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

U.S. Citizenship and Immigration Services

D2

[redacted]

Date: MAR 28 2012 Office: CALIFORNIA SERVICE CENTER File: [redacted]

IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center recommended the denial of the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO). Upon review, the AAO will affirm the decision of the director. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on November 3, 2010. The petitioner stated that its type of business is "Direct Marketing/wholesaler of fitness equipment" and that it has three employees and a gross annual income of approximately $40 million and a net annual income of $5 million.

Seeking to employ the beneficiary in what it designates as a product designer position, the petitioner filed this H-1B petition in an endeavor to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director found that the petitioner (1) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the statutory and regulatory provisions; and (2) failed to establish that the beneficiary is qualified to serve in a specialty occupation position. The petitioner recommended the petition be denied and certified the petition for review by the AAO on January 26, 2012.[1]

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's requests for additional evidence (RFE); (3) the petitioner's responses to the RFEs; (4) the director's denial letter; and (5) the Notice of Certification. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director's decision on each of the enumerated grounds. Accordingly, the decision certified to the AAO will be affirmed, and the petition will be denied.

Furthermore, the AAO will also address three additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the recommended decision of the director, the AAO finds that the petitioner (1) failed to properly file the Form I-129 petition and the Labor Condition Application (LCA), as they have not been signed by the petitioner's authorized official; (2) failed to submit an LCA that corresponds to the petition; and (3) failed to establish that it would pay the beneficiary an adequate wage for the proffered position under the applicable regulations. Thus, for these reasons as well, the petition must be denied, with each considered as an independent and alternative basis for denial.

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

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[1] Although the petitioner was provided a thirty (30) day briefing period, the AAO did not receive a brief on certification from the petitioner or its counsel. The record will therefore be considered complete as currently constituted.

the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

I. Signature Requirements

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the grounds for the director's recommendation of the denial of the petition (which it has not), it could not be found eligible for the benefit sought as there are additional issues that preclude the approval of the H-1B petition.

More specifically, upon review of the record, the AAO concludes that the petitioner failed to properly file the Form I-129 petition and LCA, as the documents have not been signed by the petitioner's authorized official.[2] Because the petition has not been properly filed, there is no valid proceeding upon which to base the director's recommendation for denial and the certification for review.

The Form I-129 petition and LCA, as well as the Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28), identify as the person designated by the petitioner to sign on its behalf. However, the documents indicate that they were signed by ' Thus, the petitioner's authorized official, did not personally sign the forms. There is no evidence in the record to indicate that the petitioner and authorized to sign the Form I-129 petition, LCA and Form G-28.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. . . .

The regulation at 8 C.F.R. § 103.2(a)(2), which concerns the requirement of a signature on applications and petitions, states the following:

> An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this

[2] As will be discussed, did not properly file the instant petition. However, all references to "petitioner" in this decision refer to this entity.

> chapter, an acceptable signature on a benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

The regulation generally requires a handwritten signature unless the petition is filed electronically. It makes no provision for proxy signatures, unless the person is less than 14 years old or mentally incompetent. There is no evidence in the record of proceeding to indicate that the petitioner's authorized official delegated his signature authority under the exceptions permitted by the regulation.

The signature requirement reflects a genuine concern regarding the validity of job offers and ensuring that employers meet their responsibilities under the H-1B program. By signing the Form I-129 (pages 4, 9 and 15), the authorized official confirms for the petitioner, "under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct" and "agrees to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment" as well as liability "for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized stay." When the authorized official signs the LCA, Declaration of Employer (section K), he/she confirms (1) the attestation that the statements in the LCA are true and accurate; (2) that the petitioner "agree[s] to comply with the Labor Condition Statements as set forth in the Labor Condition Application - General Instructions Form ETA 9035CP and with the [U.S.] Department of Labor [(DOL)] regulations (20 CFR part 655, Subparts H and I)"; and (3) the petitioner's agreement to make the LCA, its supporting documentation, and other records available to DOL.

To be valid, 28 U.S.C. § 1746 requires that declarations be "subscribed" by the declarant "as true under penalty of perjury." In pertinent part, 18 U.S.C. § 1621, which governs liability for perjury under federal law, mandates that: "Whoever in any declaration under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true is guilty of perjury."

The probative force of a declaration subscribed under penalty of perjury derives from the signature of the declarant; one may not sign a declaration "for" another. Without the authorized official's actual signature as the declarant, the declaration is completely robbed of evidentiary force. *See In re Rivera*, 342 B.R. 435, 459 (D. N.J. 2006); *Blumberg v. Gates*, No. CV 00-05607, 2003 WL 22002739 (C.D.Cal.) (not selected for publication).

The AAO notes that the integrity of the immigration process depends on the authorized official signing the immigration forms under penalty of perjury. Allowing someone other than the petitioner's authorized official to sign a petition and LCA on behalf of the petitioner would leave the immigration system open to fraudulent filings.[3]

In the instant case, although the director reviewed the petition based on its merits, the AAO notes that the petition was improperly filed, and thus should have been rejected by the director at the time of filing. That is, pursuant to 8 C.F.R. § 103.2(a)(7), a petition which is not properly signed shall be rejected as improperly filed, and no receipt date assigned to the petition. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Thus, while the Service Center did not reject the petition, the AAO is not 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). Accordingly, the AAO finds that the instant petition must be denied because the petitioner failed to properly file the petition and LCA.

II. LCA Case Number

Moreover, upon review of the Form I-129 and LCA, the AAO notes that the petitioner failed to submit a certified LCA that properly corresponds to the petition. Each LCA has a unique identification number. On page 3 of the Form I-129, the petitioner reported that the corresponding LCA for the petition was LCA Case Number [redacted] A review of the Foreign Labor Certification (FLC) Data Center website indicates that the LCA referenced on the Form I-129 was submitted to DOL on August 25, 2010, but thereafter was denied on August 30, 2010.[5]

The AAO notes that the petitioner did not provide the LCA referenced on the Form I-129 petition to USCIS. Instead, the petitioner submitted an LCA with the Case Number [redacted] to USCIS. Thus, the LCA submitted to support the petition contains a different identification number than the LCA referenced on the Form I-129 (page 3).

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[3] The AAO notes prior examples where individuals have been convicted of various charges, including money laundering and immigration fraud, after signing immigration forms of which the employer or beneficiary had no knowledge. *United States v. O'Connor*, 158 F.Supp.2d 697, 710 (E.D. Va. 2001); *United States v. Kooritzky*, Case No. 1:02CR00502 (E.D. Va. December 11, 2002).

[4] The petitioner provided the LCA Case Number [redacted] on the Form I-129. However, the first digit should be the letter "I" not the number "1" as reported by the petitioner. The AAO notes this error to aid the petitioner in locating the referenced LCA in the Foreign Labor Certification Data Center website database.

[5] The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at *http://www.bls.gov/oes/* (visited March 28, 2012). The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at *http://www.flcdatacenter.com/*.

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, the LCA referenced on the Form I-129 petition was not certified by DOL. Thus, for this reason as well, the petition must be denied.

III. H-1B Wage Requirements

The petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a product designer on a full-time basis. With the initial petition, the petitioner submitted a letter that provided the following job duties for the proffered position of product designer:

- Originating and developing product designs[;]
- Modifying and refining designs to conform to demands of business model, cost factors, size, weight, construction, materials, and results of test marketing of product[;]
- Coordinates with production facility abroad concerning construction, samples, look and functionality of sample products[;]
- Evaluates feasibility of design ideas, based upon factors such as appearance, safety, functionality, budget, costs, serviceability, market characteristics, and target market[;]
- Manages forecasts, pricing and ongoing product tasks[;]
- Evaluates financial aspects of design, and product development considering costs and allocated budget, projected sales volume and return on equity[;]
- Help create pricing strategies based upon consideration of numerous factors related to design and production[;]
- Monitoring sales and business trends as they affect design and development[;]
- Managing product life cycle and portfolio from both short-term and long range perspectives[;]

- Identifying design modifications to drive down costs of production.

The petitioner asserted that the "duties of the position . . . require the application of a general body of knowledge normally obtained in [an] academically recognized course of study leading to a degree in art, design, merchandizing or related field."[6]

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence. The director requested the petitioner submit additional documentation, including a detailed description of the proffered position with the approximate percentage of time for each duty the beneficiary will perform, level of responsibility, hours per week of work along with an explanation of why the work performed requires the services of a person who has at least a bachelor's degree or its equivalent in the occupational field.

In response to the director's RFE, the petitioner provided additional evidence including an unsigned letter on the petitioner's letterhead. The following duties were provided for the position:

- Conduct weekly team meetings to (1) provide status reports for products in the creative/development stage, (2) provide new product availability dates from factory in Asia, and (3) assign tasks and corresponding due dates to team members. (15%)

- Submit periodic report that shows all the existing product configurations, customer-specific packaging specs, and corresponding UPC codes by product. (10%)

- Compile running list of miscellaneous DVD's that are to be inserted into finish package by factory in Asia. (10%)

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[6] The term "specialty occupation" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as the following (emphasis added):

> An occupation which requires [(1)] 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 requires [(2)] 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.

The regulation specifies that the occupation must require the application of highly specialized knowledge (not general knowledge) in a field of human endeavor and the attainment of at least a bachelor's degree in a specific specialty or the equivalent (not any degree, e.g., an associate degree). The petitioner's assertion that the duties of the proffered position "require the application of a general body of knowledge . . . leading to a degree in art, design merchandizing or related field" is tantamount to admission that the proffered position is not in fact a specialty occupation.

- Communicate product packaging specs/graphics needs to third party designers for final designs of consumer packaging, which is then coordinated with Asian factory. (15%)

- [C]onduct hands-on market research by visiting retail stores and evaluating product presence, merchandising, store displays, and pricing. (10%)

- [M]onitor weekly marketing effectiveness by reviewing industry IMS report (infomercial monitoring service). (5%)

- [D]aily communication with Asian factory to obtain updates on existing product development projects, resolve outstanding issues, monitor production schedules, and determine what new products are in development stage for international distribution, in effort to evaluate similar products for the U.S. market. (20%)

- [W]eekly meetings with [the] Director Retail Operations to review any outstanding product related issues pertaining to retail accounts. (5%)

- [M]iscl. (10%)

The petitioner further stated that a "baccalaureate degree is the standard for the proffered position . . . . The proffered position requires someone with formal training in the disciplines of Business Operations Management, Finance, International Business, Market Research and Production Management." Counsel also provided a response to the RFE and stated that the petitioner plans to create "complimentary products such as clothing or towels with the name and logo. The Product Designer will be in charge of design and marketing of these new products." Counsel further stated that "[t]he position offered to [the beneficiary] requires advanced education in both art and design and business and marketing."[7]

Counsel provided direct quotations from DOL's *Occupational Outlook Handbook* (*Handbook)* for the occupational categories "Commercial and Industrial Designers" and "Market Research Analysts."[8] At the end of the direct quote from the *Handbook* regarding the duties of Market Research Analysts, counsel stated "[t]hus a product designer is integrating design concepts for

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[7] A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the alleged requirement of a degree in several disparate fields does not establish the position as a specialty occupation. *See* § 214(i)(1) of the Act (requiring in pertinent part the "application of *a* body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in *the* specific specialty" (emphasis added)); *cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

[8] The U.S. Department of Labor's *Occupational Outlook Handbook* may be accessed at the Internet site *http://www.bls.gov/OCO/.*

marketing purposes. Education in marketing is also required for the proffered position as it provides essential skills necessary for designing and merchandizing the Petitioner's products."

Upon reviewing the record of proceeding, the AAO must emphasize to the petitioner and counsel that determining whether a proffered position is a specialty occupation is a separate issue from determining whether a beneficiary is qualified for the proffered position.[9] Furthermore, although the director recommended the denial of the H-1B petition on both grounds, the issues are distinct and will be addressed separately.

Thereafter, counsel provided another letter to USCIS. Under the heading "A baccalaureate degree is normally the minimum requirement for entry into the profession," counsel stated that there was "considerable confusion as to the proper classification of this position." He then stated "[t]he position is succinctly described as follows" and provided the below description of the duties of the proffered position:

- [The beneficiary] participates in the full development cycle as required to convert conceptual product ideas to finished products.
- Participate in the evaluation of new products concepts leading to design of product that is both marketable and manufacturability [sic].
- Identify suitable manufacturers, and provide specifications for product, packaging and related graphics to third party designers for final design.
- Act as principal liaison with manufacturer as required monitoring product development and production process to ensure production comports to specifications and delivery schedules.
- Identify competitor's similar products to ensure employer's products remain competitive.
- Maintain management reports within areas of responsibility including: periodic reports detailing existing product configurations and customer-specific packaging specifications and corresponding UPC codes by product; reports compiling list of miscellaneous DVD's and publications included with finished product; reports detailing status of products in the creative/development stage; reports [sic]; reports detailing delivery dates and schedules.
- Monitor sales in order to identify need for product modifications.

[9] The AAO acknowledges that the petitioner claims that the beneficiary possesses a Master of Fine Arts in Fashion and a Bachelor of Science in Business Administration, Marketing. However, USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *See 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]."). The AAO will address the beneficiary's qualifications later in the decision.

In his letter, counsel further stated that "[w]e requested the DOL to review the position duties and classify the position." The petitioner and counsel provided a copy of the Form 9141 (Application for Prevailing Wage Determination) submitted to DOL. The petitioner stated on the Form 9141 that the job title for the position was "Commercial and Industrial Designer" and provided virtually the exact job duties as those listed above for the position. Under the description of the job, the petitioner indicated that it would involve 40 hours of work per week. The petitioner suggested to DOL that the position be classified under the occupational category "Commercial and Industrial Designers." The petitioner stated that the minimum education required for the position was a "Master's Degree in Industrial Design or Design" and six months of experience as a "Commercial and Industrial Designer or Marketing Intern." In response to the prevailing wage request, DOL determined that the position fell under the occupational category "Commercial and Industrial Designers" at a Level II wage level.

Counsel stated that to demonstrate the petitioner's need for a product designer, it was providing information regarding a new product, children's slippers, which was a product design managed by the beneficiary while she was serving in Optional Practical Training (OPT). In support, the petitioner submitted documentary evidence (described by counsel as sample prototypes) of the slippers.

The AAO notes that the documentation states "copyright [redacted] 2011 all rights reserved." However, the record of proceeding does not contain any information to establish the relationship between the petitioner and [redacted] There is no explanation or indication that the petitioner is same entity as [redacted] The record is devoid of any information to suggest that there was a change in name/identity or that the entities were involved in a merger, acquisition or division. Furthermore, there is no indication based upon a review of the documentation that the beneficiary was involved in managing the product design of the slippers. The documents do not contain the beneficiary's name or any other information connecting her to the slippers. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, without further information, the evidence regarding the children's slippers provides limited probative value.

Although the petitioner claimed that the beneficiary will serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. Furthermore, the director found that the petitioner failed to establish that the beneficiary was qualified to serve in a specialty occupation. After reviewing the record, the AAO concurs with the director's recommended decision. For the reasons discussed below, the AAO finds that the petitioner has failed to establish eligibility for the benefit sought.

The AAO will now highlight an aspect of the petition that undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect

is the discrepancy between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition.

The petitioner and counsel repeatedly claim that the duties of the proffered position are complex, unique, specialized and sophisticated. The petitioner claims that its employees must "function with as little direct supervision as possible"; "provide special and diverse skills"; and "bring unique and specific skill sets to the company, with an ability to manage a variety of responsibilities." The beneficiary "must be self-sufficient and operate with little direct supervision" and will be responsible for "assign[ing] tasks and corresponding due dates to team members." Additionally, the beneficiary will "manage product specific configurations"; "supervise design of crucial packaging" as well as "supervise and monitor marketing effectiveness." Counsel claims that the petitioner "requires highly skilled employees . . . who possess not only the educational training, but also a creative/imaginative/extraordinary ability to visualize what is needed and what specifically appeals to the mass market of consumers." It is also noted that on the Form 9141, the petitioner stated that the minimum educational requirement for the position was a Master's degree in Industrial Design or Design and six months of experience as a commercial and industrial designer or marketing intern.

In this regard, the petitioner's claims are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. The AAO notes that the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Commercial and Industrial Designers" at a Level 1 (entry level) wage.[10]

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[10] The AAO notes that, in response to the RFE, the petitioner submitted a Prevailing Wage Determination (PWD) dated December 20, 2011. As previously mentioned, the analyst classified the position as a Level II position.

It must be noted that when an employer requests a prevailing wage determination, the job is analyzed and categorized based on the employer's job description. Enough information must be given so that an analyst can determine the occupational category and the skill level within that category. In defining the job's occupational category, skill level and prevailing wage rate for the labor market area, the analyst considers the following elements of the job (which are provided by the employer): work tasks, work activities, equipment used, work environment, working conditions, complexity of the job duties, level of judgment and understanding required to perform the job, amount and nature of supervision received, and supervisory responsibilities.

In this case, the petitioner did not specify to DOL that the duties of the position are complex, unique, specialized and sophisticated (as the petitioner and counsel described the proffered position to USCIS). The petitioner did not indicate that employees must "function with as little direct supervision as possible"; "provide special and diverse skills"; and "bring unique and specific skill sets to the company, with an ability to manage a variety of responsibilities." The petitioner did not report on the Form 9141 that the beneficiary "must be self-sufficient and operate with little direct supervision" and will be responsible for "assign[ing] tasks and corresponding due dates to team members." The prevailing wage request does not indicate that the beneficiary will "manage product specific configurations"; "supervise design of crucial packaging" as well as "supervise and monitor marketing effectiveness." Furthermore, the petitioner did not indicate to DOL that it "requires highly skilled employees . . . who possess not only the educational

Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. *See* DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at *http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.* Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) 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.[11] DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. *See id.* A Level 1 wage rate is described by DOL as follows:

> **Level 1** (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 and counsel stated that the duties of the proffered position are complex, unique, specialized and sophisticated. The petitioner claims that the beneficiary will be required to work

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training, but also a creative/imaginative/extraordinary ability." Although this information was not provided by the petitioner to DOL, it appears relevant for determining the proper wage level.

[11] 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.

independently, with little supervision. Furthermore, the beneficiary will supervise and manage several functions. Moreover, the petitioner requires special, unique and diverse skills and employees must possess "creative/imaginative/extraordinary ability[ies]." However, the AAO must question the level of complexity, independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position.

The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands and level of responsibilities of the proffered position. Doubt cast on any aspect of the petitioner's proof may, of 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).

As previously mentioned, 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). Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the proffered position; that is, specifically, the petitioner has failed to submit a valid LCA that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. For this reason also, the petition must be denied.

Furthermore, even if the proffered position were determined to be a Level 1 position, upon review of the Form I-129 and LCA, the AAO finds that the petitioner failed to establish that it would pay the beneficiary an adequate salary for her work as required under the applicable statutory and regulatory provisions.

On the LCA, the petitioner reported that the prevailing wage for "Commercial and Industrial Designers" at a Level 1 wage is $16.76 per hour ($34,861 per year). The place of employment is listed as Vista, California. The wage source is listed as OES [Occupational Employment Statistics] OFLC Online Data Center.[12] The LCA was submitted to DOL on September 27, 2010 and certified on October 1, 2010.

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[12] The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at *http://www.bls.gov/oes/* (visited March 28, 2012). The OES All Industries Database is available at the Foreign Labor Certification Data Center, which includes the Online Wage Library for prevailing wage

On the LCA, the petitioner reported the rate of pay for the proffered position as $17.00 per hour. On the Form I-129 petition, the salary is stated as $670.50 per week (on page 3) and as $30,940 per year (on page 13).

The petitioner stated on the Form I-129 petition, LCA and letter of response to the RFE that it intends to employ the beneficiary on a full-time basis. According to the regulation at 20 C.F.R. § 655.731(c)(7) regarding employer wage obligations for H-1B personnel, "[a] full-time week is 40 hours per week, unless the employer can demonstrate that less than 40 hours per week is full-time employment in its regular course of business." The petitioner does not claim, nor has it submitted any documentation to demonstrate that within its regular course of business, less than 40 hours per week is full-time employment.

The AAO notes that the petitioner provided USCIS with a copy of the Form 9141 with a prevailing wage determination issued by DOL. Counsel stated that "[w]e requested the DOL to review the position duties and classify the position." Thus, counsel indicated that the petitioner considered the information provided in the request to be relevant to the instant H-1B proceedings. A review of the Form 9141 reveals that the petitioner reported that the position entails a 40 hour per work week. Specifically, in response to the entry "Number of hours of work per week" on the Form 9141, the petitioner responded "40" and further stated that the hourly work schedule would be "[f]rom 9:00 AM to 6:00 PM."

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) of the Act, 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.

The petitioner has provided inconsistent information as to the salary to be paid to the beneficiary.[13] However, the petitioner's offered wage to the beneficiary of $30,940 per year (as stated on page 13 of the Form I-129) is below the prevailing wage level for the occupational classification in the area of intended employment. The Level 1 prevailing wage for the occupation "Commercial and Industrial Designers" for a full-time position in the area of intended employment was $34,861 per year at the time the petition was filed in this matter.[14]

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determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at *http://www.flcdatacenter.com/.*

[13] On the LCA, the petitioner stated that beneficiary would be paid $17.00 per hour. The beneficiary's salary for a 40 hour week at $17.00 per hour would be $680.00 [not $670.50 as reported on the Form I-129]. The beneficiary's salary for a year (52 weeks) if her weekly salary were $670.50 would be $34,866.00, not $30,940 as reported on the Form I-129.

[14] *See* the All Industries Database for 7/2010 - 6/2011, for Commercial and Industrial Designers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at *http://www.flcdatacenter.com/OesQuickResults.aspx?area=41740&code=27-1021&year=11&source=1*

As previously mentioned, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. In the instant case, the petitioner failed to provide an explanation or any evidence to resolve the discrepancies in the record regarding the offered salary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. Moreover, even if a Level 1 wage were appropriate for the position, the petitioner has failed to establish that it will pay the beneficiary an adequate wage for the proffered position. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's recommended denial, the petition could still not be approved.

IV. Specialty Occupation

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties of the proffered position and sufficiency of the petitioner's evidence into each basis discussed below for the denial of the petition.

The AAO will now address the first basis upon which the director recommended the denial of the petition, namely, the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described by the petitioner constitutes a specialty occupation.

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

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

> (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.

(visited March 28, 2012).

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as the following:

> An occupation which requires [(1)] 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 requires [(2)] 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, the position must also meet one of the following criteria:

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

The petitioner asserted that the beneficiary would be employed as a product designer. However, 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.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[15] The petitioner and counsel claim that the proffered position falls under the occupational category "Commercial and Industrial Designers."[16] The AAO reviewed this occupational category, as well as other occupational categories depicted in the *Handbook*, in its determination of whether the *Handbook* supports the claim that the proffered position qualifies as a specialty occupation. When reviewing all of the descriptions of the proffered position as provided by the petitioner and

[15] All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site *http://www.bls.gov/OCO/*.

[16] In response to the RFE, the petitioner provided several job postings and stated that "all of the enclosed postings describe responsibilities very similar to our position." The petitioner submitted job postings for the following positions: marketing coordinator, business planning analyst (sales analysis/supply chain professional), product designer, and product development manager. The job duties for each of the positions vary, and it cannot be said that all of the advertised positions would fall under the occupational category of "Commercial and Industrial Designers" based upon the job duties provided.

counsel, the AAO finds the proffered position appears to be a combination of occupations.[17] Moreover, despite counsel's assumption to the contrary, "Commercial and Industrial Designers" do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* states, in pertinent part, the following under the "Training, Other Qualifications, and Advancement" section of this chapter:

> Education and training. A bachelor's degree in industrial design, architecture, or engineering is required for most entry-level commercial and industrial design jobs. Coursework includes principles of design, sketching, computer-aided design, industrial materials and processes, manufacturing methods, and some classes in engineering, physical science, mathematics, psychology, and anthropology. Many programs also include internships at design or manufacturing firms.
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> Because of the growing emphasis on strategic design and how products fit into a firm's overall business plan, an increasing number of designers are pursuing a master's degree in business administration to gain business skills.

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Commercial and Industrial Designers, on the Internet at *http://www.bls.gov/oco/ocos290.htm* (visited *March 28, 2012*).

As will be discussed in more detail below, it is evident from the excerpt that the *Handbook* does not support the view that the occupational category "Commercial and Industrial Designers" qualifies as a specialty occupation.

In response to the RFE, counsel asserted that the *Handbook* "states that Commercial Product Designers are degreed. Thus it is self evident that an individual performing these duties is per se engaged in a specialty occupation." For H-1B approval, a petitioner must demonstrate that the proffered position requires *a precise and specific* course of study that relates directly and closely to the position in question.

As previously mentioned, since there must be a close correlation between the required specialized studies and the position, the requirement of a degree in disparate fields (industrial

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[17] The petitioner and counsel provided three descriptions of the job duties of the proffered position and, with each description, there have been significant changes in the general characterization of the duties. The AAO notes that the purpose of the request for evidence was to elicit further information that clarified whether eligibility for the benefit sought had been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to the beneficiary or materially change a position's associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

design, architecture, or engineering) does not establish the position as a specialty occupation.[18] *See* § 214(i)(1) of the Act (requiring in pertinent part the "application of *a* body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in *the* specific specialty" (emphasis added)); *cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). Moreover, USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in engineering (or business administration), may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).[19]

The AAO further notes that the *Handbook* reports that a bachelor's degree is required for "most" commercial and industrial designer positions. The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of commercial and industrial designer positions require at least a bachelor's degree, it could be said that "most" commercial and industrial designer positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist.

While the *Handbook's* narrative indicates that commercial and industrial designers are responsible for most manufactured goods, it does not indicate that clothing is one of those types of goods; it makes no mention of clothing or fashion in any of the examples of the types of goods it mentions. Further, the AAO notes the existence of a separate entry in the *Handbook* dedicated to fashion designers.

The occupational category of "Fashion Designers" also does not categorically qualify as a specialty occupation according to the information provided in the *Handbook*. The AAO observes that the *Handbook* states the following about this occupation:

> Fashion designers help create the billions of dresses, suits, shoes, and other clothing and accessories purchased every year by consumers. Designers study fashion trends, sketch designs of clothing and accessories, select colors and fabrics, and oversee the final production of their designs. *Clothing designers* create and help produce men's, women's, and children's apparel, including casual wear, suits, sportswear, formalwear, outerwear, maternity, and intimate apparel. *Footwear designers* help create and produce different styles of shoes and boots. *Accessory designers* help create and produce items such as handbags, belts,

[18] It is further noted that the field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering.

[19] The *Handbook* does not report that a master's degree in business administration is required for entry into the occupation. Rather, the *Handbook* states that some commercial and industrial designers pursue a master's degree in business administration to gain business skills.

scarves, hats, hosiery, and eyewear, which add the finishing touches to an outfit. (The work of jewelers and precious stone and metal workers is described elsewhere in the *Handbook*.) Some fashion designers specialize in clothing, footwear, or accessory design, but others create designs in all three fashion categories.

The design process from initial design concept to final production takes between 18 and 24 months. The first step in creating a design is researching current fashion and making predictions of future trends. Some designers conduct their own research, while others rely on trend reports published by fashion industry trade groups. Trend reports indicate what styles, colors, and fabrics will be popular for a particular season in the future. Textile manufacturers use these trend reports to begin designing fabrics and patterns while fashion designers begin to sketch preliminary designs. Designers then visit manufacturers or trade shows to procure samples of fabrics and decide which fabrics to use with which designs.

Once designs and fabrics are chosen, a prototype of the article using cheaper materials is created and then tried on a model to see what adjustments to the design need to be made. This also helps designers to narrow their choices of designs to offer for sale. After the final adjustments and selections have been made, samples of the article using the actual materials are sewn and then marketed to clothing retailers. Many designs are shown at fashion and trade shows a few times a year. Retailers at the shows place orders for certain items, which are then manufactured and distributed to stores.

Computer-aided design (CAD) is increasingly being used in the fashion design industry. Although most designers initially sketch designs by hand, a growing number also translate these hand sketches to the computer. CAD allows designers to view designs of clothing on virtual models and in various colors and shapes, thus saving time by requiring fewer adjustments of prototypes and samples later.

Depending on the size of their design firm and their experience, fashion designers may have varying levels of involvement in different aspects of design and production. In large design firms, fashion designers often are the lead designers who are responsible for creating the designs, choosing the colors and fabrics, and overseeing technical designers who turn the designs into a final product. They are responsible for creating the prototypes and patterns and work with the manufacturers and suppliers during the production stages. Large design houses also employ their own patternmakers, tailors, and sewers who create the master patterns for the design and sew the prototypes and samples. Designers working in small firms, or those new to the job, usually perform most of the technical, patternmaking, and sewing tasks, in addition to designing the clothing. (The work of pattern makers, hand sewers, and tailors is covered in the statement on textile, apparel, and furnishings occupations elsewhere in the *Handbook*.)

> Fashion designers working for apparel wholesalers or manufacturers create designs for the mass market. These designs are manufactured in various sizes and colors. A small number of high-fashion (*haute couture*) designers are self-employed and create custom designs for individual clients, usually at very high prices. Other high-fashion designers sell their designs in their own retail stores or cater to specialty stores or high-fashion department stores. These designers create a mixture of original garments and those that follow established fashion trends.
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> * * *
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> The global nature of the fashion business requires constant communication with suppliers, manufacturers, and customers all over the United States and the world. Most fashion designers travel several times a year to trade and fashion shows to learn about the latest fashion trends. Designers also may travel frequently to meet with fabric and materials suppliers and with manufacturers who produce the final apparel products.

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Fashion Designers, on the Internet at *http://www.bls.gov/oco/ocos291.htm* (visited *March 28, 2012*).

In the "Training, Other Qualifications, and Advancement" section of this chapter, the *Handbook* states the following:

> Fashion designers typically need an associate or a bachelor's degree in fashion design. Some fashion designers also combine a fashion design degree with a business, marketing, or fashion merchandising degree, especially those who want to run their own business or retail store. Basic coursework includes color, textiles, sewing and tailoring, pattern making, fashion history, computer-aided design (CAD), and design of different types of clothing such as menswear or footwear. Coursework in human anatomy, mathematics, and psychology also is useful.
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> * * *
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> Aspiring fashion designers can learn these necessary skills through internships with design or manufacturing firms. Some designers also gain valuable experience working in retail stores, as personal stylists, or as custom tailors. Such experience can help designers gain sales and marketing skills while learning what styles and fabrics look good on different people.

Id. The *Handbook* indicates that an associate degree or a bachelor's degree in fashion design is typically needed for positions in the occupation. Thus, the *Handbook* does not report that at least a bachelor's degree, or the equivalent, in a specific specialty is normally required for the occupational classification of "Fashion Designers."

The AAO finds that the duties of the proffered position do not fall directly within any one occupation within the *Handbook*. There are some aspects of the duties of the proffered position that relate to the occupations cited above; however, none of the occupations encompass all of the claimed duties of the proffered position. The AAO has compared the responsibilities that comprise the occupational categories as described in the *Handbook* to the duties of the proffered position, to the extent that they are depicted in the record of proceeding. While the beneficiary may perform some tasks in common with these occupations, the beneficiary's duties would not be fully encompassed by any one of these positions.

Upon complete review of the record, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. 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 or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

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

As previously mentioned, the petitioner stated on the Form I-129 petition and initial supporting documents that its type of business is "Direct Marketing/wholesaler of fitness equipment" and that it has three employees and a gross annual income of approximately $40 million and a net annual income of $5 million.

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. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided job announcements and an opinion letter from an electrical engineer. However, upon review of the documents, the petitioner

fails to establish that organizations similar to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions.

Counsel claims that organizations are "similar if they engage in Direct Response Marketing of consumer products." The AAO notes that for the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the industry.

- The first advertisement is for a marketing coordinator. The posting contains the name of the employer; however, no further information regarding the employer is provided. The job posting is devoid of sufficient information regarding the organization to conduct a legitimate comparison of the business operations.

- The second advertisement is for a product designer. The posting contains the name of the employer and states that it is an industry leader in children's activity products that are sold primarily in the retail market. The classification under the section "Industries" is listed as "Consumer Packaged Goods Manufacturing." The job posting does not contain sufficient information to conduct a legitimate comparison of the business operations. The position requires a bachelor's degree in industrial design, graphic arts or a related field and 3-5 years of progressive design experience.

- The third advertisement is for a business planning analyst. The posting states that the employer is the largest distributor of outdoor sporting goods to mass retail customers throughout North America, with approximately 600 employees, as well as some of the most advanced merchandising, supply chain management, and retail sales analysis technology in the industry. The employer is in need of a sales analysis/supply chain professional. The position requires a bachelor's degree in business, marketing or the equivalent plus 2-4 years of related supply chain/sales analysis in the mass market or specialty retail sector. The advertisement indicates that a bachelor's degree is required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. Furthermore, it does not appear that the organization is similar to the petitioner, nor does the position appear to be parallel to the proffered position (and the petitioner has not provided any additional evidence to establish otherwise).

- The fourth advertisement is for a product development manager. The posting states that the employer is an innovator in the candle industry and the creator of '[redacted]' scented products and other home décor. The industry is listed as consumer products and manufacturing. The classification under the section "Industry" is listed as "Consumer Products Manufacturing." No further information regarding the employer is provided. The job posting is devoid of sufficient information regarding the organization to conduct a legitimate comparison of the business operations. The advertisement indicates that the product development manager is responsible for managing others. (The petitioner stated on the Form 9141 that the proffered position does not supervise the work of other employees.) The position requires a bachelor's degree in marketing or a related field with 5+ years of product management/development or equivalent combination of experience. The position appears to be a more senior, managerial position than the proffered position.

- The fifth advertisement is for a product designer. The posting contains the name of the employer and states that it is a home accessory company; however, no further information regarding the employer is provided. The job posting is devoid of sufficient information regarding the organization to conduct a legitimate comparison of the business operations. The position requires a bachelor's degree (no field specified) plus 5-7 years of experience. Therefore, the advertisement indicates that a bachelor's degree is required, but not at least a bachelor's degree or the equivalent in a *specific specialty*.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

The advertisements provided establish, at best, that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. 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 five advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* [redacted] 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").
As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty or its equivalent (for organizations that are similar to the petitioner), it cannot be found that such a limited number of postings that appear to

have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

The petitioner also provided an opinion letter from The record does not contain curriculum vitae, but stated in his opinion letter that he has been an electrical engineer for the past 35 years. He possesses a bachelor's degree and has completed some courses toward a master's degree. He did not indicate his major field of study. He stated that his "latest employment is with a small commercial company where we are developing an advanced product using state of the art technology . . . to monitor heart rate . . . for use in fitness equipment." He claimed that the "goal at product completion is a full scale commercial production of this device for inclusion in fitness equipment." He did not state his position in the company or his role in the development of the referenced product.

also stated that his experience "includes multiple decades of new product development" for commercial and military applications. He further stated that he began as a team member contributing to product design, followed by service as an engineering team lead, then as a project engineer leading and managing teams to develop new products. reported that over 20 years of his experience was with The and involved developing complex mission computers. Additionally, he owned and operated a fitness equipment repair service.

Upon review of the letter, there is no specific information in the record regarding claimed expertise on the issue here, i.e., the hiring practices and recruitment of product designers (or parallel positions) with for-profit enterprises engaged in the business of direct marketing/wholesale of fitness equipment (or similar organizations). The letter does not provide any information regarding experience giving opinions on such matters, nor does it cite specific instances in which his past opinions have been accepted or recognized as authoritative regarding this issue.

Furthermore, does not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusion. The opinion letter suggests that his knowledge of the proffered position is limited to the description of the duties provided by the petitioner and/or counsel. He does not demonstrate, nor even assert, in-depth knowledge of the petitioner's business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise.

concludes the opinion letter by stating the following regarding the proffered position:

> I have reviewed the job position and duties presented in the [petitioner's] petition. With my experience in product development I concur and have no doubt that the qualifications, requirements, and duties required to participate in the "full development cycle" as described earlier in this "Petition Response" requires a specific professional individual disciplined to adequately perform the

> productization function. Requirements such as a degree in Fashion Design, Masters in Business Administration, etc are entirely germane to the professional position and further more [sic], a business entity such as [the petitioner] would require such a distinct position to compete in the commercial environment.

The author does not indicate that he relied on any other evidence in support of his assertions. He does not include the results of outside formal surveys, research, statistics, or any other objective quantifying information to substantiate his opinion. There is no evidence that he 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. There is no indication that he has published any work pertinent to the educational requirements for product designers (or parallel positions) in the petitioner's industry, and no indication of recognition by professional organizations as an authority on those requirements. As he has not established his credentials as a recognized authority on relevant industry-hiring standards, his opinion in this area merits no special weight and does not constitute probative evidence on the specialty occupation issue that is the subject of this case.

[redacted] mentions a generic and generalized phrase ("participate in the 'full development cycle'") of the duties for the proffered position, which, the AAO finds, does not distinguish the position from those jobs that do not require the application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. Moreover, the very fact that the evaluator attributes a degree requirement (in "Fashion Design, Masters in Business Administration etc") to such a generalized treatment of the proffered position undermines the credibility of his opinion. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree or a master's degree (not to mention in a specific specialty). He does not provide sufficiently substantive and analytical bases for his opinion by which one may reasonably conclude that his opinion is well founded, reliable, and worthy of deference. The AAO may, in its discretion, use as advisory opinions statements 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 its discretion, the AAO discounts Mr. Rochlin's opinion as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

A review of the record indicates the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the certified wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment. The beneficiary's work will be closely supervised and monitored and she will receive specific instructions on required tasks and expected results. Her work will be reviewed for accuracy. The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Furthermore, the petitioner has not established that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, the fourth criterion that will be discussed again below.

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the product designer duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent.

The petitioner provided a transcript of the courses the beneficiary completed in connection with the Masters of Fine Arts in Fashion but did not submit the transcript for the beneficiary's baccalaureate program. In response to the RFE, counsel claimed that "[a] degree in design is essential to the position offered because [the beneficiary] will primarily engage in product and packaging design." Counsel further stated that the beneficiary's "education in design is directly related to the duties of the position." However, it must be noted that, based upon the record, the beneficiary does not possess a degree in design. The evidence presented indicates that the beneficiary "has completed degree requirements in Fashion." *See* Letter dated June 23, 2010, from [redacted] University in San Francisco, California. The petitioner did not submit information relevant to a detailed course of study leading to a specialty degree in "Fashion" and did not establish how such a curriculum in "Fashion" is necessary to perform the duties it claims are so complex or unique. While a few courses in fashion may be beneficial in performing certain duties of a product designer position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in Fashion is required to perform the duties of the proffered

position.

The description of the duties of the proffered position does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position of product designer is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has 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. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.[20]

In the instant matter, it appears that the proffered position is a new position. The petitioner did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position. Furthermore, no evidence regarding any current or past recruitment efforts for this position was submitted (for example, evidence that recruitment steps were taken

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[20] 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.

but were unsuccessful/canceled or in which the petitioner's plans may have changed). Thus, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty or its equivalent.

Counsel claims that the petitioner "has a history of requiring its employees in similar positions to have a bachelor's degree or the equivalent." The petitioner provided job announcements for the positions of director of retail supply chain and accounting manager. Upon review of the announcements, there is no evidence that the duties of these positions are similar to the proffered position.[21]

The AAO notes that the petitioner and counsel claim repeatedly that the duties of the proffered position can only be employed by a degreed individual. While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. As noted above, 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 employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d 384. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In the instant case, no evidence was submitted regarding the petitioner's past recruiting and hiring practices for the position of product designer. The record of proceeding does not establish that the petitioner normally requires at least a bachelor's degree, or the equivalent, in a specific specialty 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.

The AAO incorporates by reference and reiterates its earlier discussion that, based upon the record of proceeding (including the LCA), the petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that performance would require knowledge at a level associated with at least a bachelor's degree, or the equivalent, in a specific specialty.

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[21] The director of retail supply chain is a managerial position that allegedly requires 5-7 years of experience and a bachelor's degree (no particular field of study is specified). The account manager position focuses on financial and accounting duties and allegedly requires 7 years of experience and a bachelor's degree in accounting.

Upon review of the record, the petitioner has not met its burden of proof to establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).[22]

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

V. Beneficiary's Qualifications

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that the petitioner has failed to establish that the beneficiary possesses at least a bachelor's degree, or the equivalent, in a specific specialty that directly relates to the proffered position. The petitioner claims that the beneficiary possesses a Bachelor of Science degree in Business, Marketing and a Master of Fine Arts in Fashion. It must be noted that the petitioner submitted a letter from the Academy of Art University along with the beneficiary's transcripts that indicate that her master's degree is in the field of "fashion" (not fashion design, fashion merchandizing, or design as stated throughout the record). In this matter, the petitioner is seeking the beneficiary's services as a product designer and claims that the proffered position falls under the occupational category "Commercial and Industrial Designers." However, the petitioner failed to demonstrate how the beneficiary, by virtue of holding a Bachelor of Science degree in Business, Marketing and a Master of Fine Arts in Fashion, is qualified to perform the duties of such a position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.

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[22] As noted above, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.