor's degree in a specific specialty or its equivalent. Rather, the *Handbook* simply reports that "*most* medical and health services managers have at least a bachelor's degree." (Emphasis added). Thus, the *Handbook* does not indicate that a bachelor's degree in a specific specialty is normally required for entry into this occupational category. Consequently, and contrary to counsel's view, the proffered position's inclusion within the Medical and Health Services Managers occupational group is not sufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

In response to the RFE and again on appeal, counsel for the petitioner partly relies on the information contained in an O\*NET OnLine Summary Report for the Medical and Health Services Managers" occupational category. Counsel correctly notes that the "Education" section of the Summary Report indicates that 52% of the respondents have a bachelor's degree and 41% have master's degrees. From this counsel argues that "the fact that 93% of the workers in the occupations have at least their Bachelor's degrees shows that the proffered position meets the first criterion of [] 8 C.F.R. § 214.2(h)(iii)(A)(1). . . ."

First, we disagree with counsel's suggestion that the percentages scored by the survey respondents are a statistically accurate measure of the percentages of educational attainment among the entire population of medical and health services managers. We are aware of no such claim by the producers of the O\*NET, and we note that the O\*NET depicts the percentages as generated only by an unspecified number of voluntary respondents to questionnaires.

In any event, a critical feature of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) is that the criterion is satisfied only if the petitioner establishes that the "particular position" – not a percentage of

positions within the position's occupational group – normally requires the criterion's educational level.

Moreover, this O\*NET "Percentage of Respondents" information upon which counsel relies does not indicate that any particular "education level" must be in a *specific specialty*. The AAO also observes that the O\*NET report does not distinguish the respondents' positions within the occupation, such as by career level (e.g., entry-level, midlevel, senior-level), etc.

For all of the above reasons, the AAO finds that the O\*NET "Percentage of Respondents" information is not probative evidence that the particular position here proffered is one for which a bachelor's or higher degree in a specific specialty is normally the minimum requirement for entry.

Next, there is counsel's reliance on the Job Zone code 5 that the O\*NET's Summary Report section assigns to the Medical and Health Services Managers occupational group. Counsel accurately highlights that, for the Job Zone (Zone 5) assigned to the Medical and Health Services Managers occupational group, the O\*NET states that "most of these occupations require graduate school."

Having reviewed the Summary Report in its entirety, we find that the Job Zone 5 designation does not establish that the particular proffered position before us normally requires at least a bachelor's degree in a specific specialty, or its equivalent. As noted by counsel, the Summary Report for Medical and Health Services Managers has a designation of Job Zone 5, which indicates that a position requires "extensive preparation." That designation, however, does not demonstrate that a bachelor's degree in any specific specialty is required, and it does not, therefore, demonstrate that a position within a Job Zone 5 occupational group is a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii), or that a position would, by virtue of the Job Zone 5 designation, require at least a bachelor's degree, or the equivalent, in a specific specialty or, for that matter, a graduate degree in any specialty.

The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of Medical and Health Services Manager positions would require at least a bachelor's degree in nursing or a closely related field, it could be said that "most" medical and health services manager positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act. The AAO finds that Summary Report discussed above does not establish that the proffered position is a specialty occupation.

Next, we note that the *Handbook* indicates that those with general-purpose degrees in business administration may enter the occupation. However, an H-1B specialty-occupation petitioner must

demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

In sum, as the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter.

To establish that an organization is similar to it, the petitioner must demonstrate that it and the other organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the job-posting organization share the same general characteristics, 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) 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 sound factual basis for such an assertion.

On the Form I-129 petition, the petitioner describes itself as a home health care agency established in 2006, with 33 employees. The petitioner claims that it has a gross annual income of approximately \$1.2 million and a net annual income of "sufficient." On the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 621610 – "Home Health Care Services."<sup>6</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

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

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 621610 – Home Health Care Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 29, 2014).

To support the assertion that the proffered position satisfies this criterion of the regulations, counsel submitted copies of two documents which it describes as job announcements – although they bear markings of an HR policy and although there is no evidence that they were ever published as job vacancy advertisements. For convenience sake we will refer to the documents as job announcements – but we note that the lack of evidence that the documents were ever published as such undermines their evidentiary value. As we shall now discuss, there are additional reasons why these documents merit no probative weight.

We note that both so-called job announcements were posted by the same employer, i.e., Compassion Health Services, LLC, d/b/a Belcion Health Care Services.

The record of proceeding does not provide any independent evidence that the two documents represent their particular entity's recruiting and hiring history for the types of positions that the documents address. Also, if the documents are viewed as job advertisements, they are still only solicitations for hire, and as such they are not evidence of Compassion Health Services' actual

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<sup>6</sup> NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited April 29, 2014).

hiring practices.

Furthermore, the two documents do not appear to address positions that are parallel to the one for which the present petition was filed. That is, the documents' positions do not appear to have similar duties and requirements to the proffered position. Specifically, the documents pertain to a Nursing Coordinator position and to a Nursing Supervisor position with Compassion Health Services, LLC, d/b/a Belcion Health Care Services. Both documents state different positions in title and duties and identify a bachelor's degree in nursing as required. Both of these positions, however, indicate that clinical duties, including both direct and indirect patient care, are required, which are duties not included in the description of the proffered position in this matter. Moreover, while the name of the advertising company suggests the nature of its business operations, these postings are devoid of information regarding the employer's operations. Without further information, we cannot determine if this organization is similar to the petitioner, and the petitioner has not provided sufficient probative evidence to suggest that it is. Although it appears that these documents pertain to a home health care company, the record contains no evidence with regard to the size and scope of this businesses in comparison to that of the petitioner's 33-employee home health care agency.

We also note counsel's comparison on appeal of the duties of the proffered position with the duties contained in both of the above-mentioned job documents, and we further note counsel's claim that Compassion Health Services is a similar employer since it is "a health care company with 30-40 employees." For the reasons discussed in detail above, these two documents, and counsel's accompanying claims, are insufficient to establish that it is common in the home health care industry for employers similar to the petitioner to require a BSN for positions parallel to the one proffered in this petition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In sum, the evidence of record does not 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.<sup>7</sup> Therefore, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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<sup>7</sup> USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these two job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

We here refer the petitioner to our earlier comments and findings with regard to the lack of evidence that is sufficiently detailed and substantive to develop the proffered position and its duties as more unique, specialized, and/or complex than positions which may share those same generalized functions and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. We incorporate that portion of the record in our analysis of this criterion.

As reflected in our earlier discussion of the proffered position and its duties, the evidence of record simply does not provide a sufficient factual foundation to establish that the proffered position is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Further, there is the implication of the LCA submitted by the petitioner. It was certified for use with a job prospect that only merits a Level I (entry level) wage. Level I (entry level) designation is appropriate for a comparatively low, entry-level position relative to others within the occupation.<sup>8</sup> That is, 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, and it carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. We find that the submission of such an LCA is inconsistent with the

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<sup>8</sup> The wage levels are defined in 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.

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).

relative complexity or uniqueness required to satisfy this particular criterion.

Moreover, neither the description of the duties nor any supporting evidence substantiates that even the full group of the duties constituting the proffered position are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. In other words, the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position.

The AAO observes that the petitioner has indicated that the beneficiary's educational background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty or its equivalent.

With regard to this second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), we incorporate here our earlier comments regarding the lack of probative detail in the petitioner's description of the duties of the proposed position. Again, as reflected in those comments, the petitioner has not focused upon, nor provided evidence that develops, relative complexity or uniqueness as attributes of the proposed position. Further, the evidence of record does not distinguish the proposed duties, or the proposed position that they collectively comprise, as more complex or unique than positions in the pertinent occupational group which may share those same generalized functions that the petitioner ascribes to its position and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, or, consequently, a person with at least a bachelor's degree in a specific specialty. Accordingly, the petitioner has not shown that its particular position is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as the evidence of record does not show that the particular position for which the petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not 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 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 the performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner makes no claim that it currently or in the past has employed a specialty-degreed individual to serve in the proffered position. The petitioner, therefore, has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Moreover, the AAO reviewed the record of proceeding but finds that the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.

Thus, the petitioner has not satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

With regard to this third criterion, we also note that while a petitioner may 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").

Therefore, 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 even the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires (1) the theoretical and practical application of a body of highly specialized knowledge and (2) 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 the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. 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.*

Finally, 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 the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Counsel contends on appeal that the duties of the proffered position, which require the beneficiary to supervise and evaluate the work performance of almost thirty nurses, are "sufficiently complex and involve a level of knowledge and skills that require the services of a person who has at least a Bachelor's degree in nursing or closely related field of study. . . ." Counsel's claims notwithstanding, we find that evidence of record has not developed relative specialization and complexity an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of other positions in the pertinent occupational category whose performance would not require the application of knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. There is a lack of evidence substantiating counsel's assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Also, we note again that, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof: the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Additionally, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the same occupational category. The petitioner designated the position of nurse manager as a Level I position (the lowest of four possible wage-levels). Again, DOL indicates that a Level I wage is appropriate for "beginning level employees who have only a basic understanding of the occupation." See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), 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).

Counsel contends that the entry-level wage proffered to the beneficiary in this matter is not indicative of the level of complexity of the position. Rather, counsel asserts that the very designation by the Occupational Information Network (O\*NET) of the occupation of health educators as being a Job Zone Five occupation counters this finding. As previously discussed, the fact that an occupation group may require "extensive preparation" does not automatically establish that the specific duties of a particular position within that group are 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. We also note that counsel has not cited any statutory or regulatory authority or precedent decision for the claim.

As reflected in this decision's earlier discussion of the duty descriptions, the duties as described in the record of proceeding do not evidence such a level of specialization and complexity that the

knowledge they would require is usually associated with any particular level of education in any particular specialty. As generically and generally as they were described, the duties of the proposed position (such as, for example, supervising, training, and evaluating the work of nursing workers) are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent.

We therefore find that the petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. That is, the petitioner has not established that the nature of the duties of the position 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. So, 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 established 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 petition appeal will be dismissed and the petition will be denied for this reason.

#### IV. CONCLUSION

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. at 128. Here, that burden has not been met.

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