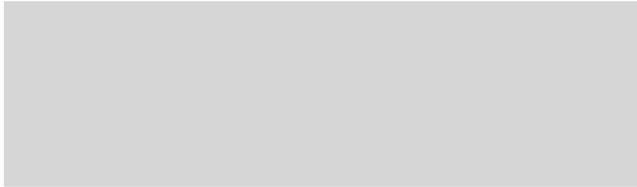




U.S. Citizenship
and Immigration
Services

(b)(6)



JUL 01 2015

DATE:

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

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

I. PROCEDURAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the supporting documents, the petitioner describes itself as a retail pharmacy and compounding prescriptions company, with seven employees, that was 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 reviewed the record of proceeding and determined that the petitioner did not establish eligibility for the benefit sought. Specifically, the Director stated that the petitioner had not established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory. The Director denied the petition.

The record of proceeding before us 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 Notice of Appeal or Motion (Form I-290B) and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree 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.

II. SPECIALTY OCCUPATION

The primary issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

A. Legal Framework

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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:

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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 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 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 387. To avoid this 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.

B. Proffered Position

In the Form I-129, the petitioner indicated that it wishes to employ the beneficiary as a compounding chemist on a part-time basis (25 hours per week).² In the support letter, the petitioner provided the following information regarding the duties and requirements of the proffered position:

[The beneficiary] will perform standard analytical tests and carry out assignments to compound chemicals and/or drugs, as necessary and as directed by a licensed pharmacist; perform analytical methods development/validation tests on raw materials and/or finished product; perform test on stability samples; perform data analysis, keep accurate records of test data and test procedures in laboratory notebook, follow all written departmental SOPs, etc. She will adhere strictly with State regulations and will not interact with patients nor will she perform any compounding activity that is restricted to a licensed pharmacist. At all times, she will work under the direct supervision of a licensed pharmacist.

² The petitioner states the beneficiary will be employed by " [REDACTED] " We observe that " [REDACTED] " is not the petitioning company.

* * *

The usual minimum requirement for performance of the job duties of this position with our company, as with any other similar organization, is a Bachelor's degree in the sciences, Pharmacy, Pharmaceutical Sciences, Pharmaceutical Chemistry or equivalent and some relevant training and/or experience or a Master's degree in lieu of the Bachelor's degree and experience.

Thereafter, in response to the RFE, the petitioner provided a new job description. More specifically, the petitioner stated that the position encompasses the following duties:

- Testing of new materials 5%
- Testing of finished mixes 5%
- Compounding of chemicals/drugs 75%
- Record keeping and compliance with SOP & Regulations 10%
- Interacting with pharmacists 5%

C. Analysis

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

We will now discuss the proffered position 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.

We recognize 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 The petitioner asserts in the Labor Condition Application (LCA) that the proffered position falls under the occupational category "Chemists." We reviewed the chapter of the *Handbook* entitled "Chemists and Materials Scientists."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 substances at the atomic and molecular levels and the ways in which substances react with each other. They use their knowledge to

³ All of the AAO's references are to the 2014-2015 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, 2014-15 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 June 24, 2015).

develop new and improved products and to test the quality of manufactured goods.

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
- 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 combinations of elements and the ways in which they interact. In applied research, chemists investigate possible new products and ways to improve existing ones. Chemistry research has led to the discovery and development of new and improved drugs, plastics, cleaners, and thousands of other products.

Materials scientists study the structures and chemical properties of various materials, to develop new products or enhance existing ones. They determine ways to strengthen or combine materials or develop new materials for use in a variety of products. Applications of materials science include inventing or improving 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.

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 the new drugs. 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. Some analytical chemists specialize in developing new methods of analysis and 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.

Theoretical chemists investigate theoretical methods that can predict the outcomes of chemical experiments. Theoretical chemistry encompasses a variety of specializations itself, though most specializations incorporate advanced computation and programming. Some examples of theoretical chemists are computational chemists, mathematical chemists, and chemical informaticians.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-2015 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 June 24, 2015).

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	20%
Pharmaceutical and medicine manufacturing	17
Testing laboratories	11
Federal government, excluding postal service	7
State and local government, excluding education and hospitals	6

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 usually are responsible for monitoring the environmental conditions at the plant. Chemists and materials scientists, who work for manufacturing companies, may have to travel occasionally, especially if their company has multiple facilities.

Chemists and materials scientists typically work on research teams. They need to be able to work well with others towards a common goal. Many serve in a leadership capacity and need to be able to motivate and direct other team members.

Work Schedules

Chemists and materials scientists typically work full time and keep regular hours.

Handbook, 2014-2015 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 June 24, 2015).

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."⁵ 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 June 24, 2015). This industry is not noted in the *Handbook* as employing chemists. Further, as noted above, chemists typically work full-time and keep regular hours. The petitioner indicated on the Form I-129 that its proffered position is not a full-time position, and that the beneficiary will work 25 hours per week.

Upon review of the record of proceeding and the chapter regarding "Chemists and Materials Scientists" in the *Handbook*, we find that the petitioner has not provided sufficient evidence to demonstrate that its proffered position has the same or similar duties, tasks, knowledge, work activities, etc. that are generally associated with "Chemists." For example, 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 addition, the petitioner does not assert that the beneficiary will direct technicians and other workers in testing procedures to analyze components and physical properties of materials. Further, the petitioner does not report 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 fact that the beneficiary may apply some chemical principles in the course of her job is not sufficient to establish the proffered position as a chemist position.

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:

⁵ 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 June 24, 2015).

- Take the information needed to fill a prescription from customers or health professionals
- Measure amounts of medications for prescriptions
- Package and label prescriptions
- Organize inventory and alert pharmacist to any shortage of medication or supplies
- Accept payment for prescriptions and process insurance claims
- Answer phone calls from customers
- Arrange for customers to meet with pharmacist if customers have questions about medications or health matters

Pharmacy technicians work under the supervision of pharmacists, who must review prescriptions before they are given to patients. In most states, technicians can compound or mix some medications and call physicians for prescription refill authorizations. Technicians also may need to operate automated dispensing equipment when filling prescription orders.

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, 2014-2015 ed., Pharmacy Technicians, on the Internet at <http://www.bls.gov/ooh/healthcare/pharmacy-technicians.htm#tab-2> (last visited June 24, 2015).

It is important to note that according to the petitioner, the beneficiary will spend 75% of her time compounding chemicals/drugs. The *Handbook* states that in most states pharmacy technicians can compound or mix medications.

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

Becoming a pharmacy technician usually requires earning a high school diploma or the equivalent. Pharmacy technicians typically learn through on-the-job training, or they may complete a postsecondary education program. Most states regulate pharmacy technicians, which is a process that may require passing an exam or completing a formal education or training program.

Education and Training

Many pharmacy technicians learn how to perform their duties through on-the-job training. These programs vary in length and subject matter according to the employer's requirements.

Other pharmacy technicians enter the occupation after completing postsecondary education programs in pharmacy technology. These programs are usually offered by

vocational schools or community colleges. Most programs award a certificate after 1 year or less, although some programs last longer and lead to an associate's degree. They 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, uses, and doses of medications. Most programs also include clinical experience opportunities, in which students gain hands-on experience in a pharmacy.

The American Society of Health System Pharmacists (ASHP) accredits pharmacy technician programs that include at least 600 hours of instruction over a minimum of 15 weeks. In 2012, there were 213 fully accredited programs, including a few in retail drugstore chains.

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, 2014-2015 ed., Pharmacy Technicians, available on the Internet at <http://www.bls.gov/ooh/healthcare/pharmacy-technicians.htm#tab-4> (last visited June 24, 2015).

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. It 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. Thus, it does not support the claim that the occupational category is one for which normally the minimum requirement for entry is a

baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did (which it does not), the record lacks sufficient evidence to support a finding that the particular position proffered here, would normally have such a minimum, specialty degree requirement, 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. 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." In the instant case, the duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner 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 has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The requirement of a baccalaureate or higher degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations

Next, we will review 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 for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

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

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 a standard industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. The petitioner did not submit documentation from the industry's professional association stating that it has made a degree a minimum entry requirement.

The petitioner submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, the petitioner's reliance on the job announcements is misplaced.

The petitioner describes itself as a retail pharmacy and compounding prescriptions company established in [redacted] with seven employees. The petitioner claims that it has a gross annual income of "\$3 Million." Although required on the petition, 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 under this criterion of the regulations, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

The petitioner submitted a number of job postings; however, the postings contain little or no information regarding the advertising employers. Consequently, the record is devoid of sufficient information regarding the employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner did not supplement the record of proceeding to establish that the employers are similar to it. That is, the petitioner has not provided sufficient information regarding which aspects or traits (if any) it shares with the organizations.⁶

Further, some postings do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.⁷ For instance, the Actavis posting states that a degree is

⁶ When determining whether the petitioner and the 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 to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

⁷ As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but a degree in a specific specialty that is directly related to the duties of the position. *See* 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

In addition, although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

necessary, but it does not state that a specific specialty is required. Moreover, some of the advertisements do not appear to be for parallel positions. For example, one of the advertisements is for a Chemist III, which requires a degree and 3 to 6 years of experience. Another posting is for a Chemist II and requires a degree and 3 to 7 years of experience. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

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.⁸ That is, not every deficit of every job posting has been addressed.

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 (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. 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 particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

We 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner described the proffered position and its business operations. Upon review, we find that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. 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 it asserts are so complex and unique. While a few related courses may be beneficial in performing certain duties of the position, the petitioner has not demonstrated 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. 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. The record does not establish which of

Id.

⁸ The petitioner did not provide any independent evidence of how representative the job postings 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.

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.

The evidence of record does not establish that this position is significantly different from other positions in the occupational category "Pharmacist Technicians" such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty, or its equivalent is not required for the proffered position.

The petitioner claims that the beneficiary is well qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

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, we review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, 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. While a petitioner may assert that a proffered position requires a specific degree, that statement 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 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.

The petitioner stated in the Form I-129 petition that it has seven employees and that it was established in [REDACTED] (approximately two years prior to the filing of the H-1B petition). The petitioner stated that this would be the first time employing someone in the proffered position.

The petitioner did not provide documentary evidence to support the assertion that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of the position. The petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 in a specific specialty, or its equivalent

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 petitioner claims 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. We reviewed the petitioner's statements regarding the proffered position and its business operations. However, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they 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.

Although the petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established 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.

III. CONCLUSION AND ORDER

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.