



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 27 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:

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 (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a musical instrument manufacturing firm with 15 employees. In order to employ the beneficiary in what it designates as a part-time art director position, the petitioner seeks to classify him 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, concluding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

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

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition. Specifically, the AAO finds that the Labor Condition Application (LCA) filed by the petitioner in support of this petition does not correspond to it, that is, the petitioner's claims in the record of proceeding with regard to the levels of independence, judgment, and responsibility to be exercised by the beneficiary do not comport with the LCA submitted by the petitioner, which had been certified for a job prospect at the lowest level (Level I) wage-rate. The AAO conducts review of service center decisions on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

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

II. STANDARD OF REVIEW

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. 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.

* * *

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. at 375-76.

Again, the AAO conducts its review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the evidence of record does not establish that the proffered position is a specialty occupation was correct. Upon its 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, the AAO finds that the evidence of record does not establish that the claim of a proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

In similar fashion, as indicated by the AAO's supplemental finding made on appeal regarding the LCA and the evidentiary deficiencies present in the materials submitted with regard to the

qualifications of the beneficiary, the evidence of record also does not lead the AAO to believe the petitioner's implicit claim that the LCA submitted by the petitioner corresponds to the petition is "more likely than not" or "probably" true.

III. THE LAW

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

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

IV. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is an Art Director position, and that it corresponds to Standard Occupational

Classification (SOC) code and title 27-1011, "Art Directors," from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in telecommunications, production option, with an emphasis on multimedia; and a master's degree telecommunications, with an emphasis in digital storytelling. Both degrees were awarded by

Counsel also submitted a letter, dated March 28, 2013, from the petitioner's president, who provided the following description of the duties of the proffered position:

- Develop the overall layout and production design of sales and marketing material for magazines, newspapers, websites, and other media;
- Determine size and arrangement of illustrations, photographs, artwork and design material;
- Select style, size, type and arrangement based upon approved specifications;
- Illustrate samples of finished layout and assemble and prepare final layout of print, interactive, and multimedia materials;
- Oversee project teams in the creation, design, and production of sales and marketing material;
- Coordinate with materials suppliers and publishers regarding presentation and placement of print media content;
- Coordinate with ukulele designers in presentation of themes, colors, and designs for print and other media;
- Produce promotional displays, packaging, and marketing brochures for company's products and services;
- Design original logos for company's Asian sales material;
- Develop signs and signage systems for Korean market;
- Develop material for internet web pages, interactive media, and multimedia product in Korean for the Korean market;
- Consult with organization managers and end-users to analyze and to define the goals of design projects for Korea market; and
- Manage and develop company's own various information technology related projects including company's official website, official blog, Facebook and Twitter technology.

With regard to the educational requirements of the proffered position, the petitioner stated that the proffered position "requires a minimum of a Bachelor of Art in telecommunications, graphic design, digital storytelling, or equivalent."

On April 24, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The acting director outlined the specific evidence to be submitted.

In response, counsel submitted (1) a more detailed description of the duties of the proffered position on the petitioner's letterhead; (2) a document headed, "Senior Art Director, Position Description," which also includes a description of duties; (3) an organizational chart of the petitioner's operation; (4) letters dated July 8, 2013 and July 15, 2013, from individuals working for public relations firms; (5) a letter, dated July 15, 2013, from the petitioner's president; and (6) counsel's own letter, dated July 16, 2013.

The updated description of the duties of the proffered position from the petitioner stated the following:

Job Summary:

The Art Director will be primarily focused on developing and refining the brand message for our consumers in different markets and overseeing the implementation of this brand message in events and consumer portals by working with media consultants and directing the company's webmaster.

JOB DUTIES:

Develop an overall [petitioner] brand experience for a target audience (20% of time)

- Work with the President of the company to extract, develop, and unify the brand and culture of [the petitioner] as a company to appeal to a target audience;
- Work with President to help determine the advertising and marketing budget and allocating resources to support the brand through marketing

Work with teams, suppliers, and publishers to create advertising and marketing materials for target market (15% of time)

- Provide overall artistic direction for print and web media campaigns;
- Develop and create overall illustrations, designs, and logos for advertising and marketing materials consistent with the [petitioner's] brand that will appeal to target audiences;
- Illustrate samples of finished layout and assemble and prepare final layout of print, interactive, and multimedia materials;
- Develop the overall layout and production design of sales and marketing material for magazines, newspapers, websites, and other media;
- Determine size and arrangement of illustrations, photographs, artwork and design material;

- Select style, size, type and arrangements of fonts and layouts based upon approved specifications;
- Oversee project teams in the creation, design, and production of sales and marketing material;
- Manage the priorities of advertising materials and deadlines;
- Coordinate with materials suppliers and publishers regarding presentation and placement of print media content;
- Ensure that work produced is consistent, on-brand, and meets a high attention to detail;
- Participate in creative and merchant review to ensure greater consistency and accuracy in marketing the [petitioner's] brand;

Work in-house with ukulele designers to enhance the brand of [the petitioner] (15% of time)

- Coordinate with ukulele designers in presentation of themes, colors, and designs for print and other media;
- Coordinate with ukulele designers in showcasing and marketing limited-edition items through print and web graphics placement;
- Coordinate with ukulele designers to produce promotional displays, packaging, and marketing brochures consistent to enhance the company's product.

Work with the president to determine how to appeal to target audiences outside the domestic market (25% of the time)

- Design original logos for company's Asian sales material;
- Develop signs and signage systems for Korean market;
- Develop material for internet web pages, interactive media, and multimedia project in Korean for the Korean market;
- Consult with organization managers and end-users to analyze and to define the goals of design projects for Korea market.
- Develop material for internet web pages, interactive media, and multimedia projects for foreign markets, such as Vietnam, Singapore, and Thailand.

Oversee the implementation of the designs and marketing materials in internet initiatives (25% of time)

- Direct the company's webmaster in designing layouts, designs, and logos for the company's various information technology related projects including company's official website, official blog, Facebook and Twitter technology.

The document headed, "Senior Art Director Position Description" contains the following additional description of the duties of the proffered position:

Primary Functions and Responsibilities

1. Provided [sic] ongoing service to clients. Will include direct client contact. Expected to interface with clients at a mid-management level.
2. Design and develop collateral material including brochures, newsletters, posters, flyers, advertising and other promotional material.
3. Provide creative direction and input for collateral and other visual material.
4. Manage production and printing of collateral and other visual material.
5. Expected to manage smaller accounts and project teams with high degree of independence.
6. Direct print, production and design vendors.
7. Support account executives, supervisors and management on account activity.
8. Participation in new business presentations. Some participation in new business proposal development.
9. Reports to vice president.
10. Bill 80 percent of time per week.

Knowledge and Skills

1. Understand graphic design and visual art principles.
2. Graphic design execution.
3. Marketing and advertising principles.
4. Knowledge of graphic design/desktop publishing computer software.
5. Basic computer skills in word processing, spreadsheet and database.

The petitioner's organizational chart shows that the beneficiary has one subordinate employee, the petitioner's webmaster.

The July 18, 2013 and July 15, 2013 letters from employees of public relations firms both indicate that the writers reviewed the proffered position's job description, but do not indicate which of the three job descriptions the writers reviewed. Both letters further state, "In my professional experience, [the proffered] position qualifies [as a specialty occupation position] based on all of the criteria [of 8 C.F.R. § 214.2(h)(4)(iii)(A)]."

The July 15, 2013 letter from the petitioner's president states the following:

We want to emphasize that the position of Art Director at our company is more than simply illustrating logos or putting together layouts. If it were simply that, we could simply hire a graphic designer. As stated in our job description, our art director would not just be in charge of developing illustrations and graphics; in fact, that is one of the responsibilities that we expect him to devote the least time to. Instead [the beneficiary] will be in charge of developing and refining our brand and our message, including how to convey the mentioned lifestyle, and will be supervising the inclusion and use of that message in our events and marketing. His work primarily will be done with the President and other management to develop and to refine our approach in different markets. He will also be working with our media consultants in each market, who are in charge of the actual work of setting up our events and finding editorials for us, and helping them determine how to utilize our brand at these events and editorials, as well as ensuring our brand stays consistent across all media. . . .

In his July 16, 2013 letter counsel cited the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) and the other evidence submitted as support for the proposition that art director positions, and the proffered position, require a minimum of a bachelor's degree in a specific specialty or its equivalent.

The director denied the petition on July 26, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submitted a letter, dated August 22, 2013, from the petitioner's president, who argued that the beneficiary's experience and education demonstrate that he is qualified for the proffered position. The AAO observes that the beneficiary's qualifications are not at issue here.¹ The visa petition was denied because the director found that the petitioner has not demonstrated that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

In the appeal brief, counsel asserted that the evidence presented demonstrates that the evidence submitted satisfies various criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), any one of which would be sufficient.

¹ USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. Cf. *Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

V. THE LCA SUBMITTED BY THE PETITIONER IN SUPPORT OF THE PETITION

Before addressing the director's determination that the proffered position is not a specialty occupation, the AAO will first address the supplemental finding it has made on appeal, which independently precludes approval of this petition, namely, our finding that the LCA submitted by the petitioner in support of this petition does not correspond to the petition.

The LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Art Directors" occupational classification, SOC Code 27-1011, and at a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Wage levels should be determined only after selecting the most relevant O*NET code classification. A prevailing wage determination is then made by selecting one of four wage levels for an occupation based upon a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.²

Prevailing wage determinations start at Level I (entry) and progress to a wage that is commensurate with that of 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.³ The U.S. 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 as indicated by the job description.

The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

² For additional information on wage levels, 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 (last visited Mar. 21, 2014).

³ 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.

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.

The petitioner has classified the proffered position at a Level I wage, which is only appropriate for a position requiring only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." That wage-level designation indicates further that the beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment." However, the AAO finds that many of the duties described by counsel and the petitioner exceed this threshold.

For example, as discussed above, the petitioner claimed that the proffered position "is a supervisory position, inherent in the title of 'director.'" The petitioner claimed further that the beneficiary will perform such tasks as developing and refining its brand and message; interfacing with clients "at a mid-management level"; managing project teams "with [a] high degree of independence"; overseeing project teams in the creation, design, and production of sales and marketing materials, and ensuring that the work done by the project teams he oversees is consistent, on-brand, and meets a high attention to detail. The petitioner also referenced the "extra knowledge" gained by the beneficiary "from the work experience he has gained by working in the field of art direction."

On appeal, counsel claims that the beneficiary "will be supervising the development of a brand that must be attractive and consistent across all of its markets," and that the "position takes elements of different disciplines – art marketing, management – and combines them."

These stated duties indicate that the beneficiary will be required to exercise extensive independent judgment in the proffered position, which conflicts with the Level I wage-rate designation.

The AAO, therefore, questions the level of complexity, independent judgment and understanding actually required for the proffered position, as the LCA was certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner conflict with the wage-rate element of the LCA submitted 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. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Thus, the petitioner's characterizations of the proffered position

and the claimed duties and responsibilities 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.

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]").

It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. The petitioner has offered the beneficiary a wage of \$16.95-\$18.63 per hour, which satisfied the Level I (entry level) prevailing wage for Art Directors in the Honolulu, Hawaii Metropolitan Statistical Area at the time the LCA was certified.⁴ However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise his salary to at least \$22.44 per hour. The Level III (experienced) prevailing wage was \$27.94 per hour, and the Level IV (fully competent) prevailing wage was \$33.43 per hour.⁵

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. 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 one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work as characterized by the petitioner on the Form I-129 and allied submissions and as required under the Act, if the petition were granted for a higher-level and more complex position than addressed in the LCA as claimed elsewhere in the petition.

Additionally, 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. Doubt cast on any aspect of the petitioner's proof may, of

⁴ U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Art Directors," <http://www.flcdatcenter.com/OesQuickResults.aspx?code=27-1011&area=26180&year=13&source=1> (last visited Mar. 21, 2014).

⁵ *Id.*

course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

DOL and USCIS regulations reveal several features of the LCA-certification process that have material implications in USCIS review of a H-1B specialty occupation petitions, including the one before us now.

DOL has stated clearly that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

That the LCA-certification process does not involve a substantive review, but instead relies upon the petitioner to provide complete and accurate information, is highlighted by the following italicized-for-emphasis statement that appears at Part M, the certification section, of the standard LCA (ETA Form 9035/9035E):

The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified LCA.

By the signature at part K (Declaration of Employer) of the ETA Form 9035/9035E, the petitioner attested, in part, "that the information and labor condition statements provided [in the LCA] are true and accurate."

As the signature at Part 7 of the Form I-129 certifies under penalty of perjury that the "this petition and the evidence submitted with it are true and correct" to the best of the petitioner's knowledge, that signature also certified that the content of the LCA filed with it and identified by the LCA or ETA case number at item 2 of Part 5 (Basic Information about the Proposed Employment and Employer) truly and correctly matched the related aspects of the petition. However, as just discussed above, this appears to not be the case.

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 [DOL] 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.⁶

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 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 claimed 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, specifically, the LCA submitted in support of this 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 with section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the 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. The AAO finds that, fully considered in the context of the entire record of proceedings, 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 LCA submitted by the petitioner 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 higher-level work and responsibilities, which if accepted as accurate would result in the beneficiary being offered a salary

⁶ *See also* 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) ("An approved labor condition application is not a factor in determining whether a position is a specialty occupation").

below that required by law. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

VI. ANALYSIS

The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 27-1011, "Art Directors," from O*NET. The *Handbook* describes the occupation of "Art Director" as follows:

What Art Directors Do

Art directors are responsible for the visual style and images in magazines, newspapers, product packaging, and movie and television productions. They create the overall design and direct others who develop artwork or layouts.

Duties

Art directors typically do the following:

- Determine how best to represent a concept visually
- Determine which photographs, art, or other design elements to use
- Develop the overall look or style of a publication, an advertising campaign, or a theater, television, or film set
- Supervise design staff
- Review and approve designs, artwork, photography, and graphics developed by other staff members
- Talk to clients to develop an artistic approach and style
- Coordinate activities with other artistic and creative departments
- Develop detailed budgets and timelines
- Present designs to clients for approval

Art directors typically oversee the work of other designers and artists who produce images for television, film, live performances, advertisements, or video games. They determine the overall style or tone, desired for each project and articulate their vision to artists. The artists then create images, such as illustrations, graphics, photographs, or charts and graphs, or design stage and movie sets, according to the art director's vision.

⁷ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online.

Art directors work with art and design staffs in advertising agencies, public relations firms, and book, magazine, or newspaper publishers to create designs and layouts. They also work with producers and directors of theater, television, or movie productions to oversee set designs. Their work requires them to understand the design elements of projects, inspire other creative workers, and keep projects on budget and on time. Sometimes they are responsible for developing budgets and timelines.

Art directors work in a variety of industries, and the type of work they do varies by industry. However, almost all art directors set the overall artistic style and visual image to be created for each project, and oversee a staff of designers, artists, photographers, writers, or editors who are responsible for creating the individual works that collectively make up a completed product.

The following are some specifics of what art directors do in different industries:

In publishing, art directors typically oversee the page layout of catalogs, newspapers, or magazines. They also choose the cover art for books and periodicals. Often, this work includes publications for the Internet, so art directors oversee production of the websites used for publication.

In advertising and public relations, art directors ensure that their clients' desired message and image is conveyed to consumers. Art directors are responsible for the overall visual aspects of an advertising or media campaign and coordinate the work of other artistic or design staff, such as graphic designers.

In movie production, art directors collaborate with directors to determine what sets will be needed for the film and what style or look the sets should have. They hire and supervise a staff of assistant art directors or set designers to complete designs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Art Directors," <http://www.bls.gov/ooh/arts-and-design/art-directors.htm#tab-2> (last visited Mar. 21, 2014).

The *Handbook* states that art directors create overall designs and then direct others who develop artwork or layouts. It states that art directors "typically oversee the work of other designers and artists who produce images for television, film, live performances, advertisements, or video games." The *Handbook* states further that art directors "set the overall artistic style and visual image to be created for each project, and oversee a staff of designers, artists, photographers, writers, or editors who are responsible for creating the individual works that collectively make up a completed product."

The evidence of record does not make clear that these duties are similar to the ones proposed for the beneficiary. First, as discussed above, the wage-level selected by the petitioner when it obtained the certified LCA was not indicative of a position involving independent work, let alone supervisory

duties, and it undermines the claim that the duties proposed for the beneficiary are analogous to those of art directors. Second, although the petitioner proposed duties for the beneficiary that included such tasks as managing project teams "with [a] high degree of independence" and overseeing project teams in the creation, design, and production of sales and marketing materials, the petitioner's organization chart names only one person subordinate to the beneficiary – the petitioner's webmaster. The record does not make clear, however, that the role played by the petitioner's single webmaster would be comparable to the work performed by "a staff of designers, artists, photographers, writers, or editors who are responsible for creating the individual works that collectively make up a completed product." Nor does the evidence of record indicate that the petitioner's webmaster would require the oversight of a dedicated art director for 20 hours per week. These factors suggest that the beneficiary would not actually be performing the duties of an art director as describe in the *Handbook*. 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).

Furthermore, it is noted that many of the duties proposed for the beneficiary relate to marketing. However, the petitioner states on appeal that it "retain[s] the services of two separate agencies in our marketing efforts." Although the petitioner claims that the beneficiary would be "working will be working with these marketing professionals," the evidence of record does not make clear the interplay between the duties proposed for the beneficiary and the role played by those marketing professionals. For this additional reason, the evidence of record does not make clear that the beneficiary would actually be performing the duties of an art director.

The evidence of record indicates that the duties proposed for the beneficiary do not correspond to those of an art director. Moreover, the lack of clarity with regard to the interplay between the duties proposed for the beneficiary and the role played by the marketing agencies retained by the petitioner raises additional questions with regard to what the beneficiary would actually be doing if the petition were approved.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nor will the AAO accord any probative weight to the letters the petitioner submits as expert opinions regarding the qualifications necessary to perform the duties of the proffered position. The petitioner submits two such letters: (1) the first, dated July 8, 2013, is from [REDACTED]

In her letter, [REDACTED] claims that her agency has previously employed art directors, and states that they played vital roles in supporting the company's marketing goals. In her letter, [REDACTED] states that her company employs art directors in the same capacity as proposed by the petitioner, and states that they are required to possess a bachelor's degree or higher in fine art, design, or a related field, as well as specialized experience. Both authors state that they have reviewed the job duties proposed for the beneficiary, and they assert that the proffered position is a specialty occupation.

As will now be discussed, the AAO finds that neither letter constitutes probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

At the outset we note a fundamental defect that we find in itself fatal to the evidentiary value of the opinions stated in the letters with regard to the educational requirements of the proffered position. That defect is the letters' failure to establish both the specific information upon which the authors base their statements about the proffered position's education requirements as well as the letters' failure to identify the authors' information about the proffered position with sufficient particularity to establish that it substantially conforms to the relevant information presented in the record of proceeding.

As noted, both [REDACTED] stated that they "have reviewed the job description of the Art Director position being offered to [the beneficiary]." However, neither letter includes copies of the referenced material or quotes it to any extent, let alone sufficiently for the AAO to discern to which, if any, of the many job and position descriptions in the record of proceeding they are referring. Moreover, it is found that because neither author discusses the specific duties of the proffered position, the degree to which they analyzed those duties prior to formulating his letter is not evident.

Further, neither letter is accompanied by, and neither author expressly states the full content of, whatever documentation and/or oral transmissions upon which they may have been based. For instance, neither author indicates whether she visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties cited by the professor would actually require.⁸

Nor does either author articulate whatever familiarity she may have obtained regarding the particular content of the work products that the petitioner would require of the beneficiary. In short, while there is no standard formula or "bright line" rule for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than either author has done here.

⁸ [REDACTED] statement that she is "very familiar with" the petitioner is not sufficient.

Nor does either author indicate whether she considered, or was even aware of, the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as discussed above, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, he does not discuss this aspect of the petition at any point in his letter. The AAO considers this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for their ultimate conclusions as to the educational requirements of the position upon which they opine.

Again, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Art Directors" occupational category, SOC (O*NET/OES) Code 27-1011, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Again, the above-discussed *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

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.⁹

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

The omission of such an important factor as the LCA wage-level by both authors significantly diminishes the evidentiary value of their assertions.

⁹ 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 (last visited Mar. 21, 2014).

It is also noted that the record contains no evidence to support the assertions [REDACTED] made with regard to their own companies' hiring practices. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Finally, the AAO notes that these two letters are virtually identical to one another. The use of identical language and phrasing across the various letters suggest that the language in the letters is not the authors' own, which detracts further from their evidentiary value. *Cf. Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, the AAO finds that the letters from [REDACTED] are not probative evidence towards satisfying any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

VII. CONCLUSION AND ORDER

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

The evidence of record does not demonstrate that the proffered position is a specialty occupation and therefore does not overcome the director's ground for denying this petition. Consequently, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the petition will also be denied because the LCA filed by the petitioner in support of this petition does not correspond to it, and it fails to establish that the petitioner will pay the beneficiary an adequate salary. Consequently, this petition could be approved even if it were determined that the petitioner had overcome the director's ground for denying this petition, which it has not.

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 at 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial.¹⁰ In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

¹⁰ Because these matters preclude approval of the petition, the AAO will not further discuss whether the evidence of record establishes that the LCA was certified for the correct occupational category, that the beneficiary is qualified to perform the duties of the proffered position, or any additional issues, deficiencies, or unresolved questions it has observed in the record of proceeding.