U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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[redacted]

Date: FEB 16 2012 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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner claims to be a clothing manufacturer established in 2001. It seeks to employ the beneficiary as a chemical process engineer and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and appellate brief. The AAO reviews these proceedings *de novo*. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner claims to have 40 employees and a gross annual income of $2,868,999. It wishes to employ the beneficiary for 25-30 hours per week as a chemical process engineer from December 1, 2009 to November 30, 2012 at an hourly rate of $26.69.

The petition was accompanied by a letter listing the duties and responsibilities of a chemical process engineer. The list includes the following duties:

- Proactively identify engineering problems and apply technical expertise to develop feasible solutions;
- Lead efforts to design and implement process improvement initiatives and manage project details;
- Develop detailed justifications for capital expenditures and communicate them both verbally and in writing;
- Collaborate with business partners to identify maintenance and operational problems;
- Perform engineering analyses and recommend detailed solutions;
- Coach and train employees in operating new equipment or navigating design and/or process changes;
- Assume responsibility for process operational consistency, reliability and safety;
- Use breakthroughs in process technology and raw materials to optimize product construction;
- Determine suitable dyeing methods; and
- Responsible for scientific laboratory measurements and testing of fabrics.

On December 22, 2009, the director issued an RFE advising the petitioner, in part, to submit (1) a more detailed description of the work to be performed by the beneficiary including specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work and the minimum education, training, and experience necessary to do the job; (2) an explanation of why the work to be performed requires the services of a person who has a college degree or its equivalent; (3) an explanation of why the proffered position is a common position in similarly-sized offices; (4) evidence that a degree requirement is common to the industry in

parallel positions among similar organization; (5) industry and professional association opinions evidencing that a bachelor's degree is required for entry into the field; and (6) evidence relating to the petitioner's past employment practices, products and the nature of its business.

On January 25, 2010, the petitioner reiterated the duties and responsibilities of the position of chemical process engineer within its organization. The petitioner stated that the duties of the proffered position require skill and aptitude associated with knowledge acquired through formal study in a highly specialized field. The petitioner also submitted a sample of online position offerings for chemical engineers. The petitioner claimed that the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) and *O*Net Online* indicate that a bachelor's degree in engineering is the minimum entry requirement for the proffered position.

The director denied the petition on February 11, 2010 finding that the petitioner had failed to demonstrate that the proffered position qualifies as a specialty occupation. On appeal, the petitioner states that it has established that a bachelor's degree or higher is normally the minimum requirement for entry into the proffered position of chemical process engineer.

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

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

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

> *Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and [(2)] 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, a proposed position must also meet one of the following criteria:

> *(1)* A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its

particular position is so complex or unique that it can be performed only by an individual with a degree;

(*3*) The employer normally requires a degree or its equivalent for the position; or

(*4*) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

The *Handbook* describes chemical engineers as follows:

> Chemical engineers apply the principles of chemistry to solve problems involving the production or use of chemicals and other products. They design equipment and processes for large-scale chemical manufacturing, plan and test methods of manufacturing products and treating byproducts, and supervise production. Chemical engineers also work in a variety of manufacturing industries other than

> chemical manufacturing, such as those producing energy, electronics, food, clothing, and paper. In addition, they work in healthcare, biotechnology, and business services. Chemical engineers apply principles of physics, mathematics, and mechanical and electrical engineering, as well as chemistry. Some may specialize in a particular chemical process, such as oxidation or polymerization. Others specialize in a particular field, such as nanomaterials, or in the development of specific products. They must be aware of all aspects of chemical manufacturing and how the manufacturing process affects the environment and the safety of workers and consumers.

The *Handbook* explains that "[a] bachelor's degree in engineering is required for almost all entry-level engineering jobs." Nevertheless, the Handbook further explains that "many colleges offer 2-year or 4-year degree programs in engineering technology" and graduates of these programs "may get jobs similar to those obtained by graduates with a bachelor's degree in engineering."

The *Handbook* distinguishes the position of engineer from that of an engineering manager, who requires "at least a bachelor's degree in some specialty of engineering." The Handbook also describes the position of chemical technician as follows:

> 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.

According to the *Handbook*,

> There are many ways to qualify for a job as a [chemical] 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 [] 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 [] specialties have higher education requirements . . . [c]hemical 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.

Therefore, the *Handbook's* information on educational requirements for positions such as the proffered "chemical process engineer" indicates that a bachelor's degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for the occupation. Rather, the occupation accommodates a wider spectrum of educational credentials, including a technological or associate's degree.

Therefore, as the petitioner has not demonstrated that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, it 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.

As stated earlier, 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).

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 for 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, the petitioner's reliance upon the small sample of online job vacancy advertisements is misplaced. The advertisements provided establish, at best, that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. The petitioner also fails to demonstrate what statistically valid inferences, if any, can be drawn from such a small sample of job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry.

See generally [redacted] Given that there is no indication that the advertisements were randomly selected, the validity of any 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 a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.

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 petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of marketing coordinator.

Specifically, even though the petitioner claims that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Therefore, the evidence of record does not establish that the proffered position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for chemical process engineer or technician positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than other chemical processing 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 chemical process technicians or engineers 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 notes that the petitioner claims repeatedly that the duties of the proffered position can only be employed by a degreed individual. 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 claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii)

(defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) based on its normal hiring practices.

The AAO concludes that the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), as the evidence in the record of proceeding does not document a recruiting and hiring history of requiring for the proffered position at least a bachelor's degree, or the equivalent, in a specific specialty.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

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 remains denied.