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

U.S. Citizenship and Immigration Services

D2

[redacted]

Date: JUN 02 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
for Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a dental alloy manufacturing business. It seeks to employ the beneficiary as a quality control technician 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 concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

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

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 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 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. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary's services as a quality control technician. The initial letter from the petitioner submitted with the petition stated that the beneficiary would conduct physical property testing of metallurgical materials. The petitioner also stated that it requires its quality control technician to have either four to five years of experience or a bachelor's degree in any science discipline with coursework in chemistry, physics, and integral and differential based calculus.

The petitioner submitted a copy of the beneficiary's U.S. bachelor of science degree in chemistry.

On June 29, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, including a more detailed job description. The RFE also requested additional information regarding the petitioner's business.

In response to the RFE, the petitioner stated that the beneficiary would perform the following duties:

- Quantitative chemical analysis of known precious metal based dental alloys (20-30% of the beneficiary's time);
- Quantitative and qualitative chemical analysis of unknown materials (20-30% of the beneficiary's time);
- Development and maintenance of analytical methods based on x-ray fluorescence principles (10-30% of the beneficiary's time);
- Thermal testing and evaluation of materials under development using differential thermal analysis and dilitometry (5-15% of the beneficiary's time);
- Corrosion testing, chemical etching, electro polishing, and microstructure analysis of dental alloys (10-20% of the beneficiary's time); and
- Development and maintenance of chemical reagents used (0-10% of the beneficiary's time).

The petitioner stated that the minimum requirements for the proffered position is four to five years of instrumental analysis and general laboratory techniques or a bachelor's degree in any science discipline. The petitioner further stated that a four year science/engineering degree or the equivalent is preferred.

The director denied the petition on August 18, 2009, finding that the proffered position is most similar to that of a Quality Control Technician as described in the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*). The director noted that the *Handbook* does not indicate that the occupation of Quality Control Technician is a specialty occupation.

On appeal, the petitioner argues that the proffered duties are so specialized that the knowledge required to perform them is usually associated with the attainment of a bachelor's or higher degree in the physical sciences. This assertion contradicts the petitioner's earlier statement that someone with four to five years of experience could perform the duties of the proffered position. The petitioner further stated that it previously appointed a 15-year employee with a bachelor's degree in a liberal arts field as well as someone with a bachelor's degree in biology to the proffered position. Of these two, the petitioner found that the person with the degree in a liberal arts field was unable to perform the proffered duties, but that the person with a bachelor's degree in biology was able to perform the proffered duties, although he was dependent on his supervisor because he lacked a background in physical chemistry. Therefore, the petitioner has not previously hired someone with a bachelor's or higher degree in the physical sciences to perform the duties of the proffered position.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(1)* and *(2)*: a baccalaureate or

higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO finds that the proffered duties fall under the *Handbook*'s section on Science Technicians. According to the *Handbook* (2010-11 online edition), Science Technicians:

> use the principles and theories of science and mathematics to assist in research and development and to help invent and improve products and processes. However, their jobs are more practically oriented than those of scientists. Technicians set up, operate, and maintain laboratory instruments, monitor experiments, make observations, calculate and record results, and often develop conclusions. They must keep detailed logs of all of their work. Those who perform production work monitor manufacturing processes and may ensure quality by testing products for proper proportions of ingredients, for purity, or for strength and durability.
>
> As laboratory instrumentation and procedures have become more complex, the role of science technicians in research and development has expanded. In addition to performing routine tasks, many technicians, under the direction of scientists, now develop and adapt laboratory procedures to achieve the best results, interpret data, and devise solutions to problems. Technicians must develop expert knowledge of laboratory equipment so that they can adjust settings when necessary and recognize when equipment is malfunctioning.
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> Most science technicians specialize, learning their skills and working in the same disciplines in which scientists work. Occupational titles, therefore, tend to follow the same structure as those for scientists.
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> * * *
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> *Chemical technicians* work with chemists and chemical engineers, developing and using chemicals and related products and equipment. Generally, there are two types of chemical technicians: research technicians who work in experimental laboratories and process control technicians who work in manufacturing or other industrial plants. Many chemical technicians working in research and development conduct a variety of laboratory procedures, from routine process control to complex research projects. For example, they may collect and analyze

> samples of air and water to monitor pollution levels, or they may produce compounds through complex organic synthesis. Most process technicians work in manufacturing, testing packaging for design, integrity of materials, and environmental acceptability. Often, process technicians who work in plants focus on quality assurance, monitoring product quality or production processes and developing new production techniques. A few work in shipping to provide technical support and expertise.

The training and qualifications required for Science Technicians are described as follows in the DOL *Handbook*:

> There are many ways to qualify for a job as a science technician. Most employers prefer applicants who have at least 2 years of specialized postsecondary training or an associate degree in applied science or science-related technology. Some science technicians have a bachelor's degree in the natural sciences, while others have no formal postsecondary education and learn their skills on the job.
>
> Some science technician specialties have higher education requirements. For example, biological technicians often need a bachelor's degree in biology or a closely related field. Forensic science positions also typically require a bachelor's degree, either in forensic science or another natural science. Knowledge and understanding of legal procedures also can be helpful. *Chemical technician positions in research and development also often require a bachelor's degree, but most chemical process technicians have a 2-year degree instead, usually an associate degree in process technology.*

(Emphasis added.) According to the *Handbook*, most employers prefer Science Technicians to hold a two-year degree and some Science Technicians have no formal postsecondary education. Moreover, although a bachelor's degree is often required for chemical technician positions in research and development, most chemical process technicians have only an associate degree. Therefore, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is usually required for Science Technicians.

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

As the *Handbook* indicates no specific degree requirement for employment as a Science Technician, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the

performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty.

Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Further, the record of proceeding does not establish the common-degree-requirement via submissions from an industry professional association or by letters or affidavits from firms or individuals attesting as to routine recruiting and employment practices in the industry with regard to the type of position that is the subject of this petition. In short, the petitioner has not established 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.

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."

The evidence of record does not refute the *Handbook's* information to the effect that there is a wide spectrum of credentials that are found acceptable for Science Technician positions, including 2-year degrees in process technology or other academic concentrations, and degrees not in a specific specialty closely related to science or technology. Likewise, the *Handbook* also indicates that some science technician positions are held by persons with no postsecondary education who learn their skills on the job.

The AAO notes the petitioner's argument on appeal that the proffered position is more complex than Science Technician or other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. However, this argument is not supported by the petitioner's own stated minimum requirements, which is for four to five years

of instrumental analysis and general laboratory techniques or a bachelor's degree in any science discipline. Further, the AAO notes that, while, on their very face, the duties, as described in the record of proceeding before the director and as expanded on appeal, appear highly technical in nature, the petitioner has not established that they comprise a position technically or otherwise so complex, or, for that matter, so unique, as to require the services of a person equipped with at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO notes that whatever body of specialized knowledge would have to be applied, and at what level of educational attainment, is not evident in the technical functions used to describe the proffered position or in the technical documentation that the petitioner has submitted into the record. The AAO finds that neither the functions as described nor the supportive documentation are inherently identifiable with the theoretical and practical application of any particular minimum educational level of a particular body of highly specialized knowledge in a specific specialty.

Next, as the record 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). As the petitioner stated previously, the petitioner has hired someone with a bachelor's degree in biology as well as a liberal arts degree.

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. The AAO here incorporates and adopts its comments, in the discussion of the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), with regard to the functions used to describe the duties of the proffered position. Based upon its review of the record of proceeding, including all of the duty descriptions and related documents presented on appeal and earlier, the AAO finds that the petitioner has demonstrated that the proposed duties are specialized and complex, but not so specialized and complex as to require knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO also finds that statements in the record by the petitioner of the minimum requirements, such as allowing for someone with four to five years of experience to perform the duties of the proffered position, are not indicative of the knowledge association required for this criterion. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, even if the proffered position had been established as a specialty occupation position, the petition could not be approved due to the petitioner's failure to submit a labor condition application (LCA) that corresponds to the petition.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). Further, U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1) and (12).

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

Here, the LCA submitted in support of the instant petition was certified for occupation code 199 for the job title "LAB TECHNICIAN" at a prevailing wage of $12.53 per hour. As the proffered position has been found to be closest to that of a chemical technician, the petition must be supported by an LCA for a chemical technician position, which at the time the petition was filed required at least a prevailing wage of $14.62 per hour for an entry level position, i.e., "Level I Wage." Moreover, if the position is as complex as the petitioner claims it to be, it would likely be a higher level three or four position, requiring a prevailing wage of $21.48 or $24.91 per hour, respectively at the time the petition was filed. As such, it cannot be found that the instant petition is supported by an LCA that corresponds to the petition. For this additional reason, the petition must be denied.

The petition will be denied and the appeal dismissed. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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