



U.S. Citizenship
and Immigration
Services

(b)(6)



Date: FEB 04 2013

Office: VERMONT SERVICE CENTER

File: 

IN RE: Petitioner: 
Beneficiary: 

ON BEHALF OF PETITIONER:

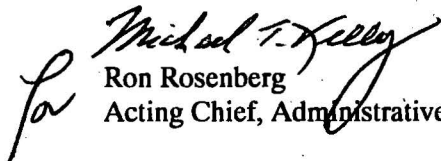


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 petition will be denied.

The petitioner describes itself as a licensed and certified home health agency. It seeks to employ the beneficiary as an H-1B temporary 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 petitioner's Form I-129 assigned "Quality Assurance Coordinator" as the job title of the proffered position. The Labor Condition Application (LCA) submitted to support the petition also cites the job title as "Quality Assurance Coordinator," and it was certified for the Standard Occupational Classification (SOC) System's occupational classification for "Medical and Health Services Managers" and the related SOC code (11-9111.00).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements. In support of this assertion, counsel for the petitioner submitted a brief and additional evidence on appeal.

As will be discussed below, the AAO finds that the director's decision to deny the petition for its failure to establish the proffered position as a specialty occupation was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

The primary issue that the AAO will consider is whether the 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 following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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,

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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, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to

be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

Providing additional support to the Form I-129, counsel for the petitioner submitted the following documents: (1) a certified Labor Condition Application (LCA); (2) a statement from the petitioner reaffirming the employer's attestations commensurate with the LCA; (3) a copy of a letter from the petitioner stating that the petitioner has the ability to pay the beneficiary's wages dated March 15, 2010; (4) a job-vacancy notice dated November 18, 2010; (5) copies of the beneficiary's foreign degrees and transcripts; (6) a copy of the beneficiary's resume; (7) copies of documents pertaining to the beneficiary's education, training, and experience, with a credential evaluation opining that the beneficiary's education together with her experience is equivalent to a U.S. bachelor's degree in nursing; and (8) various other documentation regarding the petitioner.

Within the initial support letter, the petitioner asserted that the position requires leadership, communication skills, and good judgment. Additionally, the petitioner stated the following as reasons why a nursing degree is critical to performing the constituent job duties (verbatim):

The position is one where health planning and development is needed and an employee with a four year nursing degree coupled with nursing expertise and experience can greatly help and improve health planning and development, policy development and most importantly quality assurance of the facility. A nursing graduate with a four year degree not only gives the opportunity to apply their knowledge and skills but also to develop them in a broader understanding of nursing as a profession and well-equipped them to prepare to take on leadership roles at the facilities where they are employed.¹

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on March 21, 2011. Within the RFE, the director outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation.

In his April 25, 2011 letter submitted as part of the response to the RFE, initial counsel for the petitioner expressly stated that the quality assurance coordinator would monitor, evaluate and coordinate the work of 14 registered nurses, six licensed vocational nurses, nine certified nurse aides, as well as independent contractors in roles as healthcare personnel.

¹ The AAO observes that the educational requirement stated in the initial support letter differs from the job vacancy notice dated November 18, 2010, wherein the petitioner specified that it required a bachelor's degree in any health related field.

Also, initial counsel's RFE-reply letter included this argument for recognizing the proffered position as a specialty occupation position:

The position of a quality assurance coordinator is so complex and unique because it entails a high level of decision making, planning, directing, and coordinating the efficiency and quality of health care services. It entails a lot of preparation, analysis, negotiation, and review of plans and projects directly related to the delivery of quality healthcare services as well as supervision and coordination of health care services to be performed by the personnel. The position likewise requires leadership, strong communication and negotiation skills and good judgment. The position obviously requires that the employee must be at least a college graduate who has learned the theoretical and practical aspects of the job being offered.

Initial counsel's advocacy for this petition also included the following statement, which discussed acceptable academic concentrations for the position:

The position of quality assurance coordinator is equivalent to [the] "Medical [and] Health Services Managers" occupational classification, wherein the minimum requirement is a bachelor's degree. We have attached job openings for quality assurance coordinator [positions] in [the] healthcare services [industry], wherein the minimum requirement for the job is a bachelor's degree.

The petitioner submitted three advertisements placed by other entities for the following positions: (1) a position as a quality assurance assistant for an organ procurement organization, with responsibilities for overseeing and maintaining quality systems, such as medical record review, non-conformances, complaints, documentation, auditing, and driving continuous improvement within the organization as well as ensuring adherence to applicable regulatory and accreditation requirements, stating a bachelor's degree requirement, without a statement as to the specific specialty; (2) a quality assurance RN coordinator for Kaiser Permanente, with responsibilities for coordinating quality, utilization and risk management activities for the medical center, providing technical, educational, consultative, and coordination support to assigned areas, stating a bachelor's degree in nursing or related field or equivalent work experience, as well as a current RN license in California; and (3) a quality improvement coordinator for The Coordinating Center, a nonprofit organization that coordinates the services that people with complex medical needs and disabilities need to stay in their own homes and communities, with responsibilities for providing guidance, education and technical support to enable co-workers to achieve desired outcomes, stating a bachelor's degree in nursing or related allied health curriculum.

The director denied the petition on March 23, 2011, finding that the petitioner did not demonstrate that the proffered position is a specialty occupation.

On appeal, counsel contends that the proffered position is a specialty occupation and that the service erred in making its determination. At the outset, counsel declares that the petition is for a change of employer, and cites to the beneficiary's previously approved H-1B petition for another employer under the same job title and job description to support the claim that the occupation and the proffered position qualify as a specialty occupation.

As will be indicated in the discussions below, the AAO finds that, notwithstanding the petitioner's claims to the contrary, the petitioner has not established that the proffered position as it would actually be performed in the context of this petitioner's particular business operations would, in fact, be a position within the Medical and Health Services Managers occupational classification rather than within the Registered Nurses occupational category. As will also be discussed, the AAO additionally finds that, regardless of how the proffered position is categorized, the evidence in the record of proceeding does not establish that this particular position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), or, that performance of the constituent duties 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.

At the outset, the AAO finds that there is a material conflict between the position as portrayed in the petitioner's letter of support and the vacancy announcement for the job, and, on the other hand, as differently described in the RFE response.

Among the documents submitted with the Form I-129 is a copy of the November 18, 2010 Job Vacancy Notice for a Quality Assurance Coordinator which the petitioner presented as the one issued for the proffered position. The pertinent part of that document, its Job Summary section, reads as follows:

Responsible for the supervision, evaluation and coordination of personnel directly involved in the provision of home health care services. Directs, supervises, and evaluates personnel and health care activities for compliance with physician orders and personnel performance to ensure proper delivery of home health services. Establish evaluation criteria for use in individual and unit evaluations of health care services. Conduct scheduled and random client evaluations of staff performance in the provision of health care services. Develop and maintain computerized records of personnel activities, evaluations, and other information. Establishes work schedules and assignments, according to workload, space and equipment availability. Assesses need for additional staff, equipment and services. Provide recommendation for additional health care staff, changes to company policies and procedures in the delivery of health care services, and personnel and unit reports of performance. Supervises and provides directions to subordinates, in an effort to ensure quality, compliance pf [sic] POC and assessment and re-assessment of patient needs and continuity of services by appropriate healthcare personnel.

In its December 21, 2010 letter of support filed with the Form I-129, the petitioner quoted the above Job Vacancy Notice language, verbatim, as the "specialty and professional tasks" that the

beneficiary would perform. For ease of review, the AAO provides the following bullet-phrase summary of the duties as described in the Job Vacancy Announcement:

- Supervise, evaluate and coordinate personnel directly involved in the provision of home health care services;
- Direct, supervise, and evaluate personnel and health care activities for compliance with physician orders and personnel performance to ensure proper delivery of home health services;
- Establish evaluation criteria for use in individual and unit evaluations of health care services;
- Conduct scheduled and random client evaluations of staff performance in the provision of health care services;
- Develop and maintain computerized records of personnel activities, evaluations, and other information[;]
- [Establish] work schedules and assignments, according to workload, space and equipment availability[;]
- Assess [the] need for additional staff, equipment and services[;]
- Provide recommendation[s] for additional health care staff, changes to company policies and procedures in the delivery of health care services, and personnel and unit reports of performance[;]
- Supervises and provides direction to subordinates, in an effort to ensure quality, compliance of POC and assessment and re-assessment of patient needs and continuity of services by appropriate health care personnel.

Again, the above description of duties dovetails with the copy of the November 18, 2010 Job Vacancy posting for the proffered positions, which the petitioner also submitted as part of the initial Form I-129 filing. However, the job and duty descriptions in the RFE response differ materially from those in the aforementioned documents. The job and duty descriptions in the RFE response drop – without any explanation – any references, direct or indirect, to at least the following duties that were initially presented to USCIS and which were an integral part of the related job vacancy announcement:

- Supervise, evaluate and coordinate personnel directly involved in the provision of home health care services;
- Direct, supervise, and evaluate personnel and health care activities for compliance with physician orders and personnel performance to ensure proper delivery of home health services;
- Supervises and provides direction to subordinates, in an effort to ensure quality, compliance of POC and assessment and re-assessment of patient needs and continuity of services by appropriate health care personnel.

The AAO also notes that, in the RFE response, initial counsel effectively disavowed the type of supervision and indirect patient care indicated in the above-mentioned aspects of the job vacancy announcement and letter of support. Not only did counsel excise any mention of the above-duties, but he also stated:

The alien's duties will not require her to work in a hospital, as the position of Quality Assurance Coordinator does not involve hands on patient care. The beneficiary will not be required to perform direct or indirect patient care, and thus a Nursing License is not required. The position is in the upper-level, supervisory and administrative position and consequently requires at least a bachelor's degree or its equivalent. This degree requirement is common in our industry as a minimum criter[ion] for performing the specialized and complex duties of this position.²

Included among the RFE-response documents is a one-page description of duties that identifies the following quality assurance coordinator duties (quoted verbatim, below) and the associated percentage of work time allocated to the duties:

QUALITY ASSURANCE COORDINATOR

Description of Duties

(Percentage of Time 60%)

Gather and work with others to analyze organization-wide and quality health-related data and improvement programs and report the same to management[;]

Work with management and personnel to set aims, determine outcome measures, identify changes and come up with PSDA (Plan, Do, Study, Act) cycles and/or timelines until desired outcomes are achieved [;]

Assist in identifying areas for improvement and report to management [;]

Designs, reviews and recommend approaches to quality healthcare improvement and turn quality agenda into specific goals and projects [;]

² As reflected in this decision, the AAO finds that the record of proceeding does not contain documentary evidence substantially supporting these claims. Accordingly, they have no evidentiary weight. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

Teach personnel quality improvement system and ensure that proper methodology, procedures and standards are followed[;]

(Percentage of Time 10%)

Post results of personnel improvement practices and reports progress to management, and ensure that personnel are also documenting progress and activities[;]

(Percentage of Time 20%)

Ensures facility's continuing compliance to Federal & State regulations and other accreditation and other health requirements [;]

(Percentage of Time 20%)

Manage and communicate healthcare data and information to improve decision-making by consumers, patients, nurses and other healthcare professional[s]; and document all patient-related activities and acts as liaison with all personnel[.]

The AAO observes, further, that the "Quality Assurance Coordinator" section of the petitioner's undated "Plan of Operation," which was submitted as part of the RFE response, likewise materially conflicts with the descriptions initially presented at the petition's filing.

It should be noted as a factor bearing upon the AAO's application of each of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) that the AAO finds that the aforementioned discrepancies are material, and that they materially and fatally undermine the credibility of the petition, particularly with regard to the nature of the work that the beneficiary would actually perform. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this reason alone, the appeal must be dismissed and the petition denied. However, the AAO will continue with its review in order to surface and address evidentiary deficiencies that also warrant dismissal of this appeal and denial of the petition.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(I), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position that is the subject of the petition.

The AAO will now look at the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*), which the AAO recognizes as an

authoritative source on the duties and educational requirements for the wide variety of occupations that it addresses.³

First, however, the AAO has determined that it will include in its consideration the full expanse of duties as initially presented in the job vacancy announcement and in the petitioner's letter of support. In this regard, the AAO finds that counsel's RFE response constitutes an attempt, by material deletions, to alter the nature of the proffered position that was and remains the subject of this petition. As a necessary corollary to that finding, the AAO also will disregard the work-time percentages allotted in the RFE-responses revised job description: the AAO finds them inaccurate are unreliable in that they do not account for the material duties and activities that counsel attempts to delete from the job descriptions submitted as accurate when the petition was filed.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather deleted material aspects of the position as presented on the petition's filing. Therefore, the analysis of all of the criteria will include the job descriptions submitted with the petition when it was filed.

In addressing whether the proffered position is a specialty occupation, the record is devoid of substantial documentary evidence as to whether the beneficiary's services would fall within the classification for "Medical and Health Services Managers." 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." While the petitioner repeatedly articulates that the beneficiary will perform the duties of a "Quality Assurance Coordinator," the petitioner did not submit any evidence of the substantive content and methods of quality assurance that it intends to provide.

The AAO will now discuss the 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 address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the evidence in the record of proceeding establishes that a bachelor's degree, or the

³ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the internet site <http://www.bls.gov.OCO>.

equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition.

To determine whether the duties of the proffered position support the petitioner's characterization of its proposed employment, the AAO turns to the 2012-2013 online edition of the *Handbook* for its discussion of Medical and Health Services Managers.⁴ The AAO does so in this case in order to address its finding that, even if the petitioner had established the proffered position as one within the Medical and Health Services Managers occupational classification, it does not automatically follow that the proffered position is one for which a bachelor's or higher degree, or the equivalent, in a specific specialty, is normally the minimum requirement for entry.

According to the *Handbook's* chapter on Medical and Health Services Managers, members of this occupational classification typically plan, direct, and coordinate medical and health services. Additionally, they typically engage in the duties bulleted below.

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

In group medical practices, managers work closely with physicians, nurses, laboratory technicians, and other healthcare employees. *For more information, see the profiles on physicians and surgeons, registered nurses, and medical and clinical laboratory technologists and technicians.*

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-2013 ed., at <http://www.bls.gov/ooh/Management/Medical-and-health-services-managers.htm#tab-2> (accessed December 20, 2012). The *Handbook* further explains, the duties of medical and health services managers vary based on the work setting or the populations served. *Id.*

A review of the *Handbook's* education and training requirements for this occupation, however, indicates that employers do not always require a bachelor's degree in a specific specialty or its equivalent for entry into the position.

⁴ Since the issuance of the director's decision, an updated version of the *Handbook* has become available.

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

Work Experience

Although bachelor's and master's degrees are the most common educational pathways to work in this field, *some facilities may hire those with on-the-job experience instead of formal education.* For example, managers of physical therapy may be experienced physical therapists who have administrative experience. For more information, see the profile on physical therapists.

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. As counsel points out on appeal, the critical element is not the title of the position nor an employer's self-imposed standards, but whether the position proffered 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.

Even if the petitioner had established the proffered position as a medical and health services manager position, the AAO finds that, because the *Handbook* indicates that attainment of at least a bachelor's degree or the equivalent in a specific specialty is not normally the minimum requirement for entry into that occupational classification, and because the evidence of record

does not include any authoritative documentary evidence refuting that indication, the proffered position would not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(1) even if it were shown to be that of a medical and health services manager.

The AAO recognizes that there is some similarity between the *Handbook's* medical and health services manager duties and some duties of the proffered position. However, with the aforementioned attempted deletion of material duties clearly related to supervision of nursing care at a much more substantive level than related in the attempted revision presented in the RFE response, it appears as likely as not that the core of the beneficiary's work would be that of Registered Nurse, albeit not at a level shown to require a bachelor's degree, or the equivalent, in nursing. Accordingly, the AAO will examine this criterion with regard to the proffered position as belonging to the Registered Nurses occupational classification.

The *Handbook's*⁵ section on "Registered Nurses," states the following:

What Registered Nurses Do

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

Duties

Registered nurses typically do the following:

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

Some registered nurses oversee licensed practical nurses, nursing aides, and home care aides. For more information, see the profiles on licensed practical and licensed vocational nurses; nursing aides, orderlies, and attendants; and home health and personal care aides.

Registered nurses sometimes work to promote general health by educating the public on warning signs and symptoms of disease. They might also run general

⁵ The AAO's references to the *Handbook* are to the 2012-2013 edition available online. The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>.

health screenings or immunization clinics, blood drives, or other outreach programs.

Most registered nurses work as part of a team with physicians and other healthcare specialists.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-2> (last visited January 29, 2013) (emphasis added). A pivotal point in the *Handbook* is the discussion on the advancement of registered nurses, where it acknowledges that registered nurses work within the business side of healthcare. Specifically, it states:

Some nurses move into the business side of healthcare. Their nursing expertise and experience on a healthcare team equip them to manage ambulatory, acute, home-based, and chronic care businesses.

Employers—including hospitals, insurance companies, pharmaceutical manufacturers, and managed care organizations, among others—need registered nurses for jobs in health planning and development, marketing, consulting, policy development, and **quality assurance**.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-4> (last visited January 29, 2013) (emphasis added).

The petitioner describes sufficient similarity to the registered nurse job classification in its RFE response letter, when it stated that the proffered position is supervisory in nature and requires the application of nursing knowledge and skills. This description is consistent with the *Handbook's* chapter on registered nurses, where it addresses the administrative nature and the business side of home-based care. Moreover, the *Handbook* indicates that registered nurses plan and coordinate patient care, which is aligned with the proffered duties. Following therefrom, the position more accurately falls within the Registered Nurse job classification.

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

How to Become a Registered Nurse

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

Education

In all nursing education programs, students take courses in nursing, anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take four years to complete; ADN and diploma programs usually take two to three years to complete.

All programs also include supervised clinical experience in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in extended and long-term care facilities, public health departments, home health agencies, or ambulatory (walk-in) clinics.

Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

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

Many registered nurses with an ADN or diploma find an entry-level position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4> (last visited January 29, 2013).

As evident in the excerpts above, the *Handbook's* information on the educational requirements for the occupational classification "Registered Nurses" indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement. Rather, the occupation accommodates a spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. Notably, even for administrative positions, a

bachelor's or higher degree, or the equivalent, in a specific specialty is not minimally required for entry into the occupation.

Counsel contends in the appeal brief that the position is clearly a specialty occupation because a bachelor's degree in nursing is the normal minimum requirement for the job duties for the proffered position. In support of the contention that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, counsel offers no evidence on point, because evidence from O*NET and from the *Handbook* submitted by counsel is for the medical and health services job classification.⁶

As the evidence in the record of proceeding has not established that a baccalaureate or higher degree, or the 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 requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

⁶ As discussed earlier in the decision, the *Handbook* does not indicate that a bachelor's degree in nursing is normally required for Medical and Health Services Manager. Moreover, the AAO notes that the Occupational Information Network (O*NET) Summary Report for 11-9111.00 – Medical and Health Services Managers, referenced in the FLC Data Center's Online Wage Library (OWL) cited by counsel, is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in nursing or a related field. Counsel maintains that a designation of Job Zone 5 -- Education and Training Code: 5 indicates that a position requires extensive preparation. It does not, however, demonstrate that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the O*NET actually states that there are 11 apprenticeable specialties associated the occupation, including long term care Nurse Management - Quality Assurance Specialty, which only requires on the job learning. See O*NET on the Internet at <http://www.onetonline.org/link/summary/11-9111.00#JobZone>, for a data about the education required for the classification and for apprenticeable positions. Also of importance, the education section states that most, but not all of the occupations within the classification, require a bachelor's degree. Therefore, despite counsel's assertions to the contrary, the O*NET information is not probative of the proffered position qualifying as a specialty occupation.

(b)(6)

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

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of three advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions. However, the petitioner has not supplemented the record with documentation showing the range and methodology of its inquiries that produced the advertisements. Moreover, there is no documentation in the record that supports the three advertisements as representative of the industry's recruiting and hiring practices for positions that are both parallel to the proffered position and in organizations similar to this petitioner.⁷

On appeal, counsel states that all three advertisements are peer organizations in that they fall within the health care industry engaged in the provision of direct health care services, and pointed out the Service discounted the advertisements based on a comparison of the size of the entities to the petitioner. The AAO will review each job advertisement.

The first advertisement is for a quality assurance assistant at an organ procurement organization. It does not mention direct supervision of nursing personnel, nor does it require a bachelor's degree in a specific specialty. For these reasons, the AAO concludes that the advertising organization is not similar to the petitioner, and that the advertised position is not parallel to the proffered position.

⁷ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just three job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. 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").

As such, even if the job announcements indicated that the entities that issued the advertisements specified a requirement for a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

(b)(6)

The second advertisement is for a quality assurance RN coordinator for Kaiser Permanente, and the employer states the requirements for the position are a bachelor's degree in nursing or related field and a valid RN license, as well as a preferred experience in maternal child health. Additionally, as this advertised position appears to be a Registered Nurse type of position, it supports the AAO's contention that the position offered by the petitioner fits squarely within the Registered Nurse occupational classification. For these reasons, the AAO concludes that the advertising organization is not similar to the petitioner, and that the advertised position is not parallel to the proffered position. Additionally, the AAO observes that content of this advertisement tends to rebut the petitioner's position that an RN license is not required.

The third advertisement is for a healthcare quality improvement coordinator at The Coordinating Center, a charitable not-for-profit organization. The advertised position does not indicate that the position involves supervision of nursing personnel as is required for the proffered position. The stated educational requirement is for a bachelor's degree in nursing or other related allied health curriculum, with a stated preference for MSN, MHA, or MBD degrees, as well as a stated preference for expertise in research methodology, data analysis, database management and outcome studies. For these reasons, the AAO concludes that the advertising organization is not similar to the petitioner, and that the advertised position is not parallel to the proffered position.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

Counsel asserts that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty because of the high level of responsibility commensurate with the position. The record of proceedings lacks any documentation to support this claim. By contrast, the wage level selected by the petitioner on the LCA indicates that the position is not, in fact, as complex as declared. The LCA submitted by the petitioner in support of the instant petition indicates a wage level based upon the occupational classification "Medical and Health Services Managers" at a Level I (qualified) wage.

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

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform 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 DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The AAO observes that the wage-rate element of the LCA is indicative of a low level position relative to others within the occupation that requires routine tasks that require limited, if any, exercise of judgment. According to the DOL information on the four wage levels, the Level I wage rate would be appropriate for a position that only demands a basic understanding of the occupation, and one in which the position holder would be expected to perform work under close supervision and receive specific instructions.

Thus, based upon the record of proceeding, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has been awarded a degree in a baccalaureate program in a specific discipline that directly relates to the proffered position.

It is further noted that although the petitioner insists that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent.

The petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform any part of the position. The petitioner has failed to demonstrate that completion of the curriculum culminating in the award of a bachelor's degree would be 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 than Registered Nurse positions, or for that matter, Medical and Health Services Manager positions, that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history.

The petitioner specifically states that this is a new position and that the petitioner has not previously employed individuals in the position of quality assurance coordinator. Therefore, based on this statement alone, the petitioner has failed to satisfy this criterion.

It is noted, however, that counsel claims on appeal that petitioner posted a job vacancy for the position in January 2010, stating a bachelor's degree in any health related field as the minimum requirement. This claim, however, is irrelevant to this criterion because it does not evidence the recruiting and hiring history. The AAO notes that while a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual *with* a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 384.

As the evidence in the record of proceeding 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, 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 its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

As already discussed, the AAO finds that the evidence in record of this proceeding is not persuasive that the proffered position belongs to the Medical and Health Services Managers occupational classification rather than to Registered Nurses occupational classification. In any event, regardless of the category assigned to the proffered position, the position's duties have not been presented with specific, substantive detail sufficient to show that their nature is more specialized and complex than the nature of the duties of Registered Nurse or Medical and Health Services Managers positions that is not as specialized and complex as required to satisfy this criterion. In this regard, the AAO also notes that pertinent information in the *Handbook* does not indicate that a position's inclusion in either of these two occupational classifications reflects duties of so specialized and complex a nature as to require the application of knowledge usually associated with the attainment of at least a bachelor's degree, or the equivalent, in nursing or any other specific specialty. Further, the AAO finds, the generalized and generic level at which the proposed duties are described in this record of proceeding does not distinguish them as having a nature that meets the relative specialization and complexity threshold of this criterion.

Additionally, the AAO incorporates its earlier discussion regarding the wage-level designation on the LCA, which is appropriate for duties whose nature is less complex and specialized than required to satisfy this criterion.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, the AAO cannot find that the proffered position

qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

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