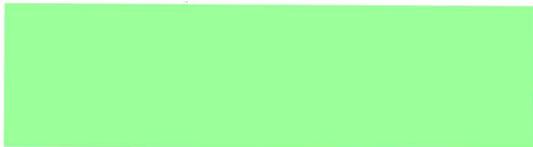




U.S. Citizenship
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Services

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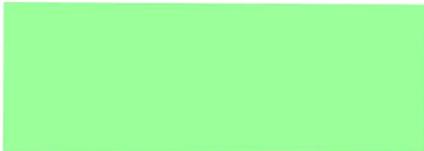


DATE: **APR 19 2013** OFFICE: VERMONT SERVICE CENTER FILE:

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:

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

On the Form I-129 visa petition, the petitioner describes itself as a retail pharmacy and compounding prescriptions company established in [REDACTED]. In order to employ the beneficiary in what it designates as a compounding chemist position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

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

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

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

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

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

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

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

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

In the petition signed on March 31, 2012, the petitioner indicates that it wishes to employ the beneficiary as a compounding chemist on a part-time basis (20 hours per week) at the rate of pay of \$26.60 per hour (\$27,664 per year). In the letter of support dated March 31, 2012, the petitioner states that "[w]e now wish to employ [the beneficiary] as a Compounding Chemist to perform the following duties under the supervision of the Pharmacist in charge." The petitioner proceeds to describe the duties of the proffered position as follows:

- Can prepare unique dosage forms containing the best dose of medication for specific patient as per physicians order under the supervision of registered Pharmacist[;]
- Formulate medications in dosage forms which are not commercially available, such as transdermal gels, ointments or creams; troches, oral liquids, vaginal or rectal suppositories etc. Also formulate medications free of problem-causing excipients such as dyes, sugar, lactose, or alcohol[;]
- Combining various compatible medications into a single dosage form for easier administration & improved compliance which are not readily available as commercial products[;]
- Excellent skills in reading the prescriptions and preparing the medicinal doses as per the order of physicians, referring to US Pharmacopeia guidelines and performing necessary calculations to compound "best-customized formulation" to deliver quality products[;]
- Strong knowledge and experience in handling, pharmacy related softwares like Best Rx system and billing of compounding medications and related services[;]
- To instruct the patients about the dosage of the medicines and to answer all the queries related to it[;]
- Maintaining and updating the database on daily basis and filling the detailed information of every patient coming in, into the database[;] [and]
- Maintain inventory of active ingredients and excipients on daily basis and file invoice for the control and regular medications following New York State Laws, Federal Laws and Drug Enforcement Agency (DEA) regulations.

Upon review of the above job duties, the AAO notes that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

In addition, the petitioner states that "the position of a Compounding Chemist is a professional level one and that the performance of the above mentioned duties requires an individual with advanced

education and experience in the field." The AAO observes that the petitioner does not specify the level of education required (e.g., associate's degree, baccalaureate, master's degree, doctorate) and the specific field of study (if any) required for the proffered position.

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's Master of Science degree in Pharmacology/Toxicology and transcript from [REDACTED] New York. The degree was awarded on January 16, 2009.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Chemist" - SOC (ONET/OES Code) 19-2031, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE on April 19, 2012. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to provide a detailed description of the proffered position, to include approximate percentages of time for each duty the beneficiary will perform.

On June 4, 2012, counsel for the petitioner responded to the RFE by submitting a brief and additional evidence. In the brief, counsel provided a revised description of the duties of the proffered position, and the percentage of time the beneficiary would spend performing the duties of the position.¹ In addition, counsel submitted documents in support of the petition, including: (1) a Notice of Filing of LCA; (2) a printout from the Internet, listing compounding pharmacies; (3) job vacancy announcements; (4) a letter from [REDACTED] (5) a letter from [REDACTED] Inc.; (6) a copy of the foreign degree and Form W-2 for [REDACTED] (7) a copy of the academic credentials, paystub, and Form W-2 for [REDACTED] (8) the petitioner's promotional materials; (9) a copy of the academic credentials and Form W-2 for [REDACTED] and (10) documentation relating to the beneficiary's credentials.

The director reviewed the information provided by counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on June 15,

¹ The brief is printed on counsel's letterhead. It is noted that this revised description of the duties of the proffered position is not probative evidence as the description was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

2012. Counsel submitted an appeal of the denial of the H-1B petition.

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

Upon review of the record of proceeding, the AAO notes that the petitioner stated that an "advanced education and experience in the field" are required for the compounding chemist position, but it did not specify the level of education required (e.g., associate's degree, baccalaureate, master's degree, doctorate) and the specific field of study (if any) necessary to perform the duties of the proffered position.² The petitioner did not state that such education and experience must be the equivalent to a baccalaureate or higher degree in a specific specialty. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just "advanced education and experience in the field," but instead a baccalaureate (or higher degree) in a *specific specialty* that is directly related to the duties and responsibilities of the position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Thus, the petitioner's requirement of "advanced education and experience in the field" is insufficient to establish that the proffered position qualifies as a specialty occupation. That is, the petitioner has not established that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The petitioner stated that the beneficiary would be employed in a compounding chemist position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not

² In the brief, submitted in response to the RFE, counsel claims that the proffered position requires "at least a baccalaureate degree in pharmacy." Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the educational requirement that counsel attributes to the proffered position. Again, 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. 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 506.

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

The AAO recognizes the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Chemists." The AAO reviewed the chapter of the *Handbook* entitled "Chemists and Materials Scientists" but did not find that the duties of the proffered position correspond to this occupational classification.⁴ The *Handbook* describes the duties of "Chemists" in the subsection entitled "What Chemists and Materials Scientists Do" and states the following about the duties of this occupation:

Chemists and materials scientists study the structures, compositions, reactions, and other properties of substances. They use their knowledge to develop new and improved products, processes, and materials.

Duties

Chemists and materials scientists typically do the following:

- Plan and carry out complex research projects, such as the development of new products, processes, and testing methods
- Direct technicians and other workers in testing procedures to analyze components and physical properties of materials
- Instruct scientists and technicians on proper chemical processing and testing procedures, such as ingredients, mixing times, and operating temperatures
- Prepare test solutions, compounds, and reagents (such as acids) used in laboratory procedures
- Analyze substances to determine their chemical and physical properties, such as their structure and composition
- Conduct tests on materials and other substances to ensure that safety and quality standards are met

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/>.

⁴ For additional information regarding the occupational category "Chemists and Materials Scientists," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Chemists and Materials Scientists, on the Internet at <http://www.bls.gov/ooh/life-physical-and-social-science/chemists-and-materials-scientists.htm#tab-1> (last visited April 10, 2013).

- Write technical reports that detail methods and findings
- Present research findings to scientists, engineers, and other colleagues

Many chemists and materials scientists work in basic and applied research. In basic research, chemists investigate the properties, composition, and structure of matter. They also experiment with the laws that govern the combination of elements and reactions of substances to each other.

In applied research, chemists create new products and processes or improve existing ones, often using knowledge gained from basic research. Chemistry research has led to the discovery and development of new and improved drugs, plastics, cleaners, and thousands of other products.

Almost all materials scientists work in applied research. They study the structures and chemical properties of various materials to develop new products or enhance existing ones. They also determine ways to strengthen or combine materials or develop new materials for use in a variety of products. Applications of materials science include superconducting materials, ceramics, and metallic alloys.

Chemists and materials scientists use computers and a wide variety of sophisticated laboratory instrumentation for modeling, simulation, and experimental analysis. For example, some chemists use three-dimensional (3D) computer modeling software to study the structure and other properties of complex molecules that they make.

Most chemists and materials scientists work as part of a team. An increasing number of scientific research projects involve multiple disciplines, and it is common for chemists and materials scientists to work on teams with other scientists, such as biologists and physicists, computer specialists, and engineers. For example, in pharmaceutical research, chemists may work with biologists to develop new drugs and with engineers to design ways to mass produce them. For more information, see the profiles on biochemists and biophysicists, microbiologists, zoologists and wildlife biologists, physicists and astronomers, computer and information technology occupations, and engineers.

Chemists often specialize in a particular branch of the field. The following are examples of some types of chemists:

Analytical chemists determine the structure, composition, and nature of substances by examining and identifying their various elements or compounds. They also study the relationships and interactions between the parts of compounds and develop new techniques for carrying out their work. Their research has a wide range of applications, including food safety, pharmaceuticals, and pollution control.

Inorganic chemists study the structure, properties, and reactions of molecules that do not contain carbon, such as metals. They work to understand the behavior and the

characteristics of inorganic substances. Inorganic chemists figure out how these materials can be modified, separated, or used in products, such as ceramics and superconductors.

Medicinal chemists research and develop chemical compounds that can be used as pharmaceutical drugs. They work on teams with other scientists and engineers to create and test new drug products. They also help develop new and improved manufacturing processes to produce new drugs on a large scale effectively.

Organic chemists study the structure, properties, and reactions of molecules that contain carbon. They also design and make new organic substances that have unique properties and applications. These compounds have, in turn, been used to develop many commercial products, such as pharmaceutical drugs and plastics.

Physical chemists study the fundamental characteristics of how matter behaves on a molecular and atomic level and how chemical reactions occur. Based on their analyses, physical chemists may develop new theories, such as how complex structures are formed. Physical chemists often work closely with materials scientists to research and develop potential uses for new materials.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Chemists and Materials Scientists, on the Internet at <http://www.bls.gov/ooh/life-physical-and-social-science/chemists-and-materials-scientists.htm#tab-2> (last visited April 10, 2013).

In the section of the *Handbook* entitled "Work Environment," the *Handbook* states that chemists and materials scientists work in the following industries:

Chemists and material scientists held about 90,900 jobs in 2010. The industries employing the largest numbers of chemists in 2010 were the following:

Research and development in the physical, engineering, and life sciences	19%
Pharmaceutical and medicine manufacturing	18
Testing laboratories	11
Federal government, excluding	8

postal service
Colleges,
universities,
and
professional
schools; state,
local, and
private

Most materials scientists work in manufacturing and scientific research and development.

Chemists and materials scientists typically work in laboratories and offices where they conduct experiments and analyze their results. In addition to laboratories, materials scientists work with engineers and processing specialists in industrial manufacturing facilities. Some chemists also work in these facilities and are usually responsible for monitoring the environmental conditions at the plant.

Chemists and materials scientists can be exposed to health or safety hazards when handling certain chemicals, but there is little risk if proper procedures are followed.

Work Schedules

Most chemists and materials scientists work full time and regular hours, though longer hours are common.

Handbook, 2012-13 ed., Chemists and Materials Scientists, on the Internet at <http://www.bls.gov/ooh/life-physical-and-social-science/chemists-and-materials-scientists.htm#tab-3> (last visited April 10, 2013).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the wage level of the proffered position as a Level I (entry) position in the LCA (the lowest of four assignable wage-levels).⁵ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁶ That is, in accordance with the relevant DOL explanatory

⁵ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. 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.

⁶ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

information on wage levels, this wage rate indicates and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. According to DOL guidance, a statement that the job offer is for a worker in training or an internship is indicative that a Level I wage should be considered.

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category for chemist positions. The AAO notes that in the Form I-129 the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 446110 – "Pharmacies and Drug Stores."⁷ The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating that this "industry comprises establishments known as pharmacies and drug stores engaged in retailing prescription or nonprescription drugs and medicines." See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 446110 – Pharmacies and Drug Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 10, 2013). The AAO notes that this industry is not one of the industries employing the largest numbers of chemists according to the *Handbook*. Further, as noted above, most chemists work full-time and regular hours, and longer hours are common. The petitioner indicated on the Form I-129 that the compounding chemist position is not a full-time position, and that the beneficiary will work 20 hours per week.

Upon review of the record of proceeding and the chapter regarding "Chemists and Materials Scientists" in the *Handbook*, the AAO finds that the petitioner has not provided sufficient evidence to demonstrate that its compounding chemist position has the same or similar duties, tasks, knowledge, work activities, etc. that are generally associated with "Chemists." For example, the AAO notes that the petitioner does not claim that the beneficiary will plan and carry out complex research projects, such as the development of new products, processes, and testing methods. In

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.

Id.

⁷ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited April 10, 2013).

addition, the petitioner does not claim that the beneficiary will direct technicians and other workers in testing procedures to analyze components and physical properties of materials. Additionally, the petitioner does not assert that the beneficiary will instruct scientists and technicians. This is further illustrated by the fact that the record of proceeding does not establish that the beneficiary will write technical reports and present research findings to scientists, engineers, and other colleagues.

The AAO observes that in response to the RFE and on appeal, counsel claims that the proffered position is more akin to the medicinal chemist position. However, counsel has not provided sufficient evidence to support his claim. The duties of the proffered position do not indicate that the beneficiary will work on teams with other scientists and engineers to create and test new drug products. In addition, the duties of the proffered position do not indicate that the beneficiary will help develop new and improved manufacturing processes to produce new drugs on a large scale effectively. The duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may perform a few general tasks in common with this occupational group, but not that the beneficiary's duties would constitute a chemist or, more specifically, a medicinal chemist position, and not that they would require the range of specialized knowledge that characterizes this occupational category.

As the petitioner has not demonstrated that the proffered position falls under the occupational category of "Chemists," the AAO will not further address this occupational category as it is not relevant to this proceeding.

The AAO also reviewed the chapter of the *Handbook* regarding "Pharmacists." The narrative of the *Handbook* states, in part, that, "With most drugs, pharmacists use standard dosages from pharmaceutical companies. However, some pharmacists create customized medications by mixing ingredients themselves, a process known as compounding." *Handbook, 2012-13 ed.*, Pharmacists, on the Internet at <http://www.bls.gov/ooH/Healthcare/Pharmacists.htm#tab-1to4> (last visited April 10, 2013). The *Handbook* further states that "pharmacists must have a Doctor of Pharmacy (Pharm.D.) degree from an accredited school. They also must be licensed, which requires passing two exams." *Id.*

In the instant case, the petitioner does not claim, and has not provided any documentation to support the conclusion, that the proffered position falls under the occupational category "Pharmacists." (The AAO also observes that the beneficiary does not appear qualified to serve in a pharmacist position.) Without further clarification by the petitioner, it appears that the beneficiary will be employed in a lesser capacity or serving in a different position. The record of proceeding lacks sufficient evidence that the beneficiary's duties as ascribed would primarily and essentially entail the tasks that are associated with the occupational category "Pharmacists."

The director reviewed the job description provided by the petitioner and found that the proffered position falls under the occupational classification of "Pharmacy Technicians." The *Handbook* states the following about this occupational category:

Pharmacy technicians help licensed pharmacists dispense prescription medication. They work in retail pharmacies and hospitals.

Duties

Pharmacy technicians typically do the following:

- Take from customers or health professionals the information needed to fill a prescription
- Count tablets and measure amounts of other medication for prescriptions
- Compound or mix medications, such as preparing ointments
- Package and label prescriptions
- Accept payment for prescriptions and process insurance claims
- Do routine pharmacy tasks, such as answering phone calls from customers

Pharmacy technicians work under the supervision of pharmacists, who must review all prescriptions before they are given to patients. If a customer's question is about the medication or health matters, the pharmacy technician arranges for the customer to speak with the pharmacist.

Pharmacy technicians working in hospitals and other medical facilities prepare a greater variety of medications, such as intravenous medications. They may make rounds in the hospital, giving medications to patients.

Handbook, 2012-13 ed., Pharmacy Technicians, on the Internet at <http://www.bls.gov/ooh/healthcare/pharmacy-technicians.htm#tab-2> (last visited April 10, 2013).

The subchapter of the *Handbook* entitled "How to Become a Pharmacy Technician" states, in part, the following about this occupation:

Becoming a pharmacy technician usually requires earning a high school diploma or the equivalent. Other requirements vary by state, with some states requiring passing an exam or completing a formal training program.

Education and Training

Many pharmacy technicians learn how to perform their duties through on-the-job training. Others attend postsecondary education programs in pharmacy technology at vocational schools or community colleges, which award certificates. These programs typically last 1 year or less and cover a variety of subjects, such as arithmetic used in pharmacies, recordkeeping, ways of dispensing medications, and pharmacy law and ethics. Technicians also learn the names, actions, uses, and doses of medications. Many training programs include internships, in which students get hands-on experience in a pharmacy.

Licenses and Certification

Most states regulate pharmacy technicians in some way. Consult your state's Board of Pharmacy for its particular regulations. Requirements for pharmacy technicians typically include some or all of the following:

- High school diploma or GED
- Criminal background check
- Formal training program
- Exam
- Fees
- Continuing education

Some states and employers require pharmacy technicians to have certification. Even where it is not required, certification may make it easier to get a job. Many employers will pay for their pharmacy technicians to take the certification exam.

Two organizations offer certification: The Pharmacy Technician Certification Board (PTCB) and the National Healthcareer Association (NHA).

Handbook, 2012-13 ed., Pharmacy Technicians, available on the Internet at <http://www.bls.gov/ooh/healthcare/pharmacy-technicians.htm#tab-4> (last visited April 10, 2013).

Upon review of the chapter of the *Handbook* regarding "Pharmacy Technicians," the AAO observes that the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Rather, the *Handbook* states that a high school diploma, or the equivalent, is sufficient for entry into this occupation in the United States. The narrative of the *Handbook* states many pharmacy technicians learn how to perform their duties through on-the-job training. The *Handbook* continues by stating that other pharmacy technicians attend postsecondary education programs in pharmacy technology at vocational schools or community colleges, which award certificates. These programs typically last one year or less. The *Handbook* further states that many training programs include internships, in which students get hands-on experience in a pharmacy. The *Handbook* does not conclude that normally the minimum requirement for entry into this position is at least a bachelor's degree in pharmacy, or its equivalent. Thus, the *Handbook* does not support the claim that normally the minimum requirement for entry into jobs falling under this occupational category is at least a bachelor's degree in a specific specialty, or its equivalent.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. 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." As previously discussed, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Upon review of the record, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally a minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in

the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement.

In the Form I-129 petition, the petitioner describes itself as a retail pharmacy and compounding prescriptions company established in 1980, with seven employees. The petitioner claims that it has a gross annual income of "\$4.4 MILLION+". The petitioner did not provide its net annual income. As previously discussed, the petitioner designated its business operations under the NAICS code 446110 – "Pharmacies and Drug Stores."

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the petitioner and counsel submitted letters from [REDACTED]. The AAO reviewed the letters in their entirety. However, contrary to the purpose for which the letters were submitted, they are not persuasive in establishing the proffered position as a specialty occupation position under any of the criteria at § 214.2(h)(4)(iii)(A).

The AAO reviewed the letters and observes that both documents lack sufficient information regarding the organizations to conduct a meaningfully substantive comparison of the business operations to the petitioner. Notably, the petitioner failed to provide any supplemental information to establish that the organizations are similar to the petitioner. Thus, from the onset, this prong of the regulations has not been established by the writers.

Notably, the letters are almost identical to each other. More specifically, the wording of the letters matches virtually verbatim, including grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity.

Furthermore, [REDACTED] states that she is the "President/position (sic) of [REDACTED] She claims that "[b]ased on my vast experience in the field of pharmacy I am recognized to the needs of leading pharmacies as [the petitioner]." [REDACTED] states that he serves as the secretary and supervising pharmacist of [REDACTED] He further references his "extensive experience in the field" and claims to be "familiar with the needs of well-established pharmacies as [the petitioner]." Notably, the writers did not provide any documentation to establish their credentials as recognized authorities on the relevant industry-hiring standards. Without further clarification, it is unclear how their education, training, skills or experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of pharmacies and drug stores (as designated by the petitioner with the NAICS code) similar to the petitioner for jobs parallel to the proffered position. Moreover, the writers do not cite specific instances in which their past opinions have been accepted or recognized as authoritative on this particular issue. The opinion letters contain no evidence that they were based on scholarly research conducted by the writers in the specific areas upon which they are opining. They provide no documentary support for their ultimate conclusions (e.g., statistical surveys, authoritative industry or government publications, or professional studies).

Both writers provide a list of "usual job duties of a compounding chemist employed in specific fields of pharmacy." [REDACTED] claims that "our professional staff in similar positions possess significant university education." Likewise, [REDACTED] asserts that "our managerial staff in similar positions possess significant university education." The AAO observes that the statements fail to establish that the organizations require *at least a bachelor's degree in a specific specialty*, or its equivalent. Obviously, a statement that an organization's staff "possesses significant university education," is insufficient to establish a *requirement* of *at least a baccalaureate degree in a specific specialty*, or its equivalent.

Furthermore, the writers failed to provide any specific job duties and day-to-day responsibilities for their "staff" positions. There is insufficient information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, the record of proceeding lacks sufficient information regarding the duties and responsibilities of the positions to determine whether they are the same or parallel to the proffered position. Moreover, the AAO observes that the writers did not provide any documentary evidence to corroborate that they currently or in the past employed individuals in parallel positions to the proffered

position, nor did they provide documentation to substantiate the academic credentials of the referenced staff at [REDACTED]

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner also submitted documentation regarding two individuals. The evidence provided indicates that the individuals were employed by [REDACTED]

More specifically, the petitioner provided a copy of the foreign degree and Form W-2, Wage and Tax Statement, (issued by [REDACTED]) for [REDACTED] and a copy of the academic credentials, paystub (issued by [REDACTED] and Form W-2 (also issued by [REDACTED] for [REDACTED]). However, this documentary evidence does not provide any information as to the job title and job duties of these individuals. The evidence does not demonstrate that these individuals held the position of compounding chemist (or parallel positions) for these pharmacies. The petitioner also failed to provide any evidence regarding the complexity of the job duties, supervisory duties (if any), independent judgment required, and the amount of supervision received, as well as information regarding the employers' business operations. Thus, the petitioner's reliance on the documentation is misplaced.

In addition, in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner and counsel submitted copies of job advertisements.⁹ The AAO notes that the petitioner did not provide any independent evidence of how representative the job posting are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

For example, the petitioner has submitted advertisements for organizations that do not appear to be

⁸ Furthermore, an academic credential evaluation was not provided to establish that [REDACTED] foreign degree is equivalent to a U.S. bachelor's degree in pharmacy.

⁹ The AAO notes that the petitioner and counsel did not provide the entire job advertisement for the positions with [REDACTED]. That is, portions of the text are missing or have been cut-off. Consequently, information regarding the requirements for the positions cannot be ascertained.

similar to the petitioner. More specifically, the advertisements include positions with [REDACTED] (a company in the chemicals/petro-chemicals industry), and [REDACTED] (a company in the seismic acquisition industry). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Furthermore, the petitioner submitted a job posting placed by a staffing firm [REDACTED] for which little or no information regarding the actual employer is provided. The advertisement states that the position is with a chemical manufacturer.) The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Furthermore, the petitioner has not established that the advertisements are for parallel positions. For instance, the petitioner provided a posting for a chemist position, which requires a candidate to possess a master's degree in chemistry, plus "[a]pproximately 5 years [of] industrial experience with a synthetic organic batch chemical operations (plant experience)." Another submission is for a senior chemist position with [REDACTED] which requires a candidate to possess "an MS in Chemistry or Chemical or Polymer Engineering, with at least 10+." These advertised positions appear to be for more senior positions than the proffered position. (As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as an entry-level position.) Moreover, there is a lack of information regarding the day-to-day tasks, complexity of the job duties, supervisory duties, independent judgment required and the amount of supervision received. The petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position. Without further information, the petitioner has not established that the advertised positions are parallel to the proffered position.

The AAO reviewed all of the advertisements submitted in support of the petition.¹⁰ However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.

Moreover, 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 these job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. 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

¹⁰ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

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").

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To begin with and as discussed previously, the petitioner itself does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. In addition, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

In the instant case, the petitioner submitted documentation regarding the duties of the proffered position and evidence regarding its business operations, including promotional materials and brochures. Upon review of the record of proceeding, the AAO finds that the petitioner failed to demonstrate how the duties of the position as 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. For instance, 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 the duties of the proffered position. While related courses may be beneficial, or in some cases even essential, in performing certain duties of a compounding chemist position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; her work will be closely supervised and monitored; she will receive specific instructions on required tasks and expected results; and her work will be reviewed for accuracy.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. A Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹¹

The evidence of record does not establish that this position is significantly different from other pharmacy technician positions such that it refutes the *Handbook's* information to the effect that a high school diploma is acceptable for such positions. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner and counsel do not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to

¹¹ For additional information on Level IV wage levels, 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.

perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the director's RFE, counsel submitted a copy of a posting notice regarding an LCA for the position of compounding chemist ["Notice of Filing of the LCA"].¹² The "Notice of Filing of the LCA" is a statement to the petitioner's workers that it has a job opportunity available, that a foreign worker may be placed in the position and that interested parties may read the notice and provide comments to DOL. Its primary purpose is not intended to be a form of recruitment. The document, which was posted in connection with the LCA on behalf of the beneficiary, is not sufficient to establish a history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

Further, in the brief, submitted in response to the RFE, counsel claims that the petitioner previously

¹² It must be noted for the record that the petitioner indicates in the posting notice that the compounding chemist's annual salary is \$29,000. However, in the Form I-129, the petitioner indicated that the proffered position is for 20 hours per week at the rate of pay is \$26.60 per hour, which equates to \$27,664 per year. No explanation for the variance was provided. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

employed one compounding chemist, [REDACTED] who had a master's degree in pharmacy and health sciences from [REDACTED]. In support of this assertion, counsel submitted a copy of [REDACTED] Master of Science degree and Form W-2 for 2010. Notably, the Form W-2 indicates that [REDACTED] earnings for 2010 was \$15,000. Thus, it appears that [REDACTED] did not necessarily work at the same level and/or performed the same duties. While counsel claimed that the petitioner employed one compounding chemist, the petitioner and counsel failed to provide the job duties and day-to-day responsibilities of the employee that it claimed served in the position that is the same as the proffered position. The petitioner and counsel did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from the job title, the petitioner has failed to establish that the duties and responsibilities of this individual were the same or related to the proffered position.

Moreover, the petitioner stated in the Form I-129 petition that it has seven employees and that it was established in 1980 (approximately 32 years prior to the H-1B submission). Consequently, it cannot be determined how representative the petitioner's claim regarding *one individual over a 32 year period* is of the petitioner's normal recruiting and hiring practices. It must be noted that without further information, the submission of *the educational credentials of one individual* is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion 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 the specific 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 in a specific specialty, or its equivalent.

The AAO must not again the petitioner itself does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. Thus, the petitioner has not established that the proffered position qualifies as a specialty occupation.

The AAO acknowledges that the petitioner may believe that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. As previously noted, the petitioner submitted documentation regarding the proffered position and its business operations, including promotional materials and brochures. The AAO reviewed all of the evidence in the record, however, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the petitioner has not established that the nature of the specific duties that the beneficiary will perform are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category. The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

As previously mentioned, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1043, *aff'd*, 345 F.3d 683; see also *Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.