

(b)(6)



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

DATE: **JUL 28 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

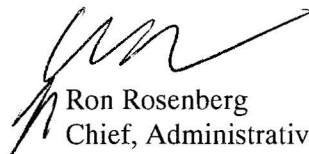
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INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
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 submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2013. In the Form I-129 visa petition and supporting documents, the petitioner describes itself as a production company for media and entertainment that was established in 1991. In order to employ the beneficiary in what it designates as an associate producer 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 November 6, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the notice of decision; (5) the Form I-290B, Notice of Appeal or Motion, and supporting materials; (6) our RFE; and (7) counsel's response to our RFE. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed, we agree with the director's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed.

## I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time associate producer at a rate of pay of \$60,000 per year. In a letter dated April 1, 2013, the petitioner states the following regarding the proffered position:

As an Associate Producer, [the beneficiary] will plan, produce and manage our various television programs and their production elements. She will develop and implement content for existing and new television programs and online content. She will develop interactive program content from initiation to completion, under the direct supervision of our Producers, Senior Producers and Executive Producers. She will provide leadership in all aspects of the content development process, including schedules, budgets, design, production, editorial, approvals, QA and usability testing. She will coordinate aspects of the product development process, including usability testing, researching content, quality assurance (functionality testing) and license or approvals. She will research, develop and recommend program ideas, treatments,

story and program scripts; and determine composition and flow of the program. She will produce various programs, including taped and live programs, specials, post-production sessions and web-ready video content. She will secure and maintain rights, releases and other documentation for broadcast and online production.

In addition, she will be responsible for planning and scheduling programming and event coverage, based on broadcast length, ratings data, and viewer demographics; monitor and review programs to ensure that schedules are met and guidelines are followed; establish work schedules and assign work to staff members; review recordings or rehearsals to ensure conformance to production and broadcast standards; monitor network transmissions for advisories concerning daily program schedules, content, or program changes; confer with directors and production staff to discuss issues such as production and casting problems, budgets and policies; maintain and support all methods *[sic]* communication to further the program and brand; hiring directors, principal cast members and key production staff members; researching and booking guests; and preparing on-air talent.

The petitioner indicated that the position "clearly involves complex and highly sophisticated responsibilities requiring extensive technical knowledge and business skills in theater or film studies, which are typically acquired through the attainment of a minimum of a Bachelor's or higher degree or its equivalent in theater studies, film studies, performing arts production, or a related discipline." In support of this statement, the petitioner provided a copy of academic equivalency evaluation from the [REDACTED] which states that the beneficiary's degree is equivalent to the U.S. degree of Bachelor of Arts in Theater Studies, and copies of the beneficiary's foreign diploma and academic transcripts.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicates on the LCA that the proffered position corresponds to the occupational category "Producers and Directors" – SOC (ONET/OES Code) 27-2012, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 13, 2013. The director outlined the evidence to be submitted.

Counsel responded to the RFE by submitting additional evidence in support of the H-1B petition. In a letter dated September 4, 2013, counsel provided a revised description of the proffered position along with the percentage of time to be spent on each duty.<sup>1</sup>

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<sup>1</sup> It is noted that counsel's description of the proffered position is not probative evidence as the information was provided by counsel, not the petitioner. Counsel's letter was not endorsed by the petitioner, and the record of proceeding does not indicate the source of the duties (and allocation of time), as well as the requirements that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).



The director reviewed the record of proceeding, and determined that the petitioner did not establish eligibility for the benefit sought. The director denied the petition on November 6, 2013. Thereafter, counsel submitted an appeal of the denial of the H-1B petition. On May 30, 2014, the AAO issued an RFE, and counsel submitted a response to the RFE on June 9, 2014.

## II. LAW AND ANALYSIS

### A. Standard of Review

On appeal, counsel asserts that the director did not apply the correct legal standard when adjudicating this petition. Counsel claims that by "concluding that the Petitioner has not met any of the regulatory criteria, the Service has imposed a standard of proof far greater than the 'preponderance o[f] evidence,' i.e. more likely than not, which simply requires a showing of a more than 50% chance." In light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

\* \* \*

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

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Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.



*Id.*

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Consistent with *Matter of Chawathe*, we examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

B. The LCA Wage Level Does Not Correspond to the Petition

Preliminarily, we find an additional reason beyond the decision of the director, which precludes approval of the petition.<sup>2</sup> That is, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility and requirements inherent in the proffered position set against the contrary level of responsibility and requirements conveyed by the wage level indicated in the LCA submitted in support of petition.

As referenced above, the petitioner submitted an LCA in support of the instant petition that designated the proffered position as corresponding to the occupational category of "Producers and Directors" - SOC (ONET/OES Code) 27-2012. The wage level for the proffered position in the LCA corresponds to a Level I (entry level) wage. The prevailing wage source is listed in the LCA as OFLC (Office of Foreign Labor Certification) Online Data Center.<sup>3</sup> By completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant 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

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<sup>2</sup> As noted above, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>3</sup> The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatcenter.com/>.

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.<sup>4</sup> The Department of Labor (DOL) emphasizes that these guidelines should not be 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.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described 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.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

In the instant case, while the petitioner designated the proffered position as an entry-level position, it appears that the duties of the position may exceed that of an entry-level position. For example, the petitioner indicates that the beneficiary will be required to "plan, produce and manage [the petitioner's] various television programs and their production elements." Further, that the beneficiary "will provide leadership in all aspects of the content development process, ...".

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<sup>4</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.



Moreover, the petitioner claims that the position proffered here "clearly involves complex and highly sophisticated responsibilities ..."<sup>5</sup>

However, upon review of the LCA submitted in support of the proffered position, we must question the level of complexity, independent judgment and understanding that are actually needed for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties, responsibilities and requirements as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. Furthermore, a Level I designation is appropriate for a position such as a research fellow, a worker in training, or an internship.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The prevailing wage on the LCA corresponds to a Level I position for the occupational category of "Producers and Directors" for [REDACTED]<sup>6</sup> Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$99,736 per year for a Level II position, \$139,776 per year for a Level III position, and \$179,816 per year for a Level IV position.

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<sup>5</sup> In addition, if we were considering counsel's claims in response to the RFE regarding the responsibilities of the position, we note counsel claimed that the beneficiary "will be employed in a position with a **high level of responsibility**, given that her position requires essential professional decision-making functions, **including performing in-depth research and analyses; developing and implementing program content; providing leadership in all aspects of content development; planning and scheduling programming; develop and recommend program ideas, treatments and stories; hiring and overseeing cast members and key production staff; conferring with directors and production staff to discuss issues such as production and casting problems, budgets and policies; and securing and maintaining rights, releases and other documentation for broadcast and online production.**" (Emphasis in the original).

<sup>6</sup> For additional information regarding the prevailing wage for this occupation in [REDACTED], see the All Industries Database for 7/2012 - 6/2013 for Producers and Directors at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults>. [REDACTED] (last visited July 25, 2014).



The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition.<sup>7</sup> To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the wage level that actually corresponds to the duties of the position it claims it is offering to the beneficiary. Accordingly, the petitioner in this matter has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted for a higher-level and more complex position as claimed elsewhere in the petition.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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 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*

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<sup>7</sup> To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

*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 of 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, provided the proffered position was in fact found to be a higher-level and more complex position as asserted by the petitioner elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position. That is, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the requirements and claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. We find that, fully considered in the context of the entire record of proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for this additional reason.<sup>8</sup>

### C. Specialty Occupation

The issue on appeal is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, we agree with the director

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<sup>8</sup> Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. Either the position is a more senior and complex position (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.



and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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



As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

We recognize the DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>9</sup> As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Producers and Directors."

We reviewed the chapter of the *Handbook* entitled "Producers and Directors," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Producers and Directors" 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 Producer or Director" states the following about this occupational category:

Most producers and directors have a bachelor's degree and several years of work experience in an occupation related to motion picture, TV, or theater production, such as an actor, film and video editor, or cinematographer.

### **Education**

Producers and directors usually have a bachelor's degree. Many students study film or cinema at college and universities. In these programs, students learn about film history, editing, and lighting, and creating their own films. Others major in writing, acting, journalism, or communication. Some producers earn a degree in business, arts management, or nonprofit management.

Many stage directors complete a degree in theater and some go on to receive a Master of Fine Arts (MFA) degree. Classes may include directing, playwriting, and set design, as well as some acting classes. The [REDACTED] accredits more than 150 programs in theater arts.

### **Important Qualities**

**Communication skills.** Producers and directors must coordinate the work of many different people to finish a production on time and within budget.

**Creativity.** Because a script can be interpreted in different ways, directors must decide how they want to interpret it and then how to represent the script's ideas on the screen or stage.

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<sup>9</sup> All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Producers and Directors."



**Leadership skills.** A director instructs actors and helps them portray their characters in a believable manner. They also supervise the crew, who are responsible for the behind the scenes work.

**Management skills.** Producers must find and hire the best director and crew for the production and make sure that all involved do their jobs effectively and efficiently.

### **Work Experience in a Related Occupation**

Producers and directors usually have several years of work experience in an occupation related to motion picture, TV, or theater production. Many directors begin as actors, writers, film or video editors, cinematographers, choreographers, or animators, and over time they learn about directing. For more information, see the profiles on actors, writers and authors, film and video editors and camera operators, dancers and choreographers, and multimedia artists and animators.

Directors may also begin their careers as assistants to successful directors on a film set. In nonprofit theaters, most aspiring directors begin as assistant directors, a position that is usually treated as an unpaid internship.

Producers might start out working in a theatrical management office as a business manager, or as an assistant or another low-profile job in a TV or movie studio. Some were directors or worked in another role behind the scenes of a show or movie.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Producers and Directors, on the Internet at <http://www.bls.gov/ooh/entertainment-and-sports/producers-and-directors.htm#tab-4> (last visited July 25, 2014).

When reviewing the *Handbook*, we must note that the petitioner designated the proffered position under this occupational category at a Level I on the LCA. As discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant DOL explanatory information on wage levels, the beneficiary will be closely supervised and her work closely monitored and reviewed for accuracy. Furthermore, she will receive specific instructions on required tasks and expected results. Again, DOL guidance indicates that a Level I designation is appropriate for a research fellow, a worker in training, or an internship. This designation suggests that the beneficiary will not serve in a high-level or leadership position relative to others within the occupational category.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupational category. Rather, the *Handbook* states that while most directors and producers have a bachelor's degree (no specific specialty is stated), many study film or cinema, studying film history, editing, and lighting, and creating their own films. Others major in writing, acting, journalism, or communication. Some



producers earn a degree in business, arts management, or nonprofit management. Thus, this passage in the *Handbook* does not indicate that employers normally require a degree in a *specific specialty* (or its equivalent) for entry into the occupation.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, degrees in disparate fields, such as film, writing, journalism, communication, business, arts management, or nonprofit management would not meet the statutory requirement that the degree be "in the specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.<sup>10</sup>

The narrative of the *Handbook* also indicate that producers and directors usually have several years of work experience in an occupation related to motion picture, TV or theater production. However, the *Handbook* does not state that such experience must be equivalent to a bachelor's degree in a specific specialty. Thus, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

In response to the RFE, counsel asserted that "the position of *Producers* (SOC 27-2012.01) is a Job Zone 4 position that requires a Bachelor's degree as a minimum entry requirement." We find that the O\*NET OnLine Help Center indicates that occupations with this designation require considerable preparation. See the O\*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>. It does not, however, demonstrate that a bachelor's degree in a *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). That is, the Help Center's discussion does not indicate that these occupations (designated as Job Zone 4) have any requirements for particular majors or academic concentrations. See *id.* Therefore, the O\*NET information is not probative of the proffered position qualifying as a specialty occupation.

Counsel further indicated that the occupation "Producers" has a Specialized Vocational Preparation (SVP) rating of 8.0. However, according to the O\*NET, "Producers" (SOC 27-2012.01) has SVP rating of 7.0 to < 8.0. It must be noted that an SVP rating of 7.0 to < 8.0 is not indicative of a specialty occupation. This is obvious upon reading Section II of the *Dictionary of Occupational*

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<sup>10</sup> Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

*Titles* (hereinafter the *DOT*) Appendix C, Components of the Definition Trailer, which addresses the SVP rating system.<sup>11</sup> The section reads:

## II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years

<sup>11</sup> Section II of the *DOT's* Appendix C, Components of the Definition Trailer, can be found on the Internet at the website [http://www.occupationalinfo.org/appendxc\\_1.html#II](http://www.occupationalinfo.org/appendxc_1.html#II).



- 7 Over 2 years up to and including 4 years
- 8 Over 4 years up to and including 10 years
- 9 Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

An SVP rating of 7.0 to < 8.0 is less than 8 and, thus, does not include "[o]ver 4 years up to and including 10 years." This does not indicate that at least a four-year bachelor's degree is required for an occupational category that has been assigned such a rating or, more importantly, that such a degree must be in a specific specialty directly related to the occupation. Rather, the SVP rating for "producers" simply indicates that the occupation requires over 2 years up to and including 4 years of training of the wide variety of forms of preparation described above, including experiential training. Accordingly, *DOT* does not indicate that at least a bachelor's degree in a specific specialty (or its equivalent) is normally the minimum requirement for entry into this position.

Counsel also asserted that "[s]ince the occupation of *Producers* is listed in PERM, it is considered a professional occupation by the Department of Labor." However, this is irrelevant to the instant petition as the petitioner is seeking in the instant petition to classify the beneficiary as an H-1B nonimmigrant worker in a specialty occupation pursuant to section 214(i)(1) of the Act and not as an immigrant worker in a professional position as defined by section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and 8 C.F.R. § 204.5(k)(2). The primary, fundamental difference between qualifying as a "profession" and qualifying as a "specialty occupation" is that specialty occupations require the U.S. bachelor's or higher degree, or its equivalent, to be in a specific specialty as defined at section 214(i)(1) of the Act.

On appeal, counsel asserts that "the requirement that the degree must be in a specific academic major has recently been explicitly rejected by a **United States District Court**" (emphasis in the original). We note that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "**[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors.**" What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge (emphasis in the original)." On appeal, counsel asserts that "it is clear that the body of specialized knowledge which must be applied theoretically and practically in the performance of the duties of the Associate Producer must be directly related to the duties of the specialty occupation."

We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." Again, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as film and nonprofit management for example, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the



petitioner establishes how each field is directly related to the duties and responsibilities of the particular position.

In this matter, we note that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>12</sup> We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are 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 us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Counsel further asserts that the Foreign Labor Certification Data Center Online Wage Library (OWL) assigned an Education and Training Code for Professional Occupations (ETCPO) of 4 for Producers (SOC 27-2012.01). Counsel further claims that "**a]n ETCPO of 4 provides that work experience, plus a bachelor's or higher degree is the usual education and training required for the specialty occupation of Producer**" (emphasis in the original). However, according to the OWL, Education & Training Code is "No Level Set." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).

In response to the RFE, counsel submitted a letter dated August 27, 2013 from [REDACTED] of College of Visual and Performing Arts from [REDACTED]. We reviewed the opinion letter in its entirety. However, as discussed below, the letter is not persuasive in establishing the proffered position as a specialty occupation position.<sup>13</sup>

In the letter, Mr. [REDACTED] asserts that "[a]fter examining the responsibilities of this Associate Producer position in detail, it becomes apparent that a minimum of a Bachelor's Degree in Media

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<sup>12</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

<sup>13</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. *See* 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

Production, Film Studies, or a related area, or the equivalent provides the [beneficiary] with the core competences and skills needed for an Associate Producer position with the responsibilities listed above." It is noted that Mr. [REDACTED] provided a brief description of the petitioner's business and a job description for the proffered position. Upon review of Mr. [REDACTED] opinion report, there is no indication that he possesses any knowledge of the petitioner's proffered position beyond this information. He does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply lists the tasks in bullet-point fashion, verbatim from the petitioner's support letter, and claims that the appropriate knowledge required for these job duties would be a bachelor's degree in Media Production, Film Studies, or a related area. He 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. For instance, there is no evidence that Mr. [REDACTED] 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. Mr. [REDACTED] opinion does not relate his 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.

Mr. [REDACTED] provides a summary of his qualifications, including his educational credentials and professional experience. Based upon a complete review of Mr. [REDACTED] report, however, he has failed to provide sufficient information regarding the basis of his expertise on this particular issue. For example, he states that he is currently an associate professor of [REDACTED] which offers undergraduate and graduate degrees in different areas in the fields of Visual Arts and Design. Further, he states that as a professional artist, his works have been shown in museums, galleries, film festivals, and conferences in [REDACTED] and many other places, and his work has been nationally broadcast on television in the U.S. and Europe. The documentation provided, however, does not establish his expertise pertinent to assessing the minimum requirements for entry into the proffered position. Without further clarification, it is not apparent how his education, training, skills or experience would translate to expertise or specialized knowledge regarding educational requirements for the proffered position as an associate producer.

Mr. [REDACTED] opinion letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. He claims to have had the opportunity over the years to become familiar with the qualifications required to attain the position of Associate Producer and similar professional positions, but he did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here.

Also, it must be noted that there is no indication that the petitioner and counsel advised Mr. [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA) relative to others within the occupational category. 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 Mr. [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately compare similar positions based upon job duties and responsibilities.

Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. Importantly, his statements are not supported by copies or citations of research material that may have been used. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. We may, in our 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, we are 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 our discretion we discount 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, we hereby incorporate the above discussion and analysis regarding the opinion letter into our discussion of each of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In summary, for the reasons discussed above, we conclude that the opinion letter rendered by Mr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. Therefore, we decline to defer to Mr. Hanlin's findings and ultimate conclusions, and further emphasize that his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, we will review the record of proceeding 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source) reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference our previous discussion on the matter.

We acknowledge that the record of proceeding contains an opinion letter from Mr. [REDACTED]. However, as previously discussed in detail, we find that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted a letter from [REDACTED] who is employed by the petitioner and is the executive producer for the [REDACTED] television network's "[REDACTED]". Based upon a complete review of Ms. [REDACTED]'s letter, we note that Ms. [REDACTED] may, in fact, be a recognized name in media and the entertainment industry; however, she has failed to provide sufficient information regarding the basis of her claimed expertise on this particular issue. While she claims to have an extensive background in international TV production as an executive producer, there is no indication that she has published any work or conducted any research or studies pertinent to the educational requirements for associate producer positions (or parallel positions) 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.

Ms. [REDACTED] claims that "the position of Associate Producer at [the petitioner's] is a specialty occupation that requires baccalaureate level educational training and/or equivalent professional experience in Film, Theater, Media Studies, Communications or related Film, or Media fields, including the application of specialized knowledge in these fields." Ms. [REDACTED] asserts that "based on the level of complexity and sophistication of her job duties, and based on the specialized focus of the position on the strategic development, production and management of shows and formats in the television industry, it is clear that in order to be qualified for the position, the applicant/candidate must have specialized knowledge of the specific concepts, methods, and techniques of film, theater and television performance, and production." Further, Ms. [REDACTED] claims that associate producers, "work at a high level of sophisticated responsibilities in the television industry." Moreover, she indicates that the associate producer "provid[es] leadership in all aspects of the content development process" and "is responsible for producing various programs, including taped and live programs, specials, post-production sessions and web-ready video content" and more.



As discussed, however, the petitioner classified the proffered position as a Level I position on the LCA. There is no indication that the petitioner or its counsel advised Ms. [REDACTED] that the petitioner characterized the proffered position to DOL as an entry-level position, for a beginning level employee who has only a basic understanding of the occupation (as indicated by the wage-level selected by the petitioner on the LCA). Again, the wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment (relative to other positions in the same occupation); 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 Ms. [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that Ms. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately analyze similar or parallel positions.

Furthermore, Ms. [REDACTED] asserts an industry standard by claiming that it is a normal industry standard requirement for employers-production companies-that specialize in the television industry, to hire an Associate Producer with a minimum of Bachelor's Degree or its equivalent in Film, Theater, Media Studies, Communications or related areas in Film or Media. However, she did not reference any supporting authority or any empirical basis for the pronouncement. The letter lacks the requisite specificity and detail and her claims are not supported by independent, objective evidence demonstrating the manner in which she reached the conclusions stated in the letter.

Again, we may, in our 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, we are 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, we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains job announcements. However, upon review of the evidence, we find that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 and supporting documentation, the petitioner indicates that it is a production company for media and entertainment established in 1991, with 200 employees. The petitioner reported its gross annual income as approximately \$504 million, but did not provide its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 512110 – "Motion Picture and Video Production."<sup>14</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

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<sup>14</sup> NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited July 25, 2014).

This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 512110 – Motion Picture and Video Production on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 25, 2014).

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

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

The petitioner submitted advertisements from employers that appear to be in TV/media industry such as [REDACTED] and more. The petitioner also submitted general Internet printouts regarding the employers; however, the printouts either do not provide sufficient information about the employers or the information provided appears inaccurate. For example, according to the printout from [REDACTED] is "a private company categorized under cable television" and its annual revenue is estimated at \$2.6 million (whether it is gross or net is unknown) and the number of employees is 30. Similarly, for [REDACTED] the printout indicates that the annual revenue estimate is \$97,000 and the number of employees is 2. Based on the information provided, we are unable to determine if the employers are similar to the petitioner. Similarly, some advertisements appear to be for employers that are not similar to the petitioner and the petitioner has not provided information regarding which aspects or traits it shares with the advertising organizations. For example, [REDACTED] is described as "the new content and multiplatform media company for [REDACTED] Conference, a leader in collegiate athletics that includes 12 of the most prestigious universities in the world." The petitioner did not supplement the record with further information and we are unable to determine if the advertising employer is similar to the petitioner.

Further, some of the advertisements do not appear to be for parallel positions based upon the job duties. Specifically, the advertisement for [REDACTED] Networks is for a production manager, whose duties include "budgeting, pre-estimating, controlling and post-estimating all [REDACTED] and [REDACTED] costs," "manage and supervise production coordinators," "manage and supervise all remote [u]nit



[m]anagers," "full accountability for all costs associated with each and every [redacted] Network" and more. The petitioner did not substantiate the record to establish how the duties of the advertised position are parallel to the proffered position. Further, some advertised positions appear to be more senior positions. More specifically, the postings for [redacted] Stations are for "Executive Producer, AM" and "Executive Producer, PM." The positions require "minimum five (5) years producing experience in mid-major market including show producing experience and "two (2) years management experience strongly preferred." As previously discussed, the petitioner designated the proffered position on the LCA as a Level I (entry level) position. These advertised positions appear to be for more senior positions than the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, the job postings from [redacted] for News & Information, Broadcast Operations, [redacted] state that a bachelor's degree is required, but do not state a specific specialty. Another posting from [redacted] for Hispanic Enterprises & Content requires a technical degree in Communications and/or Journalism, but there is no further information provided to establish that a technical degree is a bachelor's degree or its equivalent. Likewise the advertisement from [redacted] lists the required education as a "BA or BS degree," but does not indicate a specific specialty. Further, the posting for [redacted] requires "BS/BA, preferably in Journalism, Film, Television/Multimedia Production, or Liberal Arts or equivalent experience," but does not require a specific specialty.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>15</sup>

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<sup>15</sup> According to the *Handbook's* detailed statistics on producers and directors, there were approximately 103,500 persons employed as producers and directors in 2012. *Handbook*, 2014-15 ed., available at <http://www.bls.gov/ooh/entertainment-and-sports/producers-and-directors.htm#tab-6> (last visited July 25, 2014). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the

Thus, based upon a complete review of the record of proceeding, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are 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).

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including information regarding the proffered position and evidence regarding its business operations. The documents included its 2012 Annual Report, printouts about its various shows such as the [REDACTED] and more, and the beneficiary's work samples which include a summary, shot list, post production list for the show [REDACTED].

While the petitioner submitted documents regarding its business operations and the proffered position, the evidence does not establish the relative complexity or uniqueness of the proffered position. A review of the record of proceeding indicates that the petitioner has not demonstrated that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

In response to the RFE, counsel indicates that "the imposition of a degree requirement is mandated by the necessity for extensive research, writing skills, analytical skills[,] critical thinking[,] deductive reasoning, logic and reasoning[,] the ability to apply general legal rules to specific problems[,] and the ability to identify complex problems, analyze information and review related information to develop and evaluate options and implement solutions in the midst of production, including pre-and post-production." Counsel asserted that the "ability to perform these specialized

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body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that organizations similar to the petitioner in its industry, for positions parallel to the proffered position, commonly require at least a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that just these postings (which appear to have been consciously selected) could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.



and complex duties directly and indirectly affect the successful production of the show, and ultimately, the company's bottom line."

We incorporate by reference and reiterate our earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the Level I wage rate, the beneficiary is only required to have a basic understanding of the occupation. Further, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; her work will be closely supervised and monitored; she will receive specific instructions on required tasks and expected results; and her work will be reviewed for accuracy. Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. As observed above, for example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>16</sup> The evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty is not required for the proffered position.

The petitioner claims that the beneficiary "is ideally suited to undertake this assignment by virtue of her excellent academic credentials in precisely the areas required for the position." The petitioner also indicates that the beneficiary "has more than 2 years of experience in the field of television programming and production." However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The petitioner and counsel do not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In addition, the petitioner may submit any other documentation it considers relevant to this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates

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<sup>16</sup> For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

The petitioner stated in the Form I-129 petition that it has 200 employees and was established in 1991 (approximately 22 years prior to the filing of the H-1B petition). In response to the RFE, counsel for the petitioner submitted a list of associate producers who have previously worked or are currently working for the petitioner. In support, counsel also submitted printouts of the shows the associate producers have worked on or are currently working on along with copies of their LinkedIn pages which state their degrees and professional experience.

However, the petitioner did not provide the individuals' job duties and day-to-day responsibilities to establish that the duties and responsibilities for these individual are the same or are related to the



proffered position. It must be noted that the educational level of employees who hold positions that are not the proffered position (or parallel to that position) is not relevant to the instant issue of whether the proffered position qualifies as a specialty occupation. Further, the petitioner did not submit probative evidence to establish the above-mentioned individuals' current or past employment with the petitioner (e.g., pay statements, Form W-2 Wage and Tax Statements) and copies of their diplomas to substantiate their LinkedIn pages that they have a bachelor's degree in a specific specialty.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

On appeal, counsel emphasizes that the petitioner's "highly successful formats and programs include the Emmy-nominated musical/reality phenomenon [REDACTED]"

(emphasis in the original). Counsel asserts that "based on the complexity and highly-advanced nature of [the petitioner]'s renowned programs and formats, and its notable designations and awards, the nature of the duties of an Associate Producer is so specialized and complex that knowledge and experience required to perform said responsibilities require the attainment of a Bachelor's degree or its equivalent in the specific specialty of film or theater studies, media production, performing arts production or a related field in the arts or performing arts, in addition to previous experience in the field."

We have reviewed the petitioner's information regarding the proffered position and its business operations, including the documentation previously outlined. While the evidence provides some insights into the petitioner's business activities, the documents do not establish that the nature of the specific duties of the proffered position 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.

In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. We reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Producers and Directors," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level

employees who have only a basic understanding of the occupation." Without further evidence, the petitioner has not demonstrated that the proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. As previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Therefore, we conclude 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.

### III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (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 our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683

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

**ORDER:** The appeal is dismissed.