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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 07 2013 Office: CALIFORNIA SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner, through counsel, submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on November 16, 2011. On the Form I-129 visa petition, the petitioner[1] describes itself as an apparel manufacture business with an undisclosed number of employees,[2] established in 2010. In order to employ the beneficiary in what it designates as an fashion designer position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on August 15, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, submitted an appeal of the decision on September 17, 2012. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition on the specialty occupation issue "was based upon arbitrary conclusions of law and fact." In support of this assertion, counsel for the petitioner submitted additional evidence.

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

For the reasons that will be discussed below, the AAO agrees with the director's decision 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, and the petition will be denied.

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

(A) theoretical and practical application of a body of highly specialized

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[1] The AAO notes that the petitioner states on the Form I-129 that the name of its company is However, the petitioner states on the Labor Condition Application that it is doing business as ' Also, the AAO notes that the petitioner submitted a "proof of publication of fictitious business name statement" that it is doing business as '

[2] The AAO notes that the petitioner's organizational chart, which was submitted in response to the RFE, indicates that the petitioner has two employees.

knowledge, and

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

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

> *Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

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

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

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

214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a fashion designer to work on a full-time basis at a salary of $37,107.20 per year. In its support letter, dated November 1, 2011, the petitioner provided the following description of the proffered position:

- Direct and coordinate contractors involved in drawing and cutting patterns and constructing samples or finished garments.
- Examine sample garments on and off models; then modify designs to achieve desired effects.
- Sketch rough and detailed drawings of apparel or accessories, and write specifications such as color schemes, construction, material types, and accessory requirements.
- Confer with clients in order to discuss design ideas.
- Identify target markets for designs, looking at factors such as age, gender, and socioeconomic status.
- Attend fashion shows and review garment magazines and manuals in order to gather information about fashion trends and customer preferences.
- Select materials and production techniques to be used for products.
- Provide sample garments to agents and sales representatives, and arrange for showings of sample garments at sales meetings or fashion shows.
- Adapt other designers' ideas for the mass market.

The petitioner stated that it requires a bachelor's degree in a fashion design[-]related discipline, or the equivalent. In addition, the petitioner stated that "[t]he [b]eneficiary received [a] Diploma from [redacted] in France and [a] Certificate from [redacted] in France, followed by extensive hands-on experience in France and Brazil as illustrated by her CV."

The petitioner submitted a credential evaluation by that states that "[the beneficiary] has the equivalent of an associate's degree (two years of university-level credit) in fashion design from a regionally accredited community college in the United States."

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Fashion Designers" – SOC (ONET/OES Code) 27-1022.00, at a Level I wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on March 5, 2012. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

On May 15, 2012, counsel for the petitioner responded to the RFE and submitted the petitioner's response letter and additional evidence. In the letter submitted in response to the RFE, dated May 14, 2012, counsel stated the following:

> As appears from the detailed job description, the petitioner encompasses duties far beyond that [sic] of a mere fashion designer, the job title (as the Service always holds) does not determine if the position is an H-1B specialty occupation. Accordingly, because the job duties are so specialized, the position is akin to that of an Art Director.

In the letter submitted in response to the RFE, dated April 20, 2012, the petitioner provided the following revised description of the duties of the proffered position:

- Direct and coordinate contractors involved in drawing and cutting patterns and constructing samples or finished garments.
- Examine sample garments on and off models; then modify designs to achieve desired effects.
- Sketch rough and detailed drawings of apparel or accessories, and write specifications such as color schemes, construction, material types, and accessory requirements.
- Confer with clients in order to discuss design ideas.
- Identify target markets for designs, looking at factors such as age, gender, and socioeconomic status.
- Attend fashion shows and review garment magazines and manuals in order to gather information about fashion trends and customer preferences.
- Select materials and production techniques to be used for products.
- Provide sample garments to agents and sales representatives, and arrange for showings of sample garments at sales meetings or fashion shows.
- Adapt other designers' ideas for the mass market.

In addition to the above duties[,] the following specific duties are required

from the beneficiary:

- Overseeing product development from trend research of materials such as fabrics, trims and details.
- Coordinating with the pattern maker and sample maker to develop the ideas and designs according to the collection theme and vision for the season.
- Appropriate the designs according to the target market and customers' search for the next trend item.
- Understand and work with pattern maker for the best clothing fit and cut of the garment making sure it is wearable and comfortable for the ultimate retail client.
- Follow the trend and the sales and develop a plan for product development along with the production coordination.
- Coordinate the needs of the wholesale store, such as at least 10 new designs developed and pushed to production for in store delivery not longer than 2 weeks after approval.
- Make sure there is enough merchandise for sales in store.
- Meet with potential future order buyers and show new designs periodically, every other week, for future orders.
- The designer needs to be up to date with fabrics and trends in order to show the buyers what are the new fashion items for their stores and what are the possible new designs to be created for their own customers.
- Follow up with buyers if they're satisfied with the products developed and once approved, move on to production and make sure it is delivered on time.
- Maintain a good and constant relationship with the buyers showing them new designs and collections.

In the letter in response to the RFE, counsel for the petitioner also states the following:

> As appears from the detailed job description, the petitioner encompasses duties far beyond that of a mere fashion designer, the job title (as the Service always holds) does not determine if the position is an H-1B specialty occupation. Accordingly, because the job duties are so specialized, the position is akin to that of an Art Director.

In its response to the director's RFE, counsel for the petitioner expanded the beneficiary's duties and stated that the duties of the proffered position are "beyond that of a mere fashion designer" and "akin to that of an Art Director."

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed

merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Thus, if the petitioner means to assert that the proffered position is actually that of an Art Director, the petitioner must file a new or amended petition for a position within that occupational classification – with fee and an LCA timely certified for such a position.

On August 15, 2012, the director denied the petition. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. Counsel for the petitioner submitted a timely appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), 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 that is the subject of the petition.

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

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[3] As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Fashion Designers."

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

The AAO reviewed the information in the *Handbook* regarding the occupational category "Fashion Designers." However, the *Handbook* does not indicate that these positions comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Fashion Designer" states the following about this occupational category:

> Postsecondary education is not required. Most fashion designers entering the industry have some formal education where they learn design skills, including how to use computer-aided design (CAD) technology. Employers usually seek applicants with creativity, as well as a good technical understanding of the production process for clothing, accessories, or footwear.
>
> **Education**
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> Although postsecondary education is not required for fashion designers, many take classes or earn a 2-year or 4-year degree in a related field, such as fashion merchandising, that can improve their knowledge of textiles and fabrics.
>
> For many artists, including fashion designers, developing a portfolio—a collection of design ideas that demonstrates their styles and abilities—is essential because employers rely heavily on a designer's portfolio in deciding whether to hire the individual. For employers, it is an opportunity to gauge talent and creativity. Students studying fashion design often have opportunities to enter their designs in student or amateur contests, helping them to develop their portfolios.
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> The National Association of Schools of Art and Design accredits approximately 300 postsecondary institutions with programs in art and design, and many of these schools award degrees in fashion design. Many schools require students to have completed basic art and design courses before they enter a program. Applicants usually have to submit sketches and other examples of their artistic ability.
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> **Training**
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> Fashion designers often gain their initial experience in the fashion industry through internships or by working as an assistant designer. Internships provide aspiring fashion designers an opportunity to experience the design process, building their knowledge of textiles, colors, and how the industry works.
>
> **Advancement**
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> Beginning fashion designers usually start out as patternmakers or sketching assistants to more experienced designers before advancing to higher level positions. Experienced designers may advance to chief designer, design department head, creative director, or another supervisory position in which they oversee certain fashion lines or brands by a company.

Some experienced designers may start their own design company or sell their designs in their own retail stores. A few of the most successful designers work for high-fashion design houses that offer personalized design services to their clients.

Important Qualities

Artistic ability. Fashion designers sketch their initial design ideas, which are used later to create prototypes. Consequently, designers must be able to express their vision for the design through illustration.

Communication skills. Fashion designers often work in teams throughout the design process and therefore must be effective in communicating with their team members. For example, they may need to give instructions to sewers regarding how the garment should be constructed.

Computer skills. Fashion designers use technology to design. They must be able to use computer-aided design (CAD) programs and be familiar with graphics editing software.

Creativity. Fashion designers work with a variety of fabrics, shapes, and colors. Their ideas must be unique, functional, and stylish.

Decision-making skills. Because they often work in teams, fashion designers are exposed to many ideas. They must be able to decide which ideas to incorporate into their designs.

Detail-oriented. Fashion designers must have a good eye for small differences in color and other details that can make a design successful.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Fashion Designers, available on the Internet at http://www.bls.gov/ooh/arts-and-design/fashion-designers.htm#tab-4 (last visited April 25, 2012).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.[4] This designation is indicative of a comparatively low, entry-level position relative to

[4] Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be

others within the occupation.[5] That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

The AAO also finds that the petitioner's submission of an LCA certified for a Level I wage-rate (the lowest of four possible levels) is materially inconsistent with the range and level of independent responsibilities and the level of knowledge of the occupation that the petitioner's remarks have claimed for this position. The AAO also finds that this aspect of the record of proceeding adversely impacts against the overall credibility of the petition.

The *Handbook* does not state that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. As stated above, this passage of the *Handbook* reports that "[p]ostsecondary education is not required." Thus, this is not indicative of an occupation for which there is a normal requirement for at least a baccalaureate or higher degree, in a specific specialty, or its equivalent.

Accordingly, as the *Handbook* indicates that working as a fashion designer does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to

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implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

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

> **Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Id.

provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to 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." 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. 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal, counsel submitted an opinion letter from Professor Emeriti, Adjunct Faculty in Clothing and Textiles at The letter is dated October 10, 2012. In the letter, states that the proffered position is a specialty occupation and, therefore, requires a bachelor's degree or equivalent in fashion design or a related field.

attached a copy of her curriculum vitae. She described her qualifications, including her educational credentials and professional experience, as well as provided a list of the publications she has written, papers she has presented, and other presentations. Based upon a complete review of letter and curriculum vitae, the AAO notes that, while may, in fact, be a recognized authority on various topics, she has failed to provide sufficient information regarding the basis of her claimed expertise on this particular issue. claims that she is qualified to comment on the position of fashion designer because of the position she holds at However, without further clarification, it is unclear how her position as an adjunct faculty in clothing and textiles at would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of apparel manufacturers (as designated by the petitioner in the Form I-129 and with the NAICS code) similar to the petitioner for fashion designer positions (or parallel positions).

opinion letter and curriculum vitae do not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that she has published any work or conducted any research or studies pertinent to the educational requirements for fashion designers in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by in the specific area upon which she is opining. provides no documentary support for her ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Upon review of the opinion letter, there is no indication that possesses any knowledge of the petitioner's proffered position beyond the petitioner's letter of support and job description. The fact that she attributes a degree requirement to such a generalized treatment of

the proffered position undermines the credibility of her opinion. does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Her opinion does not relate her conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no evidence that has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. provides general conclusory statements regarding fashion designer positions, but she does not provide a substantive, analytical basis for her opinion and ultimate conclusions.

claims that the duties of the proffered position are complex and/or specialized. However, it must be noted that there is no indication that the petitioner and counsel advised that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA). As previously discussed, the wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. It appears that would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. document lacks an adequate factual and analytical foundation to establish the opinion therein as reliable and worthy of deference, and the AAO finds that the opinion is not in accord with other information in the record.

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

On the Form I-290B, counsel stated that the "duties are those of an Art Director[,] which position requires at least a bachelor['s] degree. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not

make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Moreover, the LCA submitted in support of the petition was not certified for, and therefore does not correspond to or support, a petition for an art director position. As noted earlier, the LCA submitted to support this petition was certified for the occupational classification of "Fashion Designers," a distinctly separate occupational group.

Also, in its response to the RFE, counsel for the petitioner stated that "[t]he specialty occupation in this case encompasses the definition of professional," and cited to *Mindseye v. Ilchert*, (1985 U.S. Distr. LEXIS 17986, No. C-84-6199-FJW (N.D. Cal., July 11, 1987), for the proposition that "[a] *"professional"* has previously been determined to include Fashion Designers." In addition, on appeal, counsel stated that the director did not consider *Mindseye v. Ilchert*. Although the current H-1B specialty occupation classification is in many respects the same as the prior H-1 "professional" classification, as it evolved through then-Immigration and Naturalization Service-precedent decisions and subsequent regulations, they are not the same classification with identical requirements. Counsel did not submit a copy of the *Mindseye v. Ilchert* into the record of proceeding. Moreover, counsel has failed to establish that the facts of *Mindseye v. Ilchert* are analogous to the facts in this record of proceeding. The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This first alternative prong calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is 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)).

As previously discussed, the *Handbook* does not support the proposition that a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Moreover, the record of proceeding does not contain any supporting documentation from the industry's professional association, or letters or affidavits from firms or individuals in the industry to satisfy this criterion.

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

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

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of fashion designer. Specifically, the petitioner failed to demonstrate how the fashion designer duties described require the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

The AAO further notes that the LCA's Level I wage rate is inconsistent with the level of complexity or uniqueness required to satisfy this criterion. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates a wage level based upon the occupational classification "Fashion Designers" at a Level I (entry level) wage. This wage level designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

Also, the evidence of record does not establish that this position is significantly different from

other fashion designer positions such that it refutes the *Handbook's* information that a "[p]ostsecondary education is not required." In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions in the pertinent occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position of fashion designer is so complex or unique relative to other fashion designer positions that can be performed by a person without at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or the equivalent, for the position.

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past. Here, there is no such evidence, as the petitioner has not previously employed anyone in the proffered position.

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

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 a 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 record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Upon review of the record, the petitioner has not provided evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that 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.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. Moreover, upon review of the record, there is insufficient evidence to establish that the duties of the fashion designer position require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

The AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, 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 their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Fashion Designers" and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation."

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. That is, the petitioner has not established that the nature of the duties of the position 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 AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

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

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.