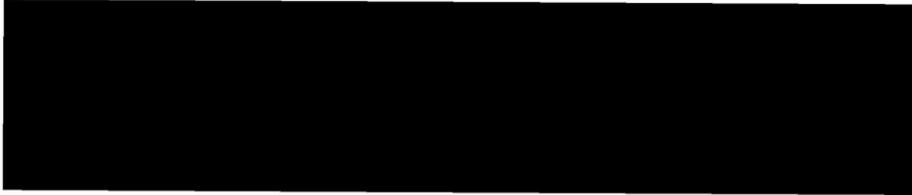


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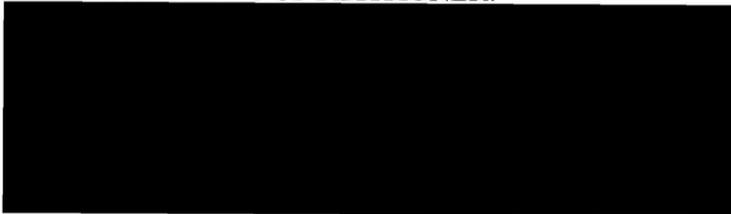
FILE: LIN 05 218 52427 Office: NEBRASKA SERVICE CENTER Date: JAN 31 2008

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Nebraska 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 is engaged in consumer health services and products with seven employees and reported gross income of approximately \$1.5 million. It seeks to employ the beneficiary as a formulations development chemist. The petitioner endeavors to employ the beneficiary in the nonimmigrant classification as a worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on April 7, 2006, having concluded that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. The director also noted several discrepancies in the record regarding the petitioner's actual business activities.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) counsel's response to the director's request for evidence and supporting documentation; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO 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 job 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 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 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 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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS 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. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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 petitioner states that it is seeking the beneficiary’s services as a chemist. In a letter of support, dated July 13, 2005, the petitioner described the beneficiary’s proposed duties as follows:

[The petitioner] is seeking a product chemist to be responsible for the research of chemical ingredients in consumer products such as soaps, detergents, cosmetic care, and multi-vitamins. Moreover, our company requires an individual who is familiar with aggressive research of chemical molecules. That individual must have experience in molecular research and technology as well as techniques involved with the related research. It is important that this individual has a college education in chemistry, with experience in the technology of the respective field. Lastly, the incumbent will work with various employees ranging from lab assistants to marketing personnel. The individual will have a direct impact on [the petitioner’s] sales and marketing efforts in the Middle East.

[The beneficiary] will utilize his research expertise, as well as his experience with research companies to aid [the petitioner] in developing viable consumer products. His employment experience will be essential to the growth of [the petitioner] since delivery

of consumer health care products is dependant on the research and development of such products. [The beneficiary] will be responsible for researching and developing ingredients for consumer products such as vitamins, supplements, and cosmetic care that fit the needs of [the petitioner's] clients as well as [the petitioner's] marketing goals.

The director determined that the petitioner had submitted insufficient evidence to process the petition. On January 12, 2006, the director requested documentation evidencing the petitioner's business activities, and requested the following: (1) a detailed statement articulating the beneficiary's proposed duties and day-to-day responsibilities, including the percentages of time the beneficiary would spend performing those functions each day; (2) evidence showing that the petitioner and similarly situated businesses in the same industry require individuals with a bachelor's degree in a specific field of study to fill the position; (3) evidence that the petitioner normally requires a degree or its equivalent for the proffered position; and, (4) evidence 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 degree.

The petitioner submitted a response on April 3, 2006. In the response letter, dated March 30, 2006, the petitioner further described the proposed position as follows:

- Creating enhanced formulas for current products and new formulas for new supplemental products – 50%
- Developing new chemical based products, including chemical home tests such as one time use drug tests, blood tests, blood glucose tests, as well as others approved by the company – 30%
- Advising and research on Middle Eastern Ministries of Health ("MOH") rules and regulations for production of formulas in compliance with MOHs – 10%
- Communicating with manufacturers on products to be manufactured – 10%

Counsel for the petitioner also stated in its response to the request for evidence that the petitioner does not "possess or own laboratory equipment." Counsel further stated, "assets in the company will be used to provide for Beneficiary's salary, including any equipment materials such as books and electronic databases and computer programs to complete Beneficiary's work." Counsel asserted that "since the company is very young, the current structure is not capable of laboratory molecular or chemical research; such activities are performed by our manufacturers, but only after our Chief Medical Officer has provided appropriate ingredients for the products."

The director denied the petition on April 7, 2006, concluding that the proffered position is not a specialty occupation. The director noted that the lack of a laboratory in the business premises would not make it possible for the beneficiary to perform the duties of a chemist.

On appeal, counsel states the petitioner has overcome the objections of CIS. Counsel asserts that, "it is possible to work as a chemist without a laboratory." Counsel further explains that the beneficiary "can research pharmaceuticals and dietary supplements, can meet with various area pharmaceuticals, dietary, and other companies, can meet with manufacturers in order to create formulas for additional products, and can instruct [the petitioner] as to which generic pharmaceuticals and dietary supplements may be

distributed in Iran,” which he will do through field work and computer work.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO finds that the proffered position is not a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations. As the petitioner has characterized its position as that of a chemist, the AAO first turns to the 2008-2009 edition of the *Handbook*’s entry for chemists and material scientists as discussed below.

Everything in the environment, whether naturally occurring or of human design, is composed of chemicals. Chemists and materials scientists search for and use new knowledge about chemicals. Chemical research has led to the discovery and development of new and improved synthetic fibers, paints, adhesives, drugs, cosmetics, electronic components, lubricants, and thousands of other products. Chemists and materials scientists also develop processes such as improved oil refining and petrochemical processing that save energy and reduce pollution. Applications of materials science include studies of superconducting materials, graphite materials, integrated-circuit chips, and fuel cells. Research on the chemistry of living things spurs advances in medicine, agriculture, food processing, and other fields.

Many chemists and materials scientists work in research and development (R&D). In basic research, they investigate the properties, composition, and structure of matter and the laws that govern the combination of elements and reactions of substances to each other. In applied R&D, these scientists create new products and processes or improve existing ones, often using knowledge gained from basic research. For example, synthetic rubber and plastics resulted from research on small molecules uniting to form large ones, a process called polymerization. R&D chemists and materials scientists use computers and a wide variety of sophisticated laboratory instrumentation for modeling, simulation, and experimental analysis.

The use of computers to analyze complex data has allowed chemists and materials scientists to practice combinatorial chemistry. This technique makes and tests large quantities of chemical compounds simultaneously to find those with certain desired properties. Combinatorial chemistry has allowed chemists to produce thousands of compounds more quickly and inexpensively than was formerly possible and assisted in the sequencing of human genes. Specialty chemists, such as medicinal and organic chemists, work with life scientists to translate this knowledge into new drugs. . . .

Chemists also work in production and quality control in chemical manufacturing plants. They prepare instructions for plant workers that specify ingredients, mixing times, and temperatures for each stage in the process. They also monitor automated processes to ensure proper product yield and test samples of raw materials or finished products to ensure that they meet industry and government standards, including regulations governing pollution. Chemists report and document test results and analyze those results in hopes of improving existing theories or developing new test methods.

Chemists often specialize. *Analytical chemists* determine the structure, composition, and nature of substances by examining and identifying their various elements or compounds. These chemists are absolutely crucial to the pharmaceutical industry because pharmaceutical companies need to know the identity of compounds that they hope to turn into drugs. Furthermore, analytical chemists develop analytical techniques and study the relationships and interactions among the parts of compounds. They also identify the presence and concentration of chemical pollutants in air, water, and soil. . . .

Physical and theoretical chemists study the physical characteristics of atoms and molecules and the theoretical properties of matter; and they investigate how chemical reactions work. Their research may result in new and better energy sources. *Macromolecular chemists* study the behavior of atoms and molecules. *Medicinal chemists* study the structural properties of compounds intended for applications to human medicine. . . .

Work environment. Chemists and materials scientists usually work regular hours in offices and laboratories. R&D chemists and materials scientists spend much time in laboratories but also work in offices when they do theoretical research or plan, record, and report on their lab research. Although some laboratories are small, others are large enough to incorporate prototype chemical manufacturing facilities as well as advanced testing equipment. In addition to working in a laboratory, materials scientists also work with engineers and processing specialists in industrial manufacturing facilities. Chemists do some of their work in a chemical plant or outdoors—gathering water samples to test for pollutants, for example. Some chemists are exposed to health or safety hazards when handling certain chemicals, but there is little risk if proper procedures are followed.

The occupation of chemist is a specialty occupation, normally requiring those seeking employment to have a bachelor's degree in a related field. However, while the petitioner has identified its position as that of a chemist, its description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention. The petitioner's listing of these duties is so generic, and nonspecific that it precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis. For example, although the petitioner has stated that the beneficiary will spend 80% of his time "creating enhanced formulas for current products and new formulas for new supplemental products, and developing new chemical based products, including chemical home tests such as one time use drug tests, blood tests, blood glucose tests, as well as others approved by the company," the petitioner offers no indication of how the beneficiary will be able to perform these duties without a

laboratory, and does not provide any indication of what the petitioner would require of the beneficiary in completing such an examination and analysis. In addition, the petitioner stated in its July 13, 2006, letter that the beneficiary will “work with various employees ranging from lab assistants to marketing personnel;” however, without a laboratory it is unclear how the petitioner will employ lab assistants. Without this type of description, the AAO is unable to determine whether the responsibilities of the proffered position would require the beneficiary to hold the minimum of a baccalaureate or higher degree or its equivalent to perform them. Accordingly, it finds the record does not establish that the proffered position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

In addition, there are several inconsistencies in the record regarding the business activities of the petitioner. In the support letter dated July 13, 2006, the petitioner stated that it has “entered into marketing and consulting contracts with several companies.” In its response to the director’s request for evidence, counsel for the petitioner explained that the petitioner “contracts manufacturers such as Nature’s Products, Inc. and Nutritional Laboratories International to produce over-the-counter drugs and supplements marketed under our Obviate brand name.” Counsel further stated that “the current structure is not capable of laboratory molecular or chemical research; such activities are performed by our manufacturer.” Thus, it appears that the petitioner is a distributor and not a manufacturer, and therefore the main business activity of the petitioner deals more with the marketing and sales rather than the development and manufacturing of products. If the petitioner is not capable of “laboratory molecular or chemical research,” the beneficiary will be unable to perform the proposed duties as a chemist. In addition, the filing does not include any evidence that the petitioner has trademarked the brand name Obviate. 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 at 165. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Finally, the petitioner submitted a distribution agreement with Nature’s Products, Inc. that was signed after the instant petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

On appeal, counsel contends that the very similarity between the petitioner’s description of its proffered position and the *Handbook*’s discussion of the occupation of chemist should be a basis for approval. The AAO does not agree. A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title. This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is that of a chemist or that it is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the seven job postings submitted by counsel on appeal. However, counsel has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner.

There is no information in the record to establish that the companies advertising their vacancies in the submitted job postings are similar in size, scope, or scale of operations, business efforts, or expenditures to the petitioner. Simply 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. at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *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 AAO has no basis to conclude that any of the job postings submitted by counsel are from organizations that may be considered "similar" to the petitioner.

Moreover, these advertisements provide too little information regarding the duties of the positions that would allow the AAO to undertake a meaningful analysis as to whether the positions are in fact "parallel" to the position proposed here. The fact that these positions share a few similar duties with the petitioner's proposed position does not mean that they are in fact parallel positions. Finally, the AAO notes that seven postings are too few to establish an industry-wide standard.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration

that the position is so complex or unique that it can only be performed by an individual with a degree. Without a reliable description of the work to be performed by the beneficiary, a petitioner cannot establish that the tasks he would perform are of sufficient complexity to impose the minimum of a baccalaureate degree or its equivalent. 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 at 165.

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. Although requested by the director, the petitioner did not submit any documentation evidencing that it normally requests a degree or its equivalent for this position. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Accordingly, the petitioner has not established the proffered position as a specialty occupation under the third criterion at 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 that a petitioner establish that the nature of the specific 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. Although the *Handbook* states that a bachelor's degree in a specific specialty is a normal minimum entry requirement for positions such as chemists, as discussed above, the petitioner failed to explain how the beneficiary will perform the duties of a chemist without a laboratory. The petitioner stated that the beneficiary will use computers and books; however, the petitioner has failed to establish that the duties described in the job description can be satisfied with only a computer and books. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. The proposed position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform its duties are inconsequential. Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner did not provide sufficient evidence to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The offered position is that of a chemist. The petitioner submitted the beneficiary's degree for completion of studies for a bachelor's degree in the field of applied chemistry at the Islamic Azas University- Tehran Central Branch. The petitioner did not submit a credentials evaluation equating the beneficiary's degree to a Bachelor of Science in Chemistry from an accredited institution in the U.S. The petitioner did not establish any of the criteria from 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). For this additional reason, the petition may not be approved.

The petitioner has failed to establish that the position is a specialty occupation or that the beneficiary qualifies to perform the duties of a specialty occupation. Thus, the decision of the director shall not be disturbed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has failed to sustain that burden and the appeal shall accordingly be dismissed.

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