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



U.S. Citizenship
and Immigration
Services

DATE: **NOV 06 2014**

OFFICE: VERMONT 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 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 Vermont Service Center seeking to extend the employment of the beneficiary. In the Form I-129, the petitioner describes itself as a "Flower Shop" established in [REDACTED]. In order to continue to employ the beneficiary in what it designates as a "Product Designer" position, the petitioner seeks to extend her classification 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 May 15, 2014, 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 before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

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 seeks to extend the employment of the beneficiary as a full-time "Product Designer or alternatively, as Commercial and Industrial Designer (its generic occupational title)" at a rate of pay of \$36,608 per year. In a letter dated April 12, 2013, the petitioner stated that as a "Product Designer" the beneficiary will:

Design, develop, validate and fully document innovative floral product arrangement and product design system to exceed industry standards for product performance and meet defined the [sic] application requirements.

The petitioner articulated the specific duties and requirements for the proffered position, as follows:

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

- Design and develop new floral product arrangements that meet or exceed industry standards and market demand for performance.
- Validate structural performance using simulation software.
- Evaluate technicality, fabrication, assembly, installation and material costs to optimize product design.
- Coordinate production of prototype samples for verification of assembly and testing.
- Develop and implement test plan to validate product design meets or exceeds performance requirements.
- Interface with suppliers, purchasing, manufacturing, sales, marketing and upper management to ensure development of cost effective designs the [sic] fit the demands of the market.
- Assist with developing marketing materials and training programs.
- Analyze specifications, sketches, technical drawings, ideas and related design data to determine critical factors affecting design of components based on knowledge of previous designs and manufacturing processes and limitations.
- Review and analyze acquired data reporting with members of the product development staff and customer[.]

The industry standard in the United States for educational requirements among all professional designers including but not limited to Fashion Designers, Interior Designers, and Commercial and Industrial Designers, is that the candidate must possess at least a Bachelors [sic] Degree or its equivalent either in Fashion Design, Product Design or a related area.

The petitioner stated that the beneficiary is qualified to perform services in the proffered position "by virtue of having relevant Bachelor's degree in specialty occupation." In support of this statement, the petitioner provided a copy of a credential evaluation report prepared by [REDACTED], which indicates that the beneficiary's academic experience is equivalent to a Bachelor's Degree in Fashion Design from an accredited institution of higher education in the United States.

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 "Designers, All Other" – SOC (ONET/OES Code) 27-1029, at a Level I (entry level) wage.

With regard to its business operations, the petitioner stated that it engages in the "business of floral arrangements for corporations and private events" and that it provides "quality, freshness and unprecedented creative design of the floral arrangements to match the background settings where their events will take place."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 20, 2013. The director outlined the evidence to be submitted.

Counsel responded to the RFE by submitting a letter from the petitioner and additional evidence. The additional evidence included: the petitioner's advertisement for a product designer which did not include the educational requirements for the position; three job advertisements from other companies; two letters from individuals in the floral industry; a letter prepared by [REDACTED] MFA, Associate Professor of Transmedia, College of Visual and Performing Arts, at [REDACTED] regarding the academic requirements for the petitioner's product designer; evidence of the beneficiary's prior H-1B approval and deposit records regarding her employment with the petitioner; contracts, invoices, and payments from clients; the petitioner's 2011 and 2012 federal tax records and recent bank statements; and a copy of the petitioner's current lease. The record also included photographs of the petitioner's work product.

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 May 15, 2014. Thereafter, counsel submitted an appeal of the denial of the H-1B petition.

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

II. STANDARD OF REVIEW

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.

* * *

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.

As footnoted above, 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*. Upon our review of the present matter pursuant to that standard, however, we find 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*, 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.

III. 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.

A. The Law

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.

B. Material Findings

When determining whether a position is a specialty occupation, we must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

That is, for H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In this matter the record of proceeding contains inconsistent information about the nature of the proffered position, which undermines the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position.

On appeal, counsel asserts that the duties the petitioner ascribed to the proffered position differ greatly from the occupation of "Floral Designer," the occupation the director found most closely corresponded to the proffered position; and that the duties of the proffered position are similar in significant ways to the Summary Report for "Commercial and Industrial Designers" – SOC (ONET/OES Code) 27-1021 – as set out in O*NET Online. We note, however, that the petitioner in this matter did not designate the occupational category "Commercial and Industrial Designers" – SOC (ONET/OES Code) 27-1021 on the LCA proffered in support of the petition.² Thus, the prevailing wage attested to and designated on the LCA, a wage for "Designers, All Others" is less than the prevailing wage for what the petitioner now claims is a "Commercial and Industrial Designer" occupation. The petitioner cannot now claim that the proffered position most closely aligns with the occupational classification of a commercial and industrial designer if the petition is to correspond to the position attested to on the LCA. The petitioner cannot have it both ways. Either the proffered position is a "Commercial and Industrial Designer" occupation and thereby necessitates a higher required wage or it is a "Designer, All Other" occupation 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.

Moreover, in the Form I-129, the petitioner indicated that it is a flower shop and identified its NAICS (North American Industry Classification System) code as 453110, which corresponds to the industry of "Florists."³ NAICS describes this category as "establishments known as florists primarily engaged in retailing cut flowers, floral arrangements, and potted plants purchased from others" and that "[t]hese establishments usually prepare the arrangements they sell." Furthermore, O*NET Online Summary Report for "Commercial and Industrial Designers" states that such designers "[d]evelop and design manufactured products, such as cars, home appliances, and children's toys." Neither counsel nor the petitioner provides a probative explanation on how the occupational category of "Commercial and Industrial Designers" is relevant to the proffered position when the petitioner claims to be a "Flower Shop."

² It is noted that the petitioner offered the beneficiary a wage of \$36,608 per year, which satisfied the Level I (entry level) prevailing wage for "Designers, All Other" SOC (ONET/OES Code) 27-1029 in the New York Metropolitan Division at the time the LCA was certified. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Designers, All Other" at [http://www.flcdatacenter.com/OesQuickResults.aspx?code=27-1029&area=\[REDACTED\]&year=13&source=1](http://www.flcdatacenter.com/OesQuickResults.aspx?code=27-1029&area=[REDACTED]&year=13&source=1) (last visited October 30, 2014). However, in order to offer employment to the beneficiary at a Level I (entry level) prevailing wage for "Commercial and Industrial Designer" SOC (ONET/OES Code) 27-1021 in the Metropolitan Division at the time the LCA was certified, the petitioner would be required to pay the beneficiary an annual wage of \$40,560, a significantly higher wage. See U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Commercial and Industrial Designers" at [http://www.flcdatacenter.com/OesQuickResults.aspx?code=27-1021&area=\[REDACTED\]&year=13&source=1](http://www.flcdatacenter.com/OesQuickResults.aspx?code=27-1021&area=[REDACTED]&year=13&source=1) (last visited Nov. 5, 2014).

³ See United States Census Bureau, NAICS Definition of code "453110" at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

Furthermore, the description of the duties of the proffered position fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. The description of duties lacks the specificity and detail necessary to support the petitioner's assertion that the proffered position qualifies as a specialty occupation. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "[v]alidate structural performance using simulation software," "[d]evelop and implement test plan to validate product design that meets or exceeds performance requirements," and "[e]valuate technicality, fabrication, assembly, installation and material costs to optimize product designs." These statements are vague and fail to provide sufficient insight into the actual work the beneficiary is expected to perform. For example, the petitioner does not identify what specific duties are involved in "validating" and "evaluating" the petitioner's floral products. As described, these duties do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. In response to the RFE, the petitioner indicates generally that the beneficiary will "[d]esign and [d]evelop new floral product arrangements by combining artistic talent with research on the product and materials to create and present the arrangements" and will "[i]nterface with suppliers, purchasing, manufacturing, sales, marketing and upper management to ensure cost effective designs that fit the demands of the market." These duties as described are not indicative of complexity, specialized knowledge, or uniqueness. The overall description does not include evidence that a high level of judgment and understanding is required to perform the duties of the position.⁴

⁴ This is further exemplified by the petitioner's attestation on the LCA that the duties of the proffered position correspond to a Level I wage. The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL 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.

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.

This designation is indicative of a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary will perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. Furthermore, DOL guidance indicates that a Level I designation is appropriate for a position (within the occupational category) as a research fellow, a worker in training, or an internship. Such a designation is inconsistent with a claim

Thus, upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. Thus, the petitioner has failed to demonstrate how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

The petitioner has failed to provide sufficient probative details regarding the nature and scope of the beneficiary's employment. The record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation. The tasks as described fail to consistently communicate (1) the substantive nature and scope of the beneficiary's employment within the petitioner's business operations; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty.

Therefore, we are precluded from 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. Accordingly, the petitioner has not established the proffered position comprises the duties of a specialty occupation and the petition must be denied on this basis alone.

that the duties of the proffered position are supervisory, complex or require specialized knowledge. Again, this designation indicates that the proffered position is a low-level, entry position relative to others within the occupational category.

The material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in that record that also require dismissal of the appeal.

C. Analysis of the Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

We will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

In this matter, the petitioner claims the proffered position is a "Product Designer or alternatively, as Commercial and Industrial Designer (its generic occupational title)." ⁵ The petitioner attests on the LCA that the proffered position corresponds to the occupational category "Designers, All Other" – SOC (ONET/OES Code) 27-1029, at a Level I (entry level) wage.

We recognize the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. ⁶ However, we note there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

Data for Occupations Not Covered in Detail

Although employment for hundreds of occupations are covered in detail in the *Occupational Outlook Handbook*, this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupational Information Network (O*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Data for Occupations Not Covered in Detail," <http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm> (last visited Nov. 5, 2014).

Thus, the narrative of the *Handbook* indicates that there are many occupations for which only brief summaries are presented. That is, detailed occupational profiles for these occupations are not

⁵ As discussed above, although the petitioner asserts that the generic occupational title for the position is a "Commercial and Industrial Designer," it failed to attest on the LCA that the position incorporates the duties of a commercial and industrial designer and accordingly, failed to attest that it would pay the beneficiary the appropriate and required prevailing wage for such a position.

⁶ 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/>.

developed.⁷ Moreover, as noted above, there are some occupational categories that are not included in the *Handbook*. Product Designer or all other designers, as the petitioner attested on the LCA is one such occupation. In such case, the petitioner is required to provide evidence that other objective, authoritative sources indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into such an occupation.

In that regard, the petitioner has submitted a letter prepared by [REDACTED] MFA, Associate Professor of Transmedia, College of Visual and Performing Arts, at [REDACTED] regarding the academic requirements for the petitioner's product designer as well as two letters submitted by the petitioner from individuals in the floral design industry.

Mr. [REDACTED] based his opinion on his education, his position as an associate professor, and his work as a professional artist and his review of the petitioner's initial description of the position as outlined in the petitioner's letter submitted in support of the petition. Mr. [REDACTED] noted that "[a] student completing a Bachelor's Degree in Design, or related area studies and obtains knowledge of the various theories and methods that are necessary for performing these daily tasks" outlined by the petitioner. Mr. [REDACTED] also noted that "this type of position is a typical job placement for students completing a Bachelor's Degree at [his] school" and that "[e]mployers with openings for Product Designers and similar professional positions have recruited at [his] campus, always seeking graduates with the minimum of a Bachelor's Degree." Mr. [REDACTED] continued by noting his opinion that "it is standard for a company such as [the petitioner], to hire a Product Designer and require that individual to have attained at least a Bachelor's Degree." Mr. [REDACTED] summarized that the described duties of the petitioner's proffered position "are of a professional nature and require preparation at the Bachelor's Degree level at a minimum." Mr. [REDACTED] also states that the "industry standard for a position such as Product Designer for [the petitioner] is to be filled through recruiting a college graduate with the minimum of a Bachelor's Degree in Design, or related area, or the equivalent."

Upon review of the opinion letter, there is no indication that Mr. [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond that which was provided in the petitioner's letter. 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. 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.

In addition, he also fails to reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. In short, while there is no

⁷ The occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm and home management advisors; audio visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

standard formula or "bright line" rules 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 Mr. [REDACTED] has exhibited here.

Moreover, it is unclear from Mr. [REDACTED] letter whether he believes the proffered position, as described, requires a general bachelor's degree or a bachelor's degree in a specific discipline, such as design. While Mr. [REDACTED] referred to the educational requirements for a Product Designer as a bachelor's degree in design or related, Mr. [REDACTED] also stated numerous times throughout his letter that the position requires only a general bachelor's degree. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In the undated letter authored by [REDACTED] of the [REDACTED] Mr. [REDACTED] noted his extensive experience in the floral design industry for several years. Mr. [REDACTED] paraphrased the petitioner's description of the duties of the proffered position and then concluded that the "job duties are complex, advanced, and sophisticated in nature and require a professional holding a bachelor's degree, or its equivalent, in Floral Design, Product Design, Fashion Design, or a related field to successfully execute same in today's challenging floral design market." Accordingly, Mr. [REDACTED] does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply paraphrases the petitioner's description and then concludes, with no analysis, that the job duties are complex, advanced and sophisticated requiring a bachelor's degree in Floral Design, Product Design, Fashion Design, or a related field. Mr. [REDACTED] like Mr. [REDACTED] does not establish specific knowledge of the proffered position and does not provide a factual and analytical basis for his opinion.

The petitioner also submitted a letter authored by [REDACTED] vice president of [REDACTED] Mr. [REDACTED] opined that a product designer in the floral industry "requires a minimum of a Bachelor's Degree in a design field and an individual strong in critical thinking and communication skills who can successfully meet the ambitious challenges in floral design." Mr. [REDACTED] does not describe his experience or provide any information regarding his source(s) as a foundation for his opinion. He, like Mr. [REDACTED] and Mr. [REDACTED] fails to reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted to reach his conclusion.

Furthermore, it does not appear that Mr. [REDACTED] Mr. [REDACTED] and Mr. [REDACTED] are fully informed of the level of responsibility that the petitioner has attributed to the proffered position. As previously discussed, the petitioner designated this position at a Level I wage level, a designation indicative of a comparatively low, entry-level position relative to others within the occupation. It appears that these individuals would have found this information relevant for their opinion letters. Without this information, the petitioner has not demonstrated that these individuals possessed the requisite information necessary to adequately assess the nature of the petitioner's position.

In light of all of the aspects discussed above, we find that Mr. [REDACTED] submission and the submissions of Mr. [REDACTED] and Mr. [REDACTED] are conclusory and perfunctory and lack a sufficient

factual and analytical foundation to merit any probative value. We may, in our discretion, use an advisory opinion or statement submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion, we decline to regard the advisory opinion letters as probative evidence of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion regarding these opinion letters into our analyses of each criterion 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 any 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)(1).

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)).

As previously 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 the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

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

First, we note that 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.

Although the advertisements submitted are from organizations that appear to be in the floral and event planning industry, or use floral arrangements, the petitioner has not established that they are similar to its flower shop. For example, one advertisement is from a private mega yacht, and the other two advertisements fail to provide sufficient information regarding the advertising companies to accurately compare the petitioner to them. In addition, none of the advertisements describe the position advertised in terms that are parallel to the petitioner's description of its proffered position. Moreover, none of the advertisements specify that a bachelor's degree in a specific discipline is required to perform the position. For example, one advertisement notes that a bachelor's degree in an unspecified discipline is preferred. However, employer preference is not synonymous with the requirement of such a degree. Two of the advertisements do not indicate that the bachelor's degree (preferred or required) must be in a specific discipline. As noted above, 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, supra*. We also note that the advertisement placed by the private mega yacht indicates that a "[f]ormal degree in floral design" is required but does not define the term "formal;" that is, it is not evident whether the required degree is an associate's, bachelor's, or some other type of degree.

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.

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.⁸

⁸ The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few 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 body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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 evidence regarding its business operations. For example, the petitioner submitted its financial documents, contracts, invoices, and payments from clients, a copy of its current lease, and samples of its work product.

Upon review, we find that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them.⁹

The petitioner has indicated that the beneficiary's work and academic experience will assist her in carrying out the duties of the proffered position. 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 qualifies as a specialty occupation. In the instant case, the petitioner has not established which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we usually review the petitioner's past recruiting and hiring practices, as well as

⁹ Again, we note that the petitioner designated the proffered position on the LCA at a Level I wage level. This designation indicates that the proffered position is a low-level, entry position relative to others within the occupational category.

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 but is necessitated by performance requirements of the position.

While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 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 13 employees and was established in 1983 (approximately 30 years prior to the filing of the H-1B petition). The petitioner has not provided any evidence regarding the individuals that previously held the proffered position, other than the beneficiary.¹⁰ Accordingly, the record does not include evidence of the petitioner's past recruiting and hiring history for the proffered position.

¹⁰ We note that the director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petitions. However, if the previous nonimmigrant petition was approved based on the same

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.

The petitioner claims that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We reviewed the petitioner's statements regarding its business operations. However, upon review of the entire record of proceeding we find that the submitted documentation fails to support the assertion that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, 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, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I wage designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's 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. For instance, 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 failed to submit adequate probative evidence to

unsupported and inconsistent assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Moreover, a prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

IV. CONCLUSION

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. The petition is denied.