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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUL 0 5 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 instant nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In a letter of support submitted with the Form I-129 visa petition, the petitioner describes itself as a retail pharmacy store. In order to employ the beneficiary in what it designates as a pharmacy technician position, the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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).

The director denied the petition, finding that the petitioner had failed to establish that it would employ the beneficiary in a specialty occupation. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in his decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The issue on appeal is whether the petitioner has demonstrated that the 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 following statutory and regulatory requirements.

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 which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

> (*1*) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (*2*) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
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> (*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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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.

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

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a pharmacy technician position, and that it corresponds to Standard Occupational Classification (SOC) code and title 29-2052, Pharmacy Technicians. The LCA further states that the proffered position is a Level II position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in physiotherapy from The record contains no evaluation of the beneficiary's degree in terms of the equivalent U.S. degree. Counsel also submitted evidence that the beneficiary completed the Pharmacy Technician Test Preparation Course and that the Pharmacy Technician Certification Board of New York has designated the beneficiary a Certified Pharmacy Technician.

Counsel also submitted a letter, dated July 5, 2011, from the petitioner's president, which contains the following description of the duties of the proffered position:

- Pick up and process the prescriptions.
- Counting the pills and medications.
- Take prescriptions on phone.
- Filing of prescriptions.
- Inventory control and ordering etc.
- Help licensed pharmacists to provide medication, prepare the prescription labels, select the type of prescription container, affix the prescription and auxiliary labels to the container.

- Receive written prescription or refill requests and verify that information is complete and accurate.
- Counts stock and enters data in computer to maintain inventory records.
- Assist customers by answering simple questions, locating items or referring them to the pharmacist for medication information.
- Receive and store incoming supplies, verify quantities against invoices, check for outdated medications in current inventory, and inform supervisors of stock needs and shortages.

The petitioner's president further stated:

> In order to perform the aforementioned duties and to meet our needs, [the petitioner] requires the candidate to hold a Baccalaureate degree or the equivalent and/or strong employment history in the field of Pharmaceutical Science.

Elsewhere in the same letter, the petitioner's president stated:

> The theoretical difficulties inherent in the position demand that [the person in the proffered position has] acquired at least a U.S. Bachelor's degree or its equivalent in Pharmacy Science or a related field.

On December 23, 2011, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation.

In response, counsel submitted a letter, dated March 1, 2012, in which he reiterated the description of duties previously provided, and asserted that the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) shows that such a position qualifies as a specialty occupation position. Counsel further stated that the petitioner has not previously employed any pharmacy technicians.

In response to the request that the petitioner submit evidence that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent, counsel stated:

> Please note that the beneficiary is qualified to work as a pharmacy technician. The beneficiary has received his bachelor's degree in physiotherapy from India. He also passed his pharmacy technician test preparation course from the City in November 2006 and therefore, he is qualified to work on an H-1B visa.

The director denied the petition on May 9, 2012, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More

specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel reiterated the description of the duties of the proffered position, reiterated that it is a pharmacy technician position, and reiterated that it qualifies as a specialty occupation position.

Counsel also stated: "The beneficiary has obtained the United States equivalence of a Bachelor's degree in Physiotherapy from in March 2004 (Exhibit A)."

The AAO observes, preliminarily, that Exhibit A is a reproduction of a portion of the *Handbook*. Neither it, nor any other evidence in the record, demonstrates that the beneficiary's foreign degree is equivalent to a U.S. bachelor's degree in any subject, let alone in a subject closely related to pharmacy science. The AAO will address the beneficiary's qualifications further below.

The AAO will now discuss the application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which is satisfied if a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position. The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[1]

> In the "Pharmacy Technicians" chapter, the *Handbook* provides the following description of the duties of those positions:
>
> 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

[1] The *Handbook,* which is available in printed form, may also be accessed on the Internet, at http://www.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

- 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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook,* 2012-13 ed., "Pharmacy Technicians," http://www.bls.gov/ooh/healthcare/pharmacy-technicians.htm#tab-2 (last visited June 17, 2013).

The duties the petitioner's president attributed to the proffered position are consistent with the duties of pharmacy technicians as described in the *Handbook.* On the balance, the AAO finds that the proffered position is a pharmacy technician position as described in the *Handbook.*

The *Handbook* states the following about the educational requirements of pharmacy technician positions:

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.

Id. at http://www.bls.gov/ooh/healthcare/pharmacy-technicians.htm#tab-4 (last visited June 17, 2013).

The *Handbook* makes clear that pharmacy technician positions, as a category, do not require a minimum of a bachelor's degree in a specific specialty, or the equivalent, as it states that such positions usually require a high school diploma, and that many pharmacy technicians learn how to perform their duties on the job. It does indicate that some pharmacy technicians have taken related college classes, but that the programs leading to a certificate in the subject are typically offered by community colleges or vocational schools, and are one year or less in duration. The *Handbook* does not support the proposition that pharmacy technician positions require a minimum of a bachelor's degree in a specific specialty or its equivalent, or even that they require any education beyond high school.

Further, the petitioner has designated the proffered position as a Level II position on the submitted LCA, indicating that it is a position for an employee who performs moderately complex tasks that require limited judgment. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), *available at* http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. The classification of the proffered position as a Level II position does not support the assertion that it is a position that cannot be performed without a minimum of a bachelor's degree in a specific specialty or its equivalent, especially since the *Handbook* suggests that pharmacy technician positions do not require such a degree.

Further still, the AAO finds that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge of the operations of a pharmacy, but do not establish any particular level of formal, post-secondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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.

In determining whether there is 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.

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or any other authoritative, objective, and reliable resource, reports a standard industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Finally, as was noted above, the petitioner has designated the proffered position as a Level II position on the LCA, indicating that it is a position for an employee who performs moderately complex tasks that require limited judgment. In order to attempt to show that parallel positions require a minimum of a bachelor's degree in pharmacy science or its equivalent, the petitioner would be obliged to demonstrate, not just that some pharmacy technician positions require a minimum of a bachelor's degree in a specific specialty or its equivalent, which has not been demonstrated, but that other Level II pharmacy technician position, positions performing moderately complex tasks that require limited judgment, require a minimum of a bachelor's degree in pharmacy science or its equivalent, the proposition of which is not supported by the *Handbook*, and has certainly not been otherwise demonstrated.

Based upon a complete review of the record, 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 in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. The petitioner has not, therefore, 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 establishes that the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree in a specific specialty or its equivalent.

The record contains little evidence that would differentiate the work of the proffered position from the work of pharmacy technician positions in general. The duties of the proffered position (such as taking the information necessary to fill a prescription, counting tablets and measuring medications, compounding, packaging and labeling, accepting payments, processing insurance claims, and other routine tasks such as answering telephone calls) are described in terms of functions common to pharmacy technician positions in general, and so have not been shown to be more complex or unique than the duties of other pharmacy technician positions, which the *Handbook* indicates do not require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Moreover, the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. While a few related courses

may be beneficial in performing some of the proposed duties, 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 proffered position, and the *Handbook* indicates that such a specialized bachelor's degree or equivalent is unnecessary. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Finally, as was also noted above, the LCA submitted in support of the visa petition is approved for a Level II pharmacy technician, an indication that the proffered position is a position for an employee who performs moderately complex tasks that require limited judgment. This does not support the proposition that the proffered position is so complex or unique that it can only be performed by a person with a specific bachelor's degree, especially since the *Handbook* makes clear that pharmacy technician positions in general do not require such a degree.

Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

In his March 1, 2012 letter, counsel asserted that the petitioner has never hired anyone to fill the proffered position. Therefore, the record contains no evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).[2]

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position, such as taking the information necessary to fill a prescription, counting tablets and measuring medications, compounding, packaging and labeling, accepting payments and processing insurance claims, and other routine tasks such as answering telephone calls, contain no indication of a nature so specialized

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[2] 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 a 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").

and complex that they requires knowledge usually associated with a specialized bachelor's degree or the equivalent. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of pharmacy technician positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Further, as was noted above, the petitioner filed the instant visa petition for a Level II pharmacy technician position, a position requiring performance of moderately complex tasks that require limited judgment. This does not support the proposition that the duties of the position are so specialized and complex that their performance is associated with attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, closely related to a pharmacy technician position, notwithstanding that pharmacy technician positions in general require no such degree.

For the reasons discussed above, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

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.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an evaluation of the beneficiary's foreign degree or sufficient evidence to establish that his degree is the equivalent of a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in a specific specialty or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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.