



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF DBM-S-, INC.

DATE: JAN. 7, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a pharmacy, seeks to temporarily employ the Beneficiary as a “Compounding Chemist” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUE

The issue before us is whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.¹ Beyond the decision of the Director, we will also address whether the Petitioner submitted a Labor Condition Application (LCA) for the proper occupational classification.

II. SPECIALTY OCCUPATION

A. Legal Framework

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:

¹ We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

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 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. Fed. 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 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 individuals 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 individual, 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 or 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. The Proffered Position

On 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).

The LCA submitted to support the visa petition states that the proffered position is a “Compounding Chemist,” and that it corresponds to Standard Occupational Classification (SOC) code and title “19-2031, Chemists” from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

On the LCA and Form I-129 Supplement H, H Classification Supplement to Form I-129, the Petitioner provided a North American Industry Classification System (NAICS) Code of “446110, Pharmacies and Drug Stores,” relating to “establishments known as pharmacies and drug stores engaged in retailing prescription or nonprescription drugs and medicines.”²

² U.S. Dep’t of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, “446110, Pharmacies and Drug Stores,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Jan. 6, 2016).

Matter of DBM-S-, Inc.

In a support letter dated March 31, 2014, the Petitioner stated that it is in the “specialty Pharmaceutical business involved in distribution, research, marketing, dispensing, export and pharmaceutical services.” The Petitioner stated that it currently has six employees. 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.

* * *

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 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 Director’s request for evidence (RFE), the Petitioner provided additional descriptions and information about the proffered position.³ In particular, the Petitioner asserted that the proffered position most closely matches the “Chemists and Materials Scientists” occupational group as described in the U.S. Department of Labor’s *Occupational Outlook Handbook (Handbook)*. The Petitioner summarized the duties of the proffered position with the amount of time spent on each duty, as follows:

- 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%

The Petitioner submitted a copy of the *Handbook* chapter on “Chemists and Materials Scientists” to support its RFE response. The Petitioner also submitted, *inter alia*, its State of New York business licenses identifying it as a registered pharmacy, and its 2012 federal tax return identifying the Petitioner as a retail pharmacy.

³ The Petitioner’s letterhead identifies its address as [redacted] New York. In contrast, the Petitioner indicated on the Form I-129 and LCA that its address is [redacted] New York.

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 *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ The Petitioner asserts in the LCA that the proffered position falls under the occupational category "Chemists." We reviewed the chapter of the *Handbook* entitled "Chemists and Materials Scientists."⁵ The *Handbook* describes the duties of chemists in the subsection entitled "What Chemists and Materials Scientists Do" as follows:

Chemists and materials scientists study substances at the atomic and molecular levels and the ways in which substances react with one another. They use their knowledge to 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 and testing methods
- Direct technicians and other workers in testing and analyzing components and the physical properties of materials
- Instruct scientists and technicians on proper chemical processing and testing procedures, including ingredients, mixing times, and operating temperatures
- Prepare solutions, compounds, and reagents used in laboratory procedures
- Analyze substances to determine their composition and concentration of elements
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

⁴ All of our references are to the 2016-17 edition of the *Handbook*, which may be accessed on the Internet at <http://www.bls.gov/OCO/>.

⁵ 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*, 2016-17 ed., "Chemists and Materials Scientists," <http://www.bls.gov/ooh/life-physical-and-social-science/chemists-and-materials-scientists.htm> (last visited Jan. 6, 2016).

Some chemists and materials scientists work in basic research. Others work in 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, and cleaners, as well as thousands of other products.

Materials scientists study the structures and chemical properties of various materials in order 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 ceramics, metallic alloys, and superconducting materials.

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 computer modeling software to study the structure and properties of complex molecules.

Most chemists and materials scientists work as part of a team. The number of scientific research projects that involve multiple disciplines is increasing, and it is common for chemists and materials scientists to work on teams with other scientists, such as biologists, 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 engineering occupations.

Chemists often specialize in a particular branch of the field. The following are examples of 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 among 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, such as ceramics and superconductors, can be modified, separated, or used in products.

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 in turn, have 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. On the basis of 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, although most specializations incorporate advanced computation and programming. Some examples of theoretical chemists are computational chemists, mathematical chemists, and chemical informaticians.

Materials scientists tend to specialize by the material they work with most often. A few examples of materials in which these scientists specialize are ceramics, glasses, metals, nanomaterials (extremely small substances), polymers, and semiconductors.

A growing numbers of chemists work in interdisciplinary fields, such as biochemistry and geochemistry. For more information, see the profiles on biochemists and biophysicists and geoscientists.

Many people with a chemistry background become professors or teachers. For more information, see the profiles on high school teachers and postsecondary teachers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Chemists and Materials Scientists," <http://www.bls.gov/ooh/life-physical-and-social-science/chemists-and-materials-scientists.htm#tab-2> (last visited Jan. 6, 2016).

In the section of the *Handbook* entitled "Work Environment," the *Handbook* lists the industries that employ the largest numbers of chemists as: research and development in the physical, engineering, and life sciences (18%), pharmaceutical and medicine manufacturing (16%), testing laboratories

Matter of DBM-S-, Inc.

(10%), federal government, excluding postal service (7%), and basic chemical manufacturing (5%). U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Chemists and Materials Scientists," <http://www.bls.gov/ooh/life-physical-and-social-science/chemists-and-materials-scientists.htm#tab-3> (last visited Jan. 6, 2016). The *Handbook* also states that "[m]ost material scientists work in manufacturing and in scientific research and development," and lists the industries that employed the most materials scientists as follows: research and development in the physical, engineering, and life sciences (27%), colleges, universities, and professional schools (9%), basic chemical manufacturing (6%), pharmaceutical and medicine manufacturing (5%), and management of companies and enterprises (5%). *Id.*

The *Handbook* further states:

Chemists and materials scientists typically work in laboratories and offices, where they conduct experiments and analyze their results. In addition to working in 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. Others may work outdoors to collect samples and conduct onsite analysis of air, soil, or water.

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

Injuries and Illnesses

Chemists and materials scientists may be exposed to health or safety hazards when handling certain chemicals, but there is little risk if they follow proper procedures, such as wearing protective clothing when handling hazardous chemicals.

Work Schedules

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

Id.

Upon review of the record of proceeding and the *Handbook* chapter regarding "Chemists and Materials Scientists," we find that the Petitioner has not provided sufficient evidence to demonstrate that its proffered position can be appropriately be classified under the "Chemists and Materials Scientists" occupational classification corresponding to O*NET SOC code and title of "19-2031.00, Chemists."

Here, 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.⁶ 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, or will write technical reports and present research findings to scientists, engineers, and other colleagues. The fact that the Beneficiary may apply some chemistry principles in the course of her job is not sufficient to establish the proffered position as a chemist position.

In addition, the *Handbook* describes the typical work environment for chemists as “laboratories and offices, where they conduct experiments and analyze their results” as well as “industrial manufacturing facilities.” *Id.* In the instant matter, the record of proceeding lacks evidence that the Petitioner could reasonably be considered a laboratory or office in which the Beneficiary could conduct experiments and analyze results, or an industrial manufacturing facility. Notably, the Petitioner designated its business operations under the NAICS code of “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,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Jan. 6, 2016). The Petitioner has also represented itself as a retail pharmacy as evidenced by its federal tax return. The evidence of record does not contain sufficient evidence to establish that the scope of the Petitioner’s business activities extend beyond that of operating a single retail pharmacy.⁸ The retail pharmacy industry is not noted in the *Handbook* as typically employing chemists.

Further, as noted above, chemists typically work full-time 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. For all of the above reasons, we find the evidence of record insufficient to establish that the chemist occupational classification is appropriate for the proffered position.

Instead, based upon the Petitioner’s job descriptions and business operations as a retail pharmacy, we find that the proffered position is more likely than not a pharmacy technician position.⁹

⁶ Instead, the Petitioner stated that the Beneficiary will perform “standard” tests and assignments, as directed by a licensed pharmacist.

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, <http://www.census.gov/eos/www/naics/> (last visited Jan. 6, 2016).

⁸ We note that the Petitioner described itself as in the “specialty Pharmaceutical business involved in distribution, research, marketing, dispensing, export and pharmaceutical services.” However, the Petitioner submitted no additional details or evidence to further explain and corroborate these claimed aspects of the Petitioner’s business (e.g., in research and export).

⁹ We are not persuaded by the Petitioner’s explanations for why the proffered position is not a pharmacy technician position. More specifically, the Petitioner stated that the Beneficiary will perform duties that a pharmacy technician “would be unable to do,” such as testing incoming new materials/drugs for quality and strength, testing chemical/drug

The *Handbook* states the following about the “Pharmacy Technicians” occupational category:

Pharmacy technicians help pharmacists dispense prescription medication to customers or health professionals. They work in retail pharmacies and hospitals.

Duties

Pharmacy technicians typically do the following:

- Collect information needed to fill a prescription from customers or health professionals
- Measure amounts of medication for prescriptions
- Package and label prescriptions
- Organize inventory and alert pharmacists to any shortages of medication or supplies
- Accept payment for prescriptions and process insurance claims
- Answer phone calls from customers
- Arrange for customers to speak with pharmacists 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.

U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Pharmacy Technicians,” <http://www.bls.gov/ooh/healthcare/pharmacy-technicians.htm#tab-2> (last visited Jan. 6, 2016).

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.

combinations for strength and safety, possessing knowledge of drug interactions, and record keeping of tests and results. However, the Petitioner has not sufficiently explained these vaguely worded duties, such as what specific “testing” and “record keeping” the Beneficiary will perform.

We note that, on appeal, the Petitioner acknowledges that a pharmacy technician “is not a specialty occupation.”

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 2015, there were 286 fully accredited programs, including a few in retail drugstore chains

Licenses and Certification

Most states regulate pharmacy technicians in some way. Consult state Boards of Pharmacy for particular regulations. Requirements for pharmacy technicians in the states that regulate them typically include some or all of the following:

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

Some states and employers require pharmacy technicians to be certified. 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) certification requires a high school diploma and the passing of an exam. Applicants for the National Healthcareer Association (NHA) certification must be at least 18 years old, have a high school diploma, and have completed a training program or have 1 year of work experience. Technicians must recertify every 2 years by completing 20 hours of continuing education courses

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Pharmacy Technicians," <http://www.bls.gov/ooh/healthcare/pharmacy-technicians.htm#tab-4> (last visited Jan. 6, 2016).

The *Handbook* states that a high school diploma, or the equivalent, is usually required 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 hands-on experience in a pharmacy. Thus, the *Handbook* 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)(I).

*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.

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 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 independent, authoritative sources) reports an industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

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 these job announcements is misplaced.

The Petitioner has not established that the advertising employers are similar and in the Petitioner's industry. The job announcements contain little or no information regarding the advertising employers. The Petitioner did not supplement the record of proceeding with additional information regarding the advertising employers. Consequently, there is insufficient information regarding the employers to conduct a legitimate comparison of the organizations to the Petitioner. That is, the Petitioner has not provided sufficient information regarding which aspects or traits (if any) it shares with the organizations.¹⁰ For a petitioner to establish that an organization is similar under this

¹⁰ 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. "[G]oing on record without supporting documentary evidence is not sufficient for

criterion of the regulations, it must demonstrate that it shares the same general characteristics as the advertising organizations. 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.

Further, some postings do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.¹¹ For instance, the Actavis posting states that a degree is 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.¹² 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 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. Accordingly, 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.

purposes of meeting the burden of proof in these proceedings." *In re Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

¹¹ 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).

¹² 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.

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 sufficiently identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. That is, the record does not establish 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. 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 normally required for the position.¹³ 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 normally 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 the Petitioner in support of this criterion of the regulations.

The Petitioner indicated that this is its first time hiring for the proffered position, as the Beneficiary would be taking over duties currently carried out by the licensed pharmacist. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for this particular position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that the Petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position.¹⁴

¹³ The Petitioner stated that the Beneficiary will be performing compounding duties currently performed by its licensed pharmacist. However, the Petitioner also stated that the Beneficiary will not "perform any compounding activity that is restricted to a licensed pharmacist." As such, we cannot conclude that the compounding duties to be performed by the Beneficiary will be so complex and unique such that they cannot be performed by a pharmacy technician.

¹⁴ While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, 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

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.

III. NON-CORRESPONDING LCA

Beyond the decision of the Director, the petition cannot be approved because the Petitioner has not provided a certified LCA that corresponds to the petition. The LCA provided in support of the instant petition was certified for employment of a position described at SOC Code and Title "19-2031.00, Chemists" in O*NET. However, we have found that the proffered position is not such a position, but is an occupational "Pharmacy Technician" position. Those positions are described in O*NET at SOC Code and Title "29-2052.00, Pharmacy Technicians." As such, the Petitioner was

degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree, or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

required to provide at the time of filing an LCA certified for SOC code “29-2052.00, Pharmacy Technicians,” not “19-2031.00, Chemists,” in order for it to be found to correspond to the petition.

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

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. Here, the Petitioner has not submitted a valid LCA that has been certified for the proper occupational classification, and the petition cannot be approved for this additional reason.

IV. CONCLUSION

As set forth above, we agree with the Director’s finding that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation. Beyond the Director’s decision, we find that the petition was submitted without a corresponding LCA.

We may deny an application or petition that does not comply with the technical requirements of the law even if the Director does not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001); *see also Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015) (noting that we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d at 1037; *see also BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) (“When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.”).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is

Matter of DBM-S-, Inc.

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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of DBM-S-, Inc.*, ID# 15370 (AAO Jan. 7, 2016)